REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 352 of 2004

PERIS WAIRIMU GICHURU…….....……..…APPELLANT

Versus

REPUBLIC……..……RESPONDENT

(Being appeal against the sentence and conviction by P. C. Tororey, Senior Resident Magistrate, in the Senior Resident Magistrate's Criminal Case No. 1704 of 2004)

JUDGMENT

The Appellant was charged with causing grievous harm contrary to *Section 234* of the Penal Code. When the charge was read to the Appellant by the trial court his response was "It is not true". The trial court thereafter received the facts from prosecution to which the Appellant responded It is true". On being requested whether he had any mitigation, the Appellant responded that he had none. The court proceeded to sentence him to three years imprisonment. The Appellant was aggrieved and accordingly preferred an appeal before this court. The grounds of appeal are as follows:

1. The learned Senior Resident Magistrate erred in failing to find that the charge sheet was fatally defective.

2. The learned Senior Resident Magistrate erred in failing to find that the plea of guilty was not unequivocal.

3. The learned Senior Resident Magistrate erred in proceeding with the trial in a language that is not known by the appellant.

4. The sentence was excessive in all the circumstances of the case.

At hearing of the appeal counsel for the Appellant stated that the appeal was against conviction and sentence. Counsel began by submitting that the charge which the Appellant faced was defective as drawn. He said that the charge omitted the word "unlawful" in the particulars of offence. He therefore submitted that the charge being defective the subsequent sentence of the Appellant was unlawful. Further he argued that the proceedings show that the magistrate did not indicate the language which was used in

taking the plea from the Appellant. He stated that it was necessary for the court to indicate that the plea had been taken in a language that the Appellant understood.

On the basis of that submission and on the basis of the grounds contained in the petition, counsel sought that the appeal be allowed as prayed. The Senior State Counsel in response conceded to the appeal but sought retrial. He accepted that there was no reason for the court to invite prosecution to read out the facts of the offence. He added that it ought to be noted that the Appellant did not serve the sentence meted out to her since she was released on bond.

In order to appreciate the argument of the Appellant it is essential to set out the charge and the particulars of offence that were read out to the Appellant. The charge read as follows:

"***grievous harm contrary to Section 234 of the Penal Code."***

"***Mohamed Sale Muriuki on the 15th day of November 2004 at Meru District of Eastern Province, did grivious (sic) harm to F N."***

I have found it necessary to go back to the original record of the trial court because there does seem to be some discrepancy in the typed proceedings. The original record shows that the court recorded as follows: "Charge read explained to the accused". "Accused – It is true". Thereafter the court recorded that facts of the offence were read out by the prosecution. Again the accused responded "it is true". The court then recorded that the accused had been convicted on a plea of facts. What then followed was the sentencing of the Appellant after the Appellant declining to mitigate.

It ought to be noted that the charge as shown hereinbefore was defective. It ought indeed to have stated that the grievous harm was unlawful. This would have accorded with the requirements of *Section 234* of the Penal Code. The charge therefore that was read out to the Appellant was defective. It was defective because if indeed the grievous harm was not unlawful then the charge did not disclose any offence. In the case of **Achoki v Republic [2000] 2 EA**. In that case the accused was charged with attempted rape contrary to *Section 139* of the Penal code. In the charge that the accused faced it failed to state that the attempted rape was unlawful. The Court of Appeal had the following to say in that regard:

"***A charge of rape (under Section 141(1) of the Penal code (Chapter 63)) must allege in its particulars that the act of sexual intercourse was unlawful and was without the consent of the woman or girl. The Appellant was wrongly convicted on this charge."***

In view of the fact that the charge was defective the same cannot sustain the conviction and sentence passed against the Appellant by the trial court. Further as had been stated hereinbefore the trial magistrate failed to state that all the ingredients of the offence had been explained to the accused in a language that he understood. The failure to so state and indeed the failure of the trial court to record a guilty plea is sufficient to quash the conviction of the Appellant. A case in point is **Andan v Republic [1973]E.A.** In that case it was held as follows:

(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

It is clear that since all the essential ingredients of the offence were not explained to the Appellant, and since a guilty plea was not entered against him, his conviction cannot stand. The finding of this court therefore is that the appeal does and must succeed and the conviction against the Appellant is hereby quashed and similarly the sentence is hereby set aside. The court however is of the view that the Appellant should be retried for the offence subject of this appeal.

The reason why the court is of the view that the Appellant should be retried is firstly that the Appellant

was granted bail two months after sentencing. But perhaps much more of a reason why the Appellant should be retried is because looking at the facts that were outlined by prosecution the Appellant seems to have meted out an unprovoked attack on the complainant. That attack as can be seen from the P3 form was very serious indeed. The trial magistrate in sentencing was of the view that the complainant may have died had she not been assisted by her neighbours. Therefore because of the seriousness of the offence the court does order that the Appellant be retried for the offence.

Dated and delivered 23rd March 2007.

MARY KASANGO

JUDGE