



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**CRIMINAL APPEAL NO. 60 OF 2018**

**RICHARD KOECH KIBET.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Eldama Ravine Cr. Case no. 1399 of 2018 delivered on the 26<sup>th</sup> day of November, 2018 by Hon. J.L. Tamar, PM]**

**JUDGMENT**

1. This is an appeal from the conviction and sentence of the Appellant for 3 years for the offence of causing “grievous harm contrary to section 234 of the penal code, the particulars of which were that the Appellant on the 7<sup>th</sup> day of September 2018 at kaproiwa village in Koibatek district within Baringo county, willfully and unlawfully did grievous harm to Dorcas Rono.”

2. Upon full trial, the Trial Court (Hon J. Tamar (PM) in Criminal Case No.1399 of 2018 delivered a judgment on 6/11/2018 convicting the appellant on his own plea of guilty, after two witnesses had testified, and later sentenced on 26/11/2018.

3. The appellant's petition of appeal is based on the following grounds:-

a) *That the learned Magistrate erred both in law and fact by convicting the Appellant on the basis of plea of guilt that was unequivocal*

b) *That the learned Magistrate erred both in law and fact by convicting the Appellant by failing to note and observe that the Appellant was evidently unwell at the time he allegedly pleaded guilty to the charge.*

c) *That the learned Magistrate erred both in law and in fact by sentencing the Appellant to 3 years imprisonment thus disregarding the probation officers report which clearly recommended a non-custodial sentence to the Appellant.*

d) *That the learned Magistrate erred both in law and fact by relying on extraneous matters to convict the Appellant.*

e) *That in the view of the circumstances giving rise to the alleged offence and probation officers report, 3 years imprisonment sentence does not capture the mitigation adduced by the Appellant.*

4. The Appellant filed his submissions on 16/1/2019 where he states that the prosecution failed to furnish the Appellant with witness statements and relevant documentary evidence and exhibits and cite **Joseph Ndung'u Kagiri v. R** (2016) eKLR where it was held:-

*“Article 50 which provides the fundamental right to fair hearing. Article 50 (2) (5) provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence while sub article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence.... Article 50(2) (5) correctly interpreted whereas that the accused person should be furnished with all the witnesses statements and exhibits which the prosecution intends to rely on in their evidence in advance.... This provision must be read together with sub article 2 (c) which provides that every accused person has a right to fair trial which includes the right to have adequate time and facility to prepare a defence.*

See also **Natsha Singh v. CBI** and **R v. Ward** the Court of Appeal in England.

5. The appellant further submitted that the plea of guilt was not unequivocal in that on plea taking on 20/9/2018 the Appellant pleaded not guilty and on 6/11/2018 after PW1 had testified the Appellant stated that he wanted to admit the charge and it is not clear if he was admitting

to some facts of the examination-in-chief or to the actual charge. The appellant cited **Simon Gitau Kinene v. R** (2016) eKLR where the Court held:

*“Finally, Courts have always held that extra caution needs to be taken in the case of undefended dependents who plead guilty. I have previously held that where an accused person is unrepresented, the duty of the Court to ensure a plea of guilty is unequivocal is heightened”.*

6. It was urged that the trial Magistrate conducted the trial when the Appellant was evidently unwell and did not comprehend on what was happening in Court and they rely on the affidavit sworn on 4/12/2018 by Gladys J. Kitilit and that of Wilson Korir sworn on the same day. That even though he did not raise the issue as he was too ill to do so, the Court ought to have observed his demeanor note his discomfort and make enquiries.

7. It is their submission that the Magistrate disregarded the probation report during sentencing which if adopted could have brought reconciliation between the two brothers and their families, considering that the dispute involved two members of the same family.

8. They submit that the three year sentence was harsh given the Appellant’s mitigation and given the Appellant’s clean criminal record and that the sentence goes against the spirit of reconciliation which forms the basis of the Court annexed mediation process that was only recently launched. The appellant, therefore, urged the Court to quash the conviction of the Trial Court and set him free.

### **The Respondent’s Submissions**

9. The respondent filed their submissions on 29/1/2019 in which they concede to the ground of appeal that the plea was not unequivocal which is ground two in the supplementary petition of appeal. They, however, submit that grievous harm is a serious offence which attracts life imprisonment. They relied on the case of **Caleb Wawire Sifuna v. Republic** (2018) e KLR citing **Paulo Malimi Mbusi v. Republic, Kiambu Criminal App no. 8 of 2016** (unreported) that:

*“In these cases where there is an unrepresented accused charged with a serious offence, care should always be taken to see that the accused understands the elements of the offence, especially the evidence suggests that he was a defence.... To put it plainly then one may did that where unrepresented accused persons plead guilty to a serious charge which is likely to attract custodial sentence, the obligation of the Court to ensure that the accused person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In this circumstances, given the seriousness of the charge the Court was about to convict and sentence the accused person of the consequences of a guilty plea”.*

10. They submit that the Appellant could follow proceedings as he was very clear during his mitigation and that he has not proved illness and that the affidavits by Bore P. Kiprotich and Gladys J. Kitilit are mere allegations that cannot be verified.

11. They further submit that a Magistrate is not bound by probation report and that it only guide. The Magistrate was aware that the Appellant had no previous records as had been indicated by the prosecution. They thus state that the only remedy herein would be a retrial. The Appellant has only been in prison for 2 months and thus justice for the complaint should be considered given that she suffered serious injuries.

### **Determination**

12. The primary issue to be determined is whether upon the DPP conceding the appeal and a retrial is to be ordered as, in the event of an order retrial, the Court cannot deal with the merits of the charge in detail so as not to prejudice the fair trial of the case during the retrial. Consistent with the duty of a first appellate Court, the Court will also examine the evidence before the trial Court to the extent appropriate whether the charge is proved, or capable of proof in a proper retrial, as the case may be. 13. The issue of retrial has been settled by the Courts on principles set out in the leading case of **Fatehali Manji v. The Republic** [1966] EA343 as follows:

*“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice requires it.”*

14. As observed in **Opicho v. R** [2009] KLR 369, 375 the factors to be considered in ordering a retrial have also been settled over time:

*“In many other decisions of this Court it has been held that although some factors may be considered, such as illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not; whether on a proper consideration of the admissible evidence or potentially admissible evidence, a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for retrial should only be made where the interests of justice require it. See **Muiruri v. Republic** [2003] KLR 552, **Mwangi v. Republic** [1983] KLR 522 and **Bernard Lolimo Ekimat v. Republic, Criminal Appeal No. 151 of 20014 UR.**”*

15. The Court agrees with the counsel for the appellant and for the DPP that in view of the severe penalty of life imprisonment for the offence of grievous harm, c/s 234 of the Penal Code, the trial Court ought to have warned the appellant of the consequences of a conviction for the offence and establish from him where being so informed of the severe penalty he still wished to proceed with the plea of guilty to the charge. Having failed so to do, the trial Court was in error, and its proceedings defective, and liable to be set aside and an order for retrial

made, if other factors for an order for retrial as restated above so dictate.

16. In addition, failure to supply witness statements infringed on the fair trial of the appellant rendering the trial defective and illegal.

17. The appellant was sentenced to imprisonment for 3 years on 26/11/2018 and has served four (4) months in prison. I find that the period of 4 months served is not such as to prejudice the appellant as to make it not in the interests of justice to order a retrial.

18. Without prejudging the merits of the case so as not to prejudice the fair trial of the appellant in the retrial, I have also considered the evidence related in the facts of the case leading to the conviction on own plea of guilty and I find that the potentially admissible evidence in a proper trial is such as may justify a Court to convict for the offence of grievous harm contrary to section 234 of the Penal Code.

19. Grievous harm is a serious offence prescribed under section 234 of Penal Code which provides:

*“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”*

20. It is in the interest of justice that such a serious offence with its injury of the complainant be heard fully so that the appellant, if guilty, be punished for deterrence and assuagement of the complainant’s grievance, and, if innocent, he absolved of the charge.

### **Orders**

21. Accordingly, for the reasons set out above, the Court makes the following orders:-

- a) The appellant’s appeal against conviction and sentence for the offence of grievous harm c/s 234 of the Penal Code is quashed and set aside, respectively.
- b) The appellant shall be retried before a Magistrate’s Court at the Eldama Ravine Principal Magistrate’s Court, differently constituted.
- c) For purposes of the retrial directions, the matter will be mentioned before the Magistrate’s Court at Eldama Ravine on **Thursday, the 4<sup>th</sup> April 2019.**

*Order accordingly.*

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF APRIL 2019**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Mr. Bore for the Appellant.

Ms. Macharia, Ass. DPP for the Respondent.