REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL CASE NO. 97 OF 2016

REPUBLIC.....APPELLANT

VERSUS

MOSES KIPKETER KURUI.....RESPONDENT

(An Appeal from the Judgement of the Resident Magistrate Hon. S. Telewa in Eldoret CMCC No.239 of 2016, dated 2nd May 2017)

JUDGEMENT

Moses Kipketer Kirui, the appellant herein, is charged with the offence of grievous harm, Contrary to *Section 234* of the Penal Code.

The particulars of this offence are that on the 27th day of February 2016 at *Kombatich* village in *Keiyo South District* within *Elgeyo Marakwet County*, the appellant unlawfully did grievous harm to Susan *Kiprotich Kiriswo.*

When the charge was read to the appellant in English and interpreted to him in Swahili on 2/3/2016, he denied the offence, the same happened later on 29/6/2016. However, on 5/8/2016 he expressed his wish to change plea. It was read to him on 17/8/2016 in English and interpreted in Swahili.

He is indicated to have responded in Swahili that "Ukweli" which means "Its true". However, after he pleaded to the charge, the court did not enter a plea of guilty at that stage.

The prosecutor read facts that on 27th day of February, 2015 at 4.00 pm the complainant was going home from a neighbour's place. She met the appellant who told her that he had been looking for her for long. The appellant alleged that she had been saying that he is H.I.V positive. He cut her on the hand and people went for her rescue. She was taken to hospital. Her P3 form was filled. The appellant took himself to the police station.

The appellant responded to the facts by saying in Swahili:-

" Mambo ni ukweli" meaning "what is said is true".

The court entered plea of guilty and convicted him on his own plea of guilty.

In mitigation the appellant called for forgiveness. The court sentenced him to life imprisonment.

Dissatisfied with the conviction and sentence he appealed to this court on four grounds, two of which are not clear but the two which are clear are that he did not understand the charge well and his mitigation was not considered in sentencing.

The state opposed the appeal on the grounds that the plea of guilty was unequivocal; the procedure in taking plea as indicated in the case of ***Adan -vs- Republic*** was well followed; under *Section 348* of the *Criminal Procedure Code* the appellant is only entitled to appeal against sentence having pleaded guilty and the sentence passed was legal under *Section 234* of the *Penal Code.*

I have weighed all that's laid before me in this matter. The proceedings are clear that the appellant understood the Swahili language of which the court used as he well responded in that language. However, after the statement of the offence was read and the brief particulars of it as contained in the charge sheet, and the appellant pleaded guilty to it, the court did not enter at that point a plea of guilty as required.

The court only did so after the prosecution read the facts and the appellant indicated were correct and true. While this mistake did not prejudice the appellant in any way in the case, the right procedure in plea taking as was laid down in the case of ***Adan -vs- Republic (1973) EA 445*** should be followed. However, I consider this alone not enough to warrant allowing of the appeal.

The facts which were read to the appellant were very brief for such a serious offence which carries a maximum of life imprisonment.

The facts do not disclose what the appellant used to cut the complainant. They do not also disclose which hand was cut and where.

When the P3 form was produced as an exhibit it was not disclosed to the appellant of what it stated about the degree of injury.

There is no evidence that the appellant had a copy of the P3 form. Even if he had, he could be illiterate. The deference between assault causing actual bodily harm under *Section 251* of the *Penal Code*, the offence of which I can see from the original file had been initially preferred against the appellant, and the offence of grievous harm under *Section 234* of the *Penal Code*, is the extent of injury to the complainant. The facts stated to an accused person must clearly indicate which of the two offences was committed, by disclosing the degree of injury to the victim. Production of the P3 form to the court without indicating what it discloses regarding the same, is not by itself sufficient.

The accused must be clear of the offence he is pleading to. In this respect I find that the plea was equivocal. The facts as read did not disclose clearly the offence the appellant was charged with, of grievous harm. I must also state that to a first offender, who pleaded guilty to the offence and pleaded with the court for forgiveness in mitigation, life imprisonment, which is the maximum provided for the offence, in the circumstance is harsh and excessive. A lower sentence should have been imposed. I accordingly find the appeal merited and is allowed. The conviction and sentence are quashed. I order retrial before a different magistrate

S. M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 1st day of November, 2018.

In the presence of:-

Appellant

Ms Oduor for the state

Mr. Mwelem - Court Assistant