REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 192A OF 2011

REUBEN MBILUNZU.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Senior Resident Magistrate's Court Criminal Case No. 409 of 2010 by Hon. M.A.O. Oparanya DMII (Proff) on 12/9/2011)

JUDGMENT

1. **Reuben Mbilunzu,** the appellant was charged with the offence of doing grievous harm contrary to Section 234 of the Penal Code. Particulars of the offence thereof were that on the **20th** day of **June, 2010** at **Kayata Village** within **Machakos County** unlawfully did grievous harm to **Simon Muoki**
2. The appellant was tried, convicted and sentenced to serve **eight (8) years** imprisonment. Being dissatisfied with the conviction and sentence he appealed on grounds that; the trial process was a nullity as part of the trial was conducted by an unqualified Police Prosecutor not specified by **Section 85 (2)** of the **Criminal Procedure Code** and **88** of the **Criminal Procedure Code;** he was not accorded a fair and impartial trial as per the provisions of **Article 25(c)** having been arraigned before court prior to the doctor ascertaining the degree of injury sustained by the complainant; and that the injury sustained was as a result of self-defence as there was no intention to cause it.
3. The appellant relied on written submissions. Learned Counsel for the Stated **Mr. Mwangi** opposed the appeal stating that the case against the appellant had been proved beyond reasonable doubt. He prayed for enhancement of the sentence to life imprisonment.
4. I have carefully perused the Lower court record. It is important to note that on the **24th July, 2012** the appellant then represented by **Mr. Mutinda** applied to have the appeal marked as abandoned. An application that was granted by the court. Thereafter he made a formal application to have the appeal reinstated. The application having not been opposed by the State was granted.
5. As a first appellate court, my duty is to scrutinize the record of the Lower Court and come up with my own conclusion. (***See Okeno versus Republic [1972] E.A. 32).*** It is therefore the duty of this court to make orders that will be just in the circumstances.
6. A perusal of the court record shows that initially the case was being tried by **A.W. Mwangi, SRM.** On the **24th March, 2011** citing pressure of work she re-allocated the case for hearing before **Court No. 2.** Consequently, the case came up for hearing before **M.A.O. Opanya, District Magistrate II (Professional).** She heard the case, concluded it and wrote a judgment thereof. She then sent the file to **A.W. Mwangi, SRM** for sentence. She meted out the sentence.
7. The charge herein is grievous harm Contrary to **Section 234** of the **Penal Code.** According to the first schedule to the Criminal Procedure Code, such an offence is triable by a Subordinate Court of the first class. A District Magistrate II (Professional) lacked jurisdiction to try such an offence. It is trite law that no court can confer jurisdiction upon itself. It is equally trite law that no court can assign or delegate jurisdiction vested in it (***see Amukwata Mary versus Uganda HCT – 00-CR-CV-004-2013.*** Proceedings heard by the District Magistrate and the judgment thereof were therefore invalid.
8. I have perused the evidence on record. I have also considered the sentence that had been meted out and the time the appellant has been in custody. I have therefore pondered whether or not a retrial should be ordered. In the case of ***Pascal Clement Braganza versus Republic [1957] E.A.***

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> ***"A retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of the case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."***

9. This is a case where the evidence on record clearly indicates that a retrial is commendable. I therefore order a retrial of the appellant before a court of competent jurisdiction. The appellant shall be produced before **Kithimani Law Courts** on the **27th January, 2013** for retrial.
10. It is so ordered.

DATED, DELIVERED and **SIGNED** this **15th** day of **JANUARY, 2014.**

L.N. MUTENDE

JUDGE