



No. 116/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 300 OF 2010

MEJA KITAVI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Meja Kitavi Mutisya** is charged with two (2) Counts.
  - i. Grievous harm contrary to Section 234 of the Penal Code.
  - ii. Giving false information to a person employed in the Public Service contrary to Section 129 (a) of the Penal Code.
2. Having pleaded not guilty to the charges, he was tried convicted and sentenced to **six (6) years** imprisonment and **one (1) year** imprisonment respectively on Count 1 and 2. Being aggrieved by both the conviction and sentence he appealed.
3. In his submissions, Counsel for the appellant, **Mr. Muigai** stated that the trial amounted to a mistrial because the accused had been jointly charged with another who died. A warrant of arrest was issued against the deceased. His case was not withdrawn. The charge sheet was never amended. In his judgment the trial magistrate acknowledged the death of the deceased but went on to make a finding against him as well.
4. It was argued by Counsel that the evidence having been overwhelming against the deceased, the appellant was prejudiced.
5. Further, he submitted that the evidence adduced did not support the offence of grievous harm as defined by statute. On count 2 he said that after the matter was taken over by another magistrate and it started *denovo* no evidence was adduced to support Count 2, but the magistrate convicted on it. He summed up by asking the court not to order a retrial as the appellant had served **one (1) year** in custody prior to being released on bail.
6. **Mrs. Abuga**, the Learned State Counsel conceded to the appeal following a mistrial. She however, asked for a retrial. She stated that witness were Kenyans and readily available to testify. She argued that the appellant would not be prejudiced by a retrial since the evidence against him was weighty.
7. I have carefully considered rival submissions by both Counsels. I have also read the record of appeal filed herein. According to proceedings, on the 17<sup>th</sup> June 2009, the Court was notified that accused 1 was ailing. On the 21<sup>st</sup> September, 2009 a warrant of arrest was issued against him. Thereafter, the matter proceeded *denovo* following transfer of the initial magistrate who had taken evidence of some witnesses. A warrant of arrest against accused 1 subsisted. The case against him was never withdrawn. In his judgment the learned trial magistrate alluded to the death of

- accused 1 and made a finding that there was overwhelming evidence against both accused persons.
8. The conduct of the court in proceeding with a case against the deceased was improper. The case should have been withdrawn. In the circumstances it must have been prejudicial to his co-accused. The issue I should determine is whether a retrial should be ordered following the mistrial.
  9. I have considered the case cited of ***Kenneth Wamukota Walela versus Republic HCCR. Appeal NO.1230 of 2009*** where **Wendo J** quoted the case of **Patel Ali Manyi versus Republic (1960) E.A 343** where consideration for a retrial was laid down:-

- “1. In general a retrial will be ordered when the original trial was illegal or defective;*
- 2. That each case must depend on its own facts and circumstances;*
- 3. That an order of retrial should only be ordered where the interest of justice requires it;*
- 4. A retrial will not be ordered if by so doing an injustice will be caused or occasioned.”*

10. In the case of ***Mwangi versus Republic 1983 KLR 522 Hancox JA, Chesoni and Nyarangi Ag JJA*** held:-

*“We are aware that a retrial should not be ordered unless the appellate court is of the opinion that on proper consideration of the admissible and potentially admissible evidence, a conviction might result”.*

11. In this case it is obvious that the trial court was to blame for the defect that is apparent. The complainant expected to be accorded justice in as much as the accused did. It would be in the interest of justice for the case to be heard on merit. I have also looked at the evidence on record, at the end of the trial a conviction might result.
12. As to whether the accused will be prejudiced. He was convicted and sentenced on 28<sup>th</sup> October, 2010. He was released on bond on 4<sup>th</sup> October, 2011. He had only served one year imprisonment. The remaining **four (4) years** have been stayed. He had not served a substantial part of the sentence. In case a conviction results, this should be a mitigating factor. In the premises, the appellant will not be prejudiced.
13. I therefore order that the appellant be retried by a court of competent jurisdiction. The appellant shall be remanded in custody to be produced before Kitui Principal Magistrate’s Court on the **12/11/2013** for purposes of taking plea.
14. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 30<sup>TH</sup> day of OCTOBER, 2013.**

**L.N. MUTENDE**

**JUDGE**