



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 112 OF 2008

1. CONSTANTIAN RUTO JEMATIA 1ST APPELLANT
2. DAVID KOECH RUTO 2ND APPELLANT

VERSUS
REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the Hon. Resident Magistrate A. B. Mong'are (Mrs) in Eldoret Chief Magistrate's Court Criminal Case No. 6034/2008 delivered on 8th December 2008)

J U D G M E N T

The appellants were convicted of the offence of manslaughter contrary to section 202 of the penal code as read with section 205 of the said code and sentenced to serve a term of imprisonment of seven (7) years. They were tried and convicted and sentenced by Resident Magistrate A.B. Mongare as she then was. They were tried without the services of an advocate.

They have now engaged learned counsel Mr. Miyienda who has field this appeal on their behalf raising two grounds, that the plea of guilty was equivocal and that the trial court lacked the requisite jurisdiction to try cases such as the one the appellants were charged with.

The state through counsel Mr. Kabaka conceded the appeal save that he prayed for a retrial before a competent court.

I have had a keen look at the proceedings. The appellants pleaded guilty to a charge of manslaughter. The facts were that the 1st appellant was the mother and the 2nd appellant was the brother of the deceased. The deceased was sent away from school where she was a student in form 3 on account of indiscipline at school. The deceased went home from where she disappeared and was unable to resume school as ordered by the school. When she finally returned home her brother asked her to explain why she had disappeared from home when she was suspended from school. He then started whipping her and was joined by the mother in so whipping her with a rubber whip. She became unconscious and regained the same after 1st aid was administered to her. Ten days later her condition worsened and she was taken to hospital where she died while undergoing treatment.

The Resident Magistrate has no jurisdiction to try a charge of manslaughter under section 202 of the penal code as is clear from the schedule to the Criminal Procedure Code. Such jurisdiction is reserved for the Chief Magistrate,

Senior Principal Magistrate, Principal Magistrate and the Senior Resident Magistrate. It follows therefore that such trial as was conducted by A.B. Mongare Resident Magistrate on 8.12.2008 was a nullity. The state rightly concedes the appeal.

Should a retrial in the circumstances of this case be ordered? What would that retrial achieve? The appellants pleaded guilty to manslaughter and prayed for leniency and mercy in sentencing stating that they never intended the unfortunate incident that followed the disciplining of their kin. In those circumstances ought the court have given each of them 7years in prison? The incident is alleged to have occurred on 15th November, 2008 and if any witnesses be called their memories would still be fresh. But the value of any evidence to be called in a new trial would be negligible in my view in a clear case such as the present one. I do not find that the plea was equivocal. That plea was very unequivocal in the circumstances of this case.

The appellants have been in custody since 25.11.2008. They pleaded for mercy and leniency in sentencing. The period they have been in custody must have served to teach them how not to discipline any one in future –

BUKACHI V. R. Criminal Appeal No. 163/2003 and ELIREMA V.R. (2003)E.A.50.

In the end I make the following orders. The trial before A.B. Mongare for a charge of manslaughter was a nullity which I hereby quash. No purpose would be served by a retrial and in the event I make no order for a retrial. The time served by the appellants is enough punishment for the offence committed and consequently I order them set at liberty forthwith unless they be otherwise legally held.

Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 14TH DAY OF OCTOBER, 2010.

**P.M. MWILU
JUDGE**

In the presence of;

Miyianda – Appellants

Kabaka – Counsel for the State

Andrew Omwenga – Court Clerk

**P.M. MWILU
JUDGE**