REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

H.C.CR.A 149 OF 2003

1. **BENJAMIN NGUU KOKE**
2. **DODRICK K MWENDA ………………………….....………… APPELLANTS**

VERSUS

REPUBLIC...RESPONDENTS

RULING

1. The Appellants herein, Benjamin Nguu Kike and Godrick Mwendwa were arraigned before the Kangundo Senior Resident Magistrate' court on 8/7/2002 and charged with the offence of grievous harm contrary to Section 234 of the Penal code. It was alleged that they jointly grievously harmed one Mutiso Ngumbau on 1/2/2001 at Donyo Sabuk National Park in Kyanzavi Location of Machakos District. They were convicted of the offence on 15/5/2003 and sentenced to a fine of Kshs.30,000/= or in default 12 months imprisonment.

2. The Appeal was lodged on 28/4/2005 and when it came for hearing before me on 5/3/2008, Mr O'Mirera, Principal State Counsel, conceded to it on the ground that the prosecution before the trial court was partly conducted by one P.C. Mbonge, a fact confirmed by Miss Nyutu for the Appellants and verified to be true by this court. I say so because P.C Mbonge indeed conducted the prosecution when PW1, Mutiso Ngumbao who was the complainant and star witness testified on 6/8/2002. As was held in Elirema vs Republic (2003) KLR 537 where such a situation obtains, the whole trial is rendered a nullity by dint of Section 85 (2) of the Criminal Procedure Code.

3. The effect of my finding above is that the whole trial was rendered a nullity and I hereby quash the Appellant's conviction and sentence.

4. Mr O'Mirera has asked for an order that the Appellants be retried because although the offence was allegedly committed more than 7 years ago, the injuries suffered by the complainant were serious and that witnesses would be availed when required. Further, that there would be no prejudice to the Appellants if a retrial was ordered.

5. Miss Nyutu opposes the prayer for a retrial on the ground that the prosecution had failed to prove the offence and would have an opportunity to fill up the gaps in evidence. She has also urged the point that the mistakes made in the trial by the prosecution should not be visited upon the Appellants. She relies on the decision in Elirema (supra) to buttress that point.

6. My view is that this is not a fit case for a retrial to be ordered for the following reasons:-

7. Firstly, the offence was allegedly committed over 7 years ago while the Appellants were convicted on 15/5/2002. They paid the fine and have been free men since. To subject them to another trial having paid the fine and effectively therefore met their sentence would be double jeopardy and wholly prejudicial to them.

8. Secondly, I have seen the evidence on record and I agree that given a second chance the prosecution may well fill up the gaps in it. One such gap is the medical evidence on record. It was wholly inconclusive and according to the P3 (Exh. 1), the degree of injury was subject to further investigation by a specialist. No record of such an investigation exists and a retrial would give the prosecution the opportunity to tie up that loose end to the prejudice of the Appellants.

9. Thirdly, although Mr O'Mirera says that witnesses would be available if required, the complainant when giving evidence said that he was a standard 7 pupil in 2001. Seven (7) years is a long time and he may well have moved on in his life. PW3, I.P. Mutunga Ngunguni may not even be in his old station and I note that Dr. Kodhek who filled the P3 was in fact never traced during the earlier trial. There is no assurance save a bare statement from the bar that witnesses would be availed.

10. Lastly, I see no plausible reason to order a retrial and would now quash the Appellant's conviction and set aside the sentence imposed. They may have a refund of the fine paid.

11. Orders accordingly.

Dated and delivered at Machakos this 4th day of April 2008.

ISAAC LENAOLA

JUDGE