

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 20 of 2005

REPUBLIC APPELLANT

VERSUS

NZIOKA NZUKI RESPONDENT

(From the acquittal of S.R. Rotich Resident Magistrate in Tawa R.M. Cr. Case No. 52 of 2002)

J U D G E M E N T

The appellant had been charged with the offence of Causing Grievous Harm Contrary to section 234 of the Penal Code. After a full trial the trial court found that the prosecution had failed to prove the charge beyond a reasonable doubt and acquitted him. The state being aggrieved of the acquittal, appealed to this court

The grounds of appeal included one that the trial was a nullity, because the prosecution was conducted by a person not qualified to prosecute under Section 85 (2) of the Criminal Procedure Code, a ground the State conceded. The state then sought an order for retrial, stating that their evidence is intact, their witnesses are available and that it will be in the interest of justice to have a retrial.

The respondent who was represented by Mr Masika opposed the appeal. He argued that the fault not to competently and lawfully prosecute the lower court charge, was the state's and therefore the state should not be allowed to rely on its own shortcoming to cause further suffering upon the respondent. He further argued that all the Criminal Procedure Code provisions, apart from providing a procedure through which justice would be established, are intended to protect the accused from being unfairly handled or treated during a trial. He also argued that the evidence on record established a conclusion that the accused was acting in self-defence and that incompetence of the prosecution aside, an acquittal would have still been arrived at.

I have carefully considered the evidence on the record and the conclusions the trial magistrate arrived at. The fact that the prosecution was conducted by a person not qualified to do so under Section 85 (2) of the Criminal Procedure Code is not denied. This court therefore has no hesitation in reaching the conclusion that the trial was a nullity. The court has also considered the actual evidence on record and arrived at the conclusion that it cannot as it stands possibly sustain a conviction. The evidence indicates that the police investigation was one-sided and clearly biased, leading to a wrong charge of grievous harm being preferred against the appellant, instead of the one of affray. Indeed it would even appear that the complainant in the lower court could have been the originator of the fight rather than the respondent.

The conclusion I reach therefore is that a retrial would be inappropriate and unjustified. I wish to add that where the respondent has been acquitted, a new trial would deprive him of such chance of being acquitted which will appear to be against his constitutional rights. Retrial is therefore refused.

Dated and delivered at Machakos this 20th day of December, 2006.

D.A. ONYANCHA

JUDGE