



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 65 of 2005**

**(From Original Conviction and Sentence in Criminal Case No.790 of 2004 of the Chief Magistrate's Court at Thika)**

**NANCY WANJIRU MIGWI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL CASE NO. 66 OF 2005**

**(From Original Conviction and Sentence in Criminal Case No.790 of 2004 of the Chief Magistrate's Court at Thika)**

**MARGARET MUTHONI MIGWI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL CASE NO. 67 OF 2005**

**(From Original Conviction and Sentence in Criminal Case No.790 of 2004 of the Chief Magistrate's Court at Thika)**

**HENRY NJOROGE MIGWI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGEMENT**

**MARGARET MUTHONI MWIGI, HENRY NJOROGE MWIGI and NANCY WANJIRU MIGWI** were all charged jointly with **Assault Causing actual bodily harm contrary to section 251 of the Penal Code** before Kandara District Magistrates Court on 18.7.2002.

After they pleaded not guilty to the charge before **KAMURU, DM I** on 29<sup>th</sup> April, 2003, the Prosecution successfully applied to substitute the charge against the Appellants from Assault as **251 of Penal Code to Grievous harm contrary 234 of Penal Code**. After a plea of not guilty was entered, the prosecution case was heard to finality and the court delivered a ruling placing all three appellants on their defence. Thereafter the case seems to have been taken over by Thika Law Courts. As well noted by the Thika Principle Magistrate, Betty Rashid was:-

*“Court: Kandara Court has no jurisdiction.*

*1<sup>st</sup> accused not guilty*

*2<sup>nd</sup> accused not guilty*

*3<sup>rd</sup> accused not guilty”*

Following that order and a plea to the original charges afresh, the Appellants filed this appeal in which they challenge the retrial of the Appellants by Hon. Rashid and arguing that such a retrial was a misdirection in law and would subject the Appellants to double jeopardy.

The Appellants were represented by Miss Muyoke while the State was represented by Miss Nyamosi.

The State conceded to the appeal on grounds the trial before the Court was conducted by an unqualified public prosecutor. Counsel urged Court to order a retrial.

The learned State Counsel with all due respect misapprehended the issue before this Court. The issue was not an appeal against conviction and sentence after finalization of the matter. The issue was the regulatory of the trial conducted against the three appellants where, as they indicated in their petition, they were being tried twice by two different courts for the same offence.

This case has caused me a considerable degree of anxiety. Mr. Kamuru D.M.I heard the entire prosecution case against the Appellants for the offence of **Grievous harm contrary to section 234 of Penal Code**. After he ruled that the Appellants had a case to answer, the file by some unexplained reason, left Kandara Law Courts where it was being heard, and surfaced at Thika Law Courts. That movement of the file should have been recorded or indicated on the record of the proceedings. Under **Section 79(a) of Criminal Procedure Code** provides for transfer of cases between magistrates and it reads as follows:-

*“79(a) may transfer a case of which he has taken cognizance to any magistrate holding a subordinate court empowered to try that case within the local limits of the first class subordinate courts jurisdiction; and”*

Mr. Kamuru was a District Magistrate of First Class. He had power or jurisdiction to transfer the instant case for trial by another subordinate court having jurisdiction to try it. Of course this can not be done arbitrarily but for good reason which should be recorded. The provision cannot be assumed to transfer a partly heard case to another subordinate court having jurisdiction unless the trial court has disqualified itself from hearing it for good cause shown on record. In the instant case, Mr. Kamuru did not disqualify himself from trying the Appellants. Mr. Kamuru had also not ceased exercising jurisdiction in the case. Mr. Kamuru did not transfer the case from his court either. That movement of the transfer was irregular and I cannot say that it has not caused injustice to the Appellants.

When Mrs B. Rashid, Principle Magistrate, took over the case, while the proceedings of the trial

before Mr. Kamuru were still 'alive'. She took fresh pleas from the Appellants after indicating **"Kandara Court has no jurisdiction."**

That 'order' or 'finding' was erroneous because Mr. Kamuru D.M.I had jurisdiction to hear and dispose of the case being a D.M.I. Had he been a DM II or DM III Professional or lay, then he could truly have been said to have no jurisdiction. But the First Schedule under the Criminal Procedure Code indicates clearly which subordinate court has jurisdiction to hear cases under each section of the Penal Code. In that schedule offences, under **S.234 of Penal Code** are indicated to be triable by a DM of First Class. That was offence for which Appellants were charged and the Class of Magistrate that was trying the case. Mrs B. Rashid's remarks that trial before Mr. Kamuru was without jurisdiction was misled and irregularly entered as Mrs Rashid had not assume any jurisdiction over the matter since **Section 79(a)** of the Criminal Procedure Code had not been complied with.

The Appellants were made to plead to the charges afresh and dates set for the hearing of the case presumably afresh. That 'act' of pleading afresh to charges for which the Appellants had been tried almost to completion was irregular null and void.

I find that the Appellants were being tried twice for the same offence. It was unconstitutional I declare the proceedings a mistrial. I have considered that the Appellants were first charged before Kandara Magistrate on 18.7.2002. They have been going to court every month since then for the mention or hearing of their case. That has occasioned injustice to the Appellants, has caused them to suffer prejudice and to incur costs. The Appellants have suffered enough and to cause them to be tried any further for this offence would be trampling on the Appellants Constitutional rights to a fair trial and this should not be allowed.

Accordingly, I will not order for the Appellants to be tried afresh given the circumstances of this case. I set all three Appellants free and quash all the charges against them in Kandara District Court Criminal Case No. 235 of 2002 and any other proceedings arising there from. I also order that the three Appellants should not be charged again for the same or similar offence arising out of the complainant's complaint against them.

**DATED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER 2006.**

**J. LESIIT**

**JUDGE**

Read Signed and Delivered in the presence of:-

Appellant – present

.....for Appellants

.....for State

Wambui - Court Clerk

J.LESIIT

JUDGE