



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Criminal Revision 7 of 2005**

**REPUBLIC .....APPLICANT**

**Versus**

**JOSEPH NGUGI MUNGAI .....RESPONDENT**

**RULING**

This matter has come to me by way of revision. The state counsel has written to court to complain that the learned trial Magistrate unreasonably refused the prosecution application for adjournment and proceeded to acquit the accused when the complainant refused to testify. I have called for the lower court record and perused it.

The Accused, Joseph Ngugi Mungai, was initially charged before the Senior Resident Magistrate's Court at Voi with grievous harm contrary to section 234 of the Penal Code. As there was a related case before the same court the case under review was transferred to Taveta Resident Magistrate's Court for trial. When it was called for hearing before the Ag. Senior Resident Magistrate at Taveta on 20th April 2005 the prosecutor applied for adjournment on the ground that the Accused was allegedly bragging that he was not going to be convicted. The prosecution required time to investigate that allegation: The application was opposed by the defence but the learned trial Magistrate refused to grant it and ordered the complainant and any other available witnesses to testify and "thereafter the complainant can apply for the case to be transferred to a court of his choice". The complainant after being sworn refused to testify saying he would rather go to the High Court. The court found that the complainant had been ignorant and stubborn and that his behaviour amounted to contempt of court. There being no evidence against the Accused the learned trial Magistrate dismissed the case against him and accordingly acquitted him under section 210 of the Criminal Procedure Code.

It is not clear from the record what exact remarks the Accused is alleged to have made. There was no allegation of the trial Magistrate having been compromised. To me this appears to have been the theatrical type of threats given by wrestlers out of the ring to intimidate their opponents. The courts should not entertain such things to hamper the hearing of cases before them. If the trial Magistrate in this case had refused to adjourn the case and ordered the hearing to proceed and stopped at that, I would have had no reason to interfere with his decision. But he made remarks that have caused me concern. He ordered the complainant to testify and thereafter have the case transferred to a court of his choice." That may have been an innocuous remark but it tended to lend credence to complainant's fears. It must have given the complainant the impression that the court was compromised. No wonder he refused to testify.

As the old adage goes justice should not only be done but be seen to be done. In this case justice may have been done but it was not seen to have been done.

I gave the Accused in that case an opportunity to address me before making any orders in the matter and he has done so through his advocate who has opposed the state counsel's plea for a retrial. Having considered counsel's submissions, I find that in the interest of justice a retrial is warranted. Accordingly, I order that the Accused be retried before the Resident Magistrate at Wundanyi. The Accused who is here before me is directed to appear in that court on 8th August 2005 for plea. The police are at liberty to investigate the complainant's allegations take whatever action they may deem fit.

**DATED and delivered this 28th day of July 2005.**

**D. K. MARAGA**

**JUDGE**