REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 224 of 2004

1. NASSORO KOMBO MWAVUCHE

2. FIDAUS KOMBO MWAVUCHE…….
….APPELLANTS

-Versus -

REPUBLIC……..……..…..RESPONDENT

JUDGEMENT

The appellants were jointly charged with the offence of manslaughter contrary to Section 205 of the Penal Code. They pleaded not guilty but after trial before the Senior Resident Magistrate at Kwale they were convicted and sentenced to seven years imprisonment. They have appealed against both the conviction and sentence.

When the appeal came for hearing before me on the 19th July 2005 Mr. Ademba, learned State Counsel, conceded it on the ground that the plea was taken by a District Magistrate II contrary to the provisions of the Criminal Procedure Code. He however sought a retrial arguing that the offence with which the Appellants were charged was a serious one carrying a life sentence. He further argued that the evidence against the Appellant is water-tight and that the witnesses are available and ready to testify again. He said that the irregularity in the trial was caused by the court and not by the prosecution.

In response Mr. Magolo, counsel for both the Appellants opposed the plea for a retrial arguing that a retrial will be prejudicial to the Appellants. He submitted that even if the plea had been taken before a magistrate who had jurisdiction, the appeal would still have been allowed on two other grounds. First, that contrary to Section 89 of the Criminal Procedure Code which requires the commencement of criminal proceeding by a formal charge drawn up by a magistrate or a police officer, there was no proper charge against the Appellants. They were prosecuted on the basis of an information filed by the State Counsel. Secondly, that there was no evidence before court to sustain the conviction. He said, that the direct evidence in the case was that of PW 1 and PW 2. PW2 was a child of tender years whose evidence was irregularly received. The voire dire examination was not properly carried out. Instead of establishing whether or not the witness understood the nature of an oath the trial court sought to find out if he understood the need to tell the truth. That, counsel said, rendered his evidence worthless and if it is ignored the remaining evidence cannot sustain a conviction. To allow a retrial, he concluded, will enable the prosecution rectify these defects to the prejudice of the Appellants.

In a short rejoinder, Mr. Ademba said that the other irregularities in the trial were curable under Section 382 of the Criminal Procedure Code.

I have considered these submissions. Starting with the taking of the plea I agree with both the state and defence counsel that a District Magistrate II has no jurisdiction to try the offence of manslaughter. The schedule to the Criminal Procedure Code provides that the offence is triable by a Chief Magistrate, a Principal Magistrate or a Senior Resident Magistrate.

As plea is an integral part of a criminal trial, taking it before a magistrate who has no jurisdiction to try the offence, as was done in this case, renders the whole trial fatally defective. In the circumstances I allow this appeal quash the conviction and set aside the sentence.

As regards the plea for a retrial, it is trite law that the same will not be ordered where to do so would

enable the prosecution to fill up gaps in its case **– Fatehali Manji – Vs – Republic (1966) EA 343** or when there is no sufficient evidence which on a proper consideration can found a conviction **– Mwangi – Vs – Republic (1983) KLR 522**. It will also not be ordered where it will be prejudicial to the Appellant **– Richard Eliremia and Another – Vs – Republic, Criminal Appe**al **No. 67 of 2002 (CA)** (unreported).

I have carefully read the lower court record in this matter. It would appear that the deceased in the eyes of his family members was not only a truant but also a thief. When his grandmother's sewing machine head and wall clock went missing he was therefore the first suspect and his father instructed the Appellants to interrogate him over the theft of those items and discipline him. The Appellants themselves admit they interrogated him but deny that they beat him to death. The second Appellant said they only pressed his knails and he offered to go and show them where the stolen items were hidden. When the items could not be found at the alleged spot the deceased tried to run away but members of the public chased and beat him up. The first Appellant said he is the one who restrained the public from continuing to beat him.

I agree with Mr. Magolo, counsel for the appellants, that the voire dire examination of PW 2, a child of tender years was not properly done. Even if it had in my view her evidence was not any different from her mother, PW 1's. Both of them were outside the house where the deceased was being beaten by the Appellants. They did not witness the beating. PW 1 alleged that there were sticks in that house but the police did not find them.

When the deceased left the house with the Appellants to go and show them where he had hidden the stolen items PW 1 and PW 2 said he was well and was walking on his own. It is when they returned that he looked haggard and dirty. That lends credence to the Appellant's version of the story that the deceased was beaten by the public and "He had sand all over."

The appellants called two witnesses who supported their story. As no aspersions were cast on evidence I believe them and find that the deceased was beaten up by members of the public and died of injuries inflicted on him by members of the public. Whereas I do not approve of what the Appellants did, that is taking it upon themselves to interrogate the deceased on the stolen items instead of reporting the matter to police, I am afraid there is no sufficient evidence on record to support the charge of manslaughter against the Appellants. To order a retrial will therefore be prejudicial to them. Accordingly I order that they be released forthwith unless otherwise lawfully held.

DATED and delivered this 26th day of July 2005.

D. K. MARAGA

JUDGE