



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO.23 OF 2004**

**(From original criminal case No.1337 of 2002 of the CM's court at Kisii.)**

**NELSON ATANDI NCHOGA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT:**

The appeal is against a ruling made by the learned Senior Resident Magistrate Kisii made on 21st January 2004.

The Appellant NELSON ATANDI was charged vide KISII CMCCR NO.1387 of 2002 for the offence of Grievous Harm c/s 234 Penal Code. He pleaded not guilty and four witnesses gave evidence. On 20/1/04 the court prosecutor applied to withdraw the case under s.87(a) CPC stating that another suspect had been arrested and they were to be charged jointly. Ruling was delivered on 21st January 2004. The court rejected the application for withdraw. The prosecutor promptly applied to consolidate the case with Kisii CMCCR NO.3073 of 2003. The other suspect had already been charged. The applicant opposed the application but the court allowed the same and ordered the two cases consolidated. It is this ruling the appellant is appealing against.

It was submitted that the consolidation was not proper. Prosecutor had already called four witnesses and only the evidence of the doctor and investigating officer remained. Mr. Ondari submitted that appellant will be prejudiced by the consolidation and that prosecution are looking for ways to introduce new evidence after failing to do so in their previous applications.

The appeal was opposed. Mr. Chirchir the learned state counsel submitted that the order for consolidation was proper and the application was made in good faith. The other suspect was mentioned during the proceedings.

I have keenly considered the appeal. Prosecution can apply to have cases arises out of the same facts consolidate. Indeed in CMCCR No.1387 of 2002 the accused (appellant) was said to have committed the offence "jointly with others not before the court." However I do concur with the appellant's counsel that the application for consolidation was brought too late in the life of the case. Four witnesses had already given evidence and only a doctor and a police officer were remaining. In essence the trial was almost over. It is not just to subject the appellant to a second trial. The prosecution can prosecute the accused in CMCCR No.3073 of 2003 separately. The witnesses who have already testified were in any case to be recalled to testify again. The doctor and the police officer will have to be called to give evidence in both cases. That way the appellant will not have to go through the whole trial a second time.

Issue of good faith was raised by the appellant's counsel. This seems to hold some water. On 30/5/03 the prosecution told court that it had problems with statements of witnesses. It was submitted that some evidence was omitted. The court disagreed with the prosecution. In his submissions Mr. Ondari has said the other suspect had been at home all along. I think prosecution was not sincere in their application.

All in all the appeal is allowed. The court quashes and set aside the orders made on 21st January 2004 consolidating the two cases and order that each case proceed for hearing separately.

It is so ordered.

**KABURU BAUNI**

**JUDGE**

21/6/04

Delivered on 21/6/04 in presence of Mr. Kemo for State.