



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**  
**CRIMINAL APPEAL NO.132 OF 1999**

**(Being an appeal from Original Conviction and Sentence in Criminal Case  
No.2755 of 1998 of the Chief Magistrate's Court at Mombasa – J.Siganga  
SRM)**

**BENJAMIN MWANZIA OMAR ..... APPELLANT**

**- VERSUS -**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

The Appellant appeals against sentence passed against him for the offence of manslaughter contrary to Section 202 as read with Section 205. The record shows that when the Appellant together with another were brought before the Court for plea on 19/8/1998 the appellant pleaded "NOT GUILTY". The hearing commenced on 18/9/98. After a long time when 5 prosecution witnesses had given evidence the Appellant on 4/3/99 decided to change his plea to that of Guilt. He was on bond. On 6.4.99 the appellant still maintaining his plea of guilty had facts of the charge read to him after which he said "I admit facts stated as true". He was therefore convicted on his own plea and was sentenced to imprisonment for 5 years. This appeal is against that sentence on the grounds that the Trial Magistrate failed to give due consideration to the mitigatory statement that the long stay in prison was not considered and the effect long stay in prison would have on his health, that the sentence is inappropriate in the circumstances and should be reduced.

The State Counsel on her part was of the view that the plea of guilty was not genuine. It was after a long period during which the proceedings were in progress that made appellant to opt to change his plea. She quoted the authority of Criminal Appeal No.1 of 1989 **NDEDE V. R** to support the submission that the Appellant was prejudiced in this case. She submitted that the facts of the charge are not according to evidence. She urged the court to order a retrial. I understand the State Counsel to say that the Appellant chose to change his plea due to the delay the trial was taking and that in the circumstances the change of plea was not really a genuine admission of the offence. On the issue of change of plea the Court of Appeal has held that an accused person has right to change his plea at any time before the trial is concluded by final order. This was in the case of **KAMUNDI V. REPUBLIC 1973 EA 540** where the point is discussed fully and it was held:

"a magistrate has a judicial discretion to allow a change of plea before passing sentence or making some order finally disposing of the case"

I therefore find that the Trial Magistrate acted correctly in accepting the plea of guilty in the middle of hearing of the case.

On the issue of sentence the Appellant was sentenced to 5 years imprisonment. He was a first offender and he pleaded for leniency. He appears to have appreciated the seriousness of the offence. He was already in custody for 3½ years. The circumstances of the case show clearly that no intention to cause death was present at the material time and the single blow was not even aimed at the deceased. These are no special aggravating circumstances in the facts. Sentence of 5 years is therefore excessive and the same is set aside and substitute with imprisonment for 2½ years from the date of conviction. The conviction is upheld.

**Dated at Mombasa this 30th Day of August 2001.**

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

Read in Court in presence of State Counsel Ogot and Appellant.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**