



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO. E010 OF 2021

PETER MBURU GIATHI.....APPELLANT/APPLICANT

-VERSUS-

GEOFFREY NGARUIYA KARIUKI.....1ST RESPONDENT

AMOS KARIUKI NGARUIYA.....2ND RESPONDENT

DANIEL GACHINGIRI NGARUIYA.....3RD RESPONDENT

PHILIP NJOROGE NGARUIYA.....4TH RESPONDENT

-AND-

ODPP.....INTERESTED PARTY

JUDGMENT

1. The Respondents are charged with causing *Grievous Harm contrary to Section 234 of the Penal Code Cap 63 Laws of Kenya.*
2. They pleaded not guilty and matter commenced hearing before Momanyi Magistrate. After hearing 1 witness, the said Magistrate was transferred and matter was allocated to court 2. The advocate watching brief told Court 2 accused persons refused to go to Court 2.
3. Thus matter was allocated to Court 6. The watch brief Counsel discovered Court 6 is an RM Court thus not mandated to entertain matter of the nature and charges herein as they could attract life sentence.
4. The issue was raised and the Court 6 rejected the matter being taken for re-allocation.
5. Thus instant appeal was lodged raising the grounds:

i. The Court 6 erred in law in failing to acknowledge she had no jurisdiction to impose sentence under Section 234 Penal Code and thus send file for re-allocation.

ii. Inter alia.

6. Parties were directed to canvass appeal via written submissions but only the Appellant filed same. The Interested Party adopted Appellant's position in matter.

APPELLANT'S SUBMISSIONS:

7. Appellant submits that the trial Court No. 6 presided over by Hon. C. Muhoro a Resident magistrate is not seized of the requisite jurisdiction to handle the case due to the nature of the charges the accused are facing and thus the Appellant moved the court vide Chamber Summons application dated 25th February, 2021 which sought for case to be transferred to Court No. 1 for re-allocation to a court with jurisdiction to handle the charge. Vide a ruling delivered on the 31st March, 2021, the prayer was denied.

8. The Appellant lodged an appeal dated 13th April, 2021 where he has set out 3 grounds which shall be argued together.

9. *The Magistrate's Court Act Cap 10* referred to by the learned trial Magistrate in confirming jurisdiction was repealed by *the Magistrate's Court Act 2015* which came into effect on the 2nd January, 2016.

10. *Section 6 of the Magistrate's Court Act, 2015* provides as follows:

“6. A Magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by:-

a) The Criminal Procedure Code; or

b) Any other written law.”

11. Interpretation *Section 2 of the Act* defines a Magistrate's Court as a subordinate Court established by *Article 169(1) of the Constitution*.

12. *Article 169 (1) of the Constitution* on the other hand defines a subordinate Court as the Magistrate's Court.

13. The marginal notes to *Section 7 of the Criminal Procedure Code* provides for ***“Sentence which subordinate Court may pass”***.

14. The Section provides as follows:

“7. (1) A subordinate Court of the first class held by:

a) A Chief Magistrate, Senior Principal Magistrate, Principal Magistrate or Senior Resident Magistrate may pass any sentence authorized by law for any offence triable by that court;

b) A Resident Magistrate may pass any sentence authorized by law for an offence under Section 278, 308(I) or 322 of the Penal Code or under the Sexual Offences Act 2006.

(2) Subject to subsection (1), a subordinate Court of the first class may pass the following sentences in cases where they are authorized by law:

a) Imprisonment for a term not exceeding seven years.

b) A fine not exceeding twenty thousand shillings.

15. From the foregoing, it is clear beyond peradventure that a Magistrate's Court held by a Resident Magistrate has limited powers in criminal case to impose a maximum sentence of 7 years imprisonment or a fine not exceeding Kshs.20,000/- for offences other than those provided for under *Section 7(1) (b)*.

16. It therefore follows that the learned trial Magistrate has no jurisdiction to hear and determine the matter before her and it is only fair and just that the matter be referred to the Chief Magistrate in charge of the station for re-allocation to a court of competent jurisdiction.

17. As to the issue of costs, the court is urged to make no orders as to costs this being a criminal appeal. The accused were cited as Respondents in the appeal for the very fact that they were opponents in the application before the lower court the subject of this appeal which application was not opposed by the state.

18. The application dated 13th July, 2021 filed before this court served its purpose of ensuring that the lower court file was made available for typing of proceedings as the file was only availed after the court issued orders on the 21st July, 2021 as was confirmed by the court on the 30th July, 2021 when the application was fixed for inter-parties hearing.

19. The Respondents' replying affidavit sworn on the 24th September, 2021 opposing the notice of motion dated 21st July, 2021 was premised on the assumption that there was no memorandum of appeal filed in the matter and which is not the case.

20. The Application was necessary noting that the Appellant had written several letters to the lower court asking for the file to be retrieved from the Chambers of the trial Magistrate who had proceeded on leave to no avail.

21. It was the Respondents' choice to engage a counsel and to oppose the appeal which appeal addresses matters on jurisdiction of the trial court in a case that was brought to court by the police through the office of the ODPP which office had conceded to the fact that the matter ought to have to be placed before a court of competent jurisdiction for trial and the issue of costs does not therefore arise.

DETERMINATION

22. The court finds that the only issues here is ***whether the Resident magistrate can try and sentence cases of grievous harm? And what is***

the order as to costs?

23. Section 7(1) (b) of the Criminal Procedure Code stipulate:

“A subordinate court of the first class held by - (b) A resident magistrate may pass any sentence authorized by law for an offence under section 278, 308 (1) or 322 of the Penal Code or under the Sexual Offences Act, 2006”.

24. Under Section 7 (2) of the Criminal Procedure Code the same provides thus: -

“Subject to subsection (1), a subordinate court of the first class may pass the following sentences in cases where they are authorized by law. Imprisonment for a term not exceeding seven years;

(b) A fine not exceeding twenty thousand shillings;

(c) (Repealed by 5 of 2003 s. 60.)”

25. In the case of Martin Mwangi Kiswii v Republic [2014] eKLR Mutende J held that, **the law authorizes the Resident Magistrate being a Court of First Class to hear the case of doing grievous harm. The penalty provided for the offence is up to life imprisonment where a magistrate trying such an offence is a Resident Magistrate he/she can only mete out a sentence up to seven (7) imprisonment as provided by the law.**

26. I agree with above holding. If the Resident Magistrate finds after conviction that severe sentence exceeding 7 years is merited, the matter can be taken to a magistrate with mandate to sentence beyond that 7 years' limit.

27. Thus court finds no merit in the appeal and same is dismissed. On costs, this being a criminal case and taking into account all circumstances, I find same cannot be awarded herein.

28. Thus the final orders are;

i. Appeal dismissed.

ii. No orders as to costs.

iii. The trial court file be transmitted back to the trial court Hon. C. Muhoro Resident Magistrate for hearing and determination.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 11TH DAY OF NOVEMBER, 2021.

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CHARLES KARIUKI

JUDGE