



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 102 OF 2017**

**GIBSON NYAKANGO MOTERI.....APPELLANT**

**=VRS=**

**REPUBLIC.....RESPONDENT**

*[Being an Appeal from the Judgement and Decree of Hon. J. Mwaniki – Senior Principal Magistrate delivered on the 9<sup>th</sup> day of March 2017 in Keroka PM CR Case No. 704 of 2012]*

**JUDGEMENT**

In this appeal the appellant was sentenced to serve eight (8) years imprisonment for the offence of Grievous Harm contrary to Section 234 of the Penal Code. He had pleaded not guilty to the charge and was throughout the trial represented by an Advocate. His petition of appeal is premised on several grounds but the ones which have caught my attention are ground 3 & 4 which states: -

**“3. That the learned trial magistrate erred in law and in fact in proceeding with CR Case No. 704 of 2012 without considering that same had been ordered to start denovo by a magistrate of the same rank on 30.4.2014.**

**4. THAT the trial magistrate erred in law and in fact in overturning the order of 30.4.2014 as if he had the powers of an Appellant (sic) court on 15.6.2015.”**

On perusing the proceedings, I found that the evidence of the three key witnesses in this case was recorded by Hon. J. Mitey, RM. However, on 26<sup>th</sup> March 2014 Hon. J. Mitey, RM indicated that he was proceeding on leave and that the matter would be mentioned next on 30<sup>th</sup> April 2014. On that date the matter went before N. Kahara – RM and the Advocate for the appellant indicated their desire for the case to start afresh. N. Kahara – RM granted the request but referred the case to be heard in Court No. 1 on 7<sup>th</sup> July 2014. On the said date the matter went before Hon. C. N. Sindani – PM but it did not proceed as Counsel for the appellant was indisposed. The matter was adjourned several times after that but subsequently on 15<sup>th</sup> June 2015 it was listed before Hon. J. Mwaniki – PM. The appellant was not present but Mr. Ochoki his Advocate is on record as stating that they wanted the matter to start denovo meaning afresh. The court however noting that the case was a 2012 one and finding that no reasons had been given for wanting a denovo hearing rejected the application. The magistrate did however direct that the witnesses would be recalled for further cross examination. It is however clear from the record that he subsequently proceeded to hear the defence and the witnesses were not recalled. No explanation was given for this. Section 200 (3) of the Criminal Procedure Code bestows a right upon an accused person to demand that any witness be resummoned and reheard and a duty is placed on the magistrate to inform the accused person of that right. Even granted that, the trial magistrate had a good reason for the case not starting denovo, he does not either in the proceedings or in his judgement give an explanation for not resummoning the witnesses if only for cross examination as he had ordered on 15<sup>th</sup> June 2015. By failing to do so he violated the rights of the accused under Section 200 (3) of the Criminal Procedure Code and compromised the accused’s right to a fair trial under Article 50 of the Constitution. It is my finding therefore that on that ground the appeal has merit and that the conviction and sentence cannot stand. I do however find that as there was overwhelming evidence to sustain a conviction the case is one suitable for retrial. Accordingly, I allow the appeal, quash the conviction and set aside the sentence of imprisonment for eight years and order that the appellant shall be taken back to Keroka Court for trial by a Magistrate other than J. Mwaniki – SPM. The appellant be presented before Keroka Court on 24<sup>th</sup> October 2018 for directions.

In the meantime he shall be remanded at the Kisii Main GK Prison. The Deputy Registrar of this Court to ensure that this judgement is certified to the Lower Court.

It is so ordered.

**Signed, dated and delivered in open court this 18<sup>th</sup> day of October, 2018.**

**E. N. MAINA**

**JUDGE**