



IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 55 of 2004

REPUBLIC
APPELLANT

AND

1. SHANDE ALI

2. ABDI NANE

3. ADAN MAMO.....
RESPONDENTS

(Appeal from a judgment of the High Court of Kenya at Nyeri (Ombija, J) dated 21st January, 2004

in

H.C. Cr. Appeal Nos. 171, 172 & 173 of 2002 (Consolidated))

JUDGMENT OF THE COURT:

In this second appeal, the appellant’s single ground of appeal is that the first appellate judge erred in law in holding that the trial magistrate had no jurisdiction to hear the criminal case against the respondents.

The respondents had been arraigned before a court presided over by a Resident Magistrate at Moyale for the offence of doing grievous harm contrary to **section 234 of the Penal Code**. They were tried, convicted and each sentenced to 5 years imprisonment. They appealed to the High Court of Kenya sitting at Nyeri against conviction and sentence. In their respective supplementary petition of appeal, they each averred:

“THAT the learned trial magistrate erred in law by taking up and purporting to adjudicate upon the subject of the offence brought against the Appellant under section 234 (of the) Penal Code being an offence triable only by a subordinate Court of the First Class and the said Magistrate by designation then being a Resident Magistrate. (First Schedule – Division IV of the Crim. Procedure Code).”

‘The learned Magistrate’s trial and the resultant conviction and sentence being without proper jurisdiction was/is thus null and void “ab initio”’.

They each submitted on these two grounds of appeal through their counsel and the first appellate court

acceded to their submissions and held that the respondents' trial was null and void as the trial magistrate being a Resident Magistrate had no jurisdiction as he was not a First Class Magistrate according to the Schedule referred to above. In the result, the respondents' first appeal was allowed, their respective conviction quashed and their sentence set aside. The first appellate court then ordered a retrial. It is against that holding and the order for a retrial that the appellant now appeals to this Court.

Under **section 2 of the Magistrates' Courts Act**, Chapter 10 of the Laws of Kenya a Resident Magistrate's Court is a court of the First Class. In the instant appeal therefore, the Resident Magistrate who presided over the trial of the respondents at Moyale for the offence of doing grievous harm contrary to **section 234 of the Penal Code** had jurisdiction. Consequently therefore, we allow this appeal, set aside the orders of the first appellate court quashing the respondents' respective conviction, setting aside their respective sentences and for their retrial before the Nyeri Principal Magistrate and reinstate their conviction and sentence by the trial magistrate which sentence shall be the balance outstanding consequent to actualizing the orders of the first appellate court.

Dated and delivered at Nyeri this 4th day of August, 2006.

J.E. GICHERU

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CHIEF JUSTICE

S.E.O. BOSIRE

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR