



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 32 OF 2015

REPUBLIC PROSECUTION

versus

MARCUS MWENDWA MWOLOLO ACCUSED

RULING ON REVISION

1. This file was placed before me by the Deputy Registrar, Machakos pursuant to an order made by the T. A. Odera, Principal Magistrate, Mavoko on 10th April 2015.
2. The background of the matter is that **Marcus Mwendwa Mwololo** was charged with the **offence of robbery with violence contrary to section 296(2) of the Penal Code**. The case was heard substantially.
3. On the 22.1.2015 the prosecution applied to have the charge substituted with that of Murder under section 214 of the CPC. In her ruling the learned trial magistrate allowed the application and directed the matter to be placed before the Deputy Registrar for directions.
4. Section 214(1) of the CPC provides thus:

“214. (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that –

- i. ***where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***
- ii. ***where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”***

5. Evidence adduced in the case necessitated an amendment of the charge. In allowing substitution of the charge the learned trial magistrate admitted the new charge which was an information for murder that is duly filed dated 22nd January 2015 signed by Mukofu Nayler the prosecutions counsel. Ordinarily, after

allowing substitution of the charge the court would be required to call upon the accused person to plead to it. This could not happen because the trial court had no jurisdiction to do so.

6. In the premises, what the prosecution ought to have done was to act pursuant to the provisions of section 87(a) of the CPC which provides thus:-

“87. In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of public prosecution at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal –

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.”

In the matter the prosecution had not closed its case, it should have withdrawn the charge. The withdrawal would not have barred the prosecution from charging the accused person in the proper court.

7. From the foregoing I am satisfied that the order by the subordinate court was improper. In the premises I do quash it and direct that the file shall be placed before the trial court presided over by T. A. Odera, Principal Magistrate on the 3.6.2015 in order for the prosecution to make an appropriate application for withdrawal.

8. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 27TH day of MAY 2015.

L.N. MUTENDE

JUDGE