



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NOS. 245 AND 246 OF 2011

(CONSOLIDATED)

BETWEEN

PETER MOROBE 1ST APPELLANT

THOMAS KIRIGA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original ruling delivered on 14th October 2011 in Kehancha Srm's

Court criminal case No.309 of 2011 – Hon. T.A. Sitati, DMII (Prof).

JUDGMENT

1. The appellant herein Peter Morobe (1st Appellant) and Thomas Kiriga (2nd Appellant) were the accused in criminal case No.309 of 2011. In count 1 they were charged with obstructing a police officer contrary to **Section 253 (b)** of the **Penal Code**. The particulars of the charge were that on the 16th April 2011 at Nyabohanse Market in Kuria District within Nyanza Province jointly willfully obstructed No.93134 PC (W) Namka a police officer who at the time of such obstruction was executing a court summons to ERNEST NYANGOKO of case file No.672/136/2011 of 122/2011.
2. In count II they were charged with interfering wrongly with witness contrary to **Section 121(f)** of the **Penal Code**. The particulars of the charges were that on the 16th April 2011 at around 11.30 a.m. at Nyabohanse market in Kuria District within Migori County, interfered wrongly with witness namely ERNEST NYANGOKO to refuse to sign summons to attend court as a witness in criminal case Number 122 of 2011. The appellants pleaded not guilty to both counts and trial ensued.
3. The case commenced on 10th May 2011 with the evidence in chief of PW1, Number 93134 PC (W) Everlin Ramka of Isebania police station. At the close of PW1's evidence in chief, the appellants asked for time to hire an advocate for purposes of cross examination of PW1 and for further hearing. The adjournment was granted and the case fixed for cross examination of PW1 and for further hearing on 17th August 2011. However, after several adjournments, the matter finally came up for further hearing on 6th October 2011, but before PW1 could be examined Mr. Abisai who had come on record for both appellants, applied to have the trial court recuse itself from hearing the case and to let the case be heard by another magistrate. The grounds for the

application were that the trial court was already handling **Kehancha Cr. Case No.122 of 2011 – Republic –vs- Alex Chacha** and that in the course of proceedings in that case, the trial court was informed that the 2 appellants herein had dissuaded a witness by the name Nyangoko from testifying in that case.

4. Counsel for the appellant argued that the trial court was likely to have its mind poisoned by that prior information and as such was unlikely to dispense justice in the matter with an open mind.
5. By a ruling delivered by the trial court on 14th October 2011, the trial court refused to recuse itself, the trial court relied on the case of **Pells –vs- R[1958] EA 121** where the Supreme Court of Kenya (Sinclair CJ) held, *inter alia*, that **“the disclosure of the previous conviction on the bail application was in this case entirely proper. It may in certain cases be undesirable for a magistrate, who has knowledge of the previous bad character of an accused person, to try him if arrangements can be made for the case to be transferred. On the other hand, a magistrate tries an accused on evidence given before him in that trial only, excluding from his mind any personal knowledge having any bearing on the charge. A magistrate and particularly one sitting in a small township must of necessity through his office alone acquire some knowledge of the character of some of the persons he is called upon to try, and if he must disqualify himself for such reasons, it would result in chaos in the administration of justice.”**
6. The appellants were aggrieved by the said ruling and appealed. Thomas Kiriga filed appeal Number 245 of 2011 while Peter Morobe filed Criminal Appeal Number 246 of 2011.
7. When the appeals came up for hearing on 16th October 2014, they were consolidated under file Number 245 of 2011. The appellants set out the following 12 grounds of appeal which are similar in both cases:-

1. *The learned trial magistrate erred in law and fact by ordering for the arrest of the Appellant in **KEHANCHA S.R.M CRIMINAL CASE NO.122 OF 2011 REPUBLIC –VS- ALEX CHACHA RIOBA** where the Appellant was not a party, and thereafter proceeded to try the Appellant over the allegations leveled against him in **KEHANCHA SRM CRIMINAL CASE NO.309 OF 2011** hence leading to travesty of justice.*
2. *The learned trial magistrate erred in law and fact by commencing investigation concerning the Appellant in **KEHANCHA SRM CRIMINAL CASE NO.122 OF 2011** by ordering the arrest of the Appellant herein and then proceeding to try the Appellant without referring the parties to the police to commence the investigations.*
3. *The learned trial magistrate erred in law and fact by refusing to disqualify himself from hearing the Appellant’s case despite the fact that it is the same judicial officer who had ordered for the arrest and subsequent arraignments in court of the Appellant in another case he was*

handling, where the appellant was not a party.

4. *The learned trial magistrate erred in law by hurrying the Appellant into trial without according the appellant reasonable time to prepare for his defence.*
5. *The learned trial magistrate erred in law and fact by failing to disqualify himself from hearing the Appellants’ case despite the prosecution admission that the offences facing the appellant were committed in furtherance of earlier proceedings presided over by the same judicial officer.*
6. *The learned trial magistrate erred in law and fact by holding that he shall not be prejudiced in hearing the Appellants case despite having full knowledge of the allegations leveled against the Appellant, made by the prosecution witness in another case handled by the same presiding magistrate.*
7. *The learned trial magistrate erred in law by misapprehending the authority in **PELLS –VS- REPUBLIC [1958] EA 121**, failed to distinguish the same in light of the circumstances of this case and hence led to miscarriage of justice.*
8. *The learned trial magistrate erred in law by deciding on issues that were not raised either by prosecution or defence.*
9. *The learned trial magistrate erred in law by holding that the Appellant was shopping for a judicial officer of his liking to hear his case, a fact not deduceable from the proceedings.*
10. *The learned trial magistrate erred in law and fact by being biased, arrogant and whimsical in his*

- holding.*
11. *The learned trial magistrate erred in law and fact by deliberately distorting misapprehending and deliberately misinterpreting the appellants' submissions tendered before him hence prejudging the appellants' case.*
 12. *The learned trial magistrate erred in law and fact by failing to make his decisions on the application based on the submissions tendered by the prosecution and defence.*
8. The appellants therefore pray that the appeal be allowed, the trial magistrate be disqualified from hearing Kehancha SRMCR Case No.309 of 2011 so that the case is remitted to any other court of competent jurisdiction for trial and final determination.
 9. At the hearing of the appeal, Mr. Abisai for the appellant submitted that at the time when Cr. Case No.309 of 2011 so that the case is remitted to any other court of competent jurisdiction for trial and final determination.
 10. At the hearing of the appeal, Mr. Abisai for the appellant submitted that at the time when Cr. Case No.309 of 2011 came up before the honourable trial court, the court was already hearing Cr. Case No.122 of 2011 in which it had been alleged that the 2 appellants herein were interfering with witnesses. That the said complainant led to the arrest of the appellants herein and their being subsequently charged in Cr. Case No.309 of 2011. That before their arrest, the prosecution had successfully applied to the trial court for warrants of arrest of the 2 appellants.
 11. Counsel therefore submitted that it was improper for the trial court to proceed to try the appellants for offences that were committed in the course of proceedings before the same court. Counsel also submitted that the proper course of action was for the trial court to refer the matter to the police for investigations and that having failed to do so, there was no chance that the trial court could be impartial. It was the view of counsel that by deciding to proceed with the two cases side by side, the trial court chose to be a judge in its own cause.
 12. Counsel submitted the trial court's finding that by seeking to have the trial court recuse itself from the case the appellants were shopping for a magistrate who would treat their case favourably was a misplaced and resulted in miscarriage of justice. Counsel asked the court to allow the appeal.
 13. Mr. Tom Imbali from the office of the DPP, appearing on behalf of

the respondent conceded the appeal and submitted that the trial court was under a duty to direct police to investigate the complaints that had been made against the appellants in Cr. Case No.122 of 2011 and thereafter he should have let another magistrate hear the second case in which the appellants were charged with obstruction and interfering with a witness in criminal case No.122 of 2011. Counsel also submitted that the utterances by the trial magistrate through the ruling showed that the trial magistrate could not have been impartial in dealing with the matter.

14. This is a first appeal. In this regard, this court is under a duty to rehear this case by reconsidering and evaluating the evidence afresh so as to reach its own conclusions in the matter. Generally see **Patrick & another –vs- Republic [2005] 2 KLR 162, Arum –vs- Republic [2006] 2 EA 10 (CAK)** and **Kibuuka –vs- Uganda [2006] EA 140 (SCU)**.
15. I have now carefully reconsidered the proceedings before the trial court. I have also carefully considered and weighed the ruling of the learned trial magistrate. I have also considered the submissions by counsel when they appeared before me for the hearing of this appeal. From all the above, the issue for determination is whether the respondent counsel rightly conceded this appeal.
16. In my considered view, I think that learned counsel for the respondent rightly conceded the appeal herein. First and foremost, it is not clear from the record how the 2 appellants came to be charged with the offences in Criminal Case 309 of 2011. If it is true, and it appears that the trial court ordered for the arrest and subsequent arraignment in court of the appellants herein, then it would have been only fair for him to let another magistrate proceed to hear the new case against the appellants since he was already handling another case in which the 2 appellants had been adversely mentioned. It was thus undesirable for the trial court in this case, which had knowledge of previous adverse complaints against the appellants concerning a witness who was testifying before it to proceed to hear the case against the appellants on the same complaint.
17. It also appears to me that the trial court's comments in its ruling that the appellants were **"inclined to shop for a magistrate of their liking"** were not well founded.

18. In the premises, this appeal is allowed. The learned trial magistrate, if he is still sitting at Kehancha is disqualified from hearing **Cr. Case No.309 of 2011–Republic –vs- (1) Peter Marobe, (2) Thomas Kiriga.**
19. The said case shall be remitted to Kehancha for hearing and final determination before a magistrate of competent jurisdiction other than Hon. T.A. Sitati who was previously handling the case.
20. It is so ordered.

Dated, signed and delivered at Kisii this 27th day of February, 2014

R.N. SITATI

JUDGE

In the presence of:

Mr. Nyagwencha for Abisai for Appellants

Mr. P.O. Ochieng for Respondent

Mr. Bibu - Court Clerk