

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 84 OF 2011

FRANCIS CHEGE MUTHEE APPLICANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in criminal case Number 2602 of 2009 in the Chief Magistrate’s Court at Kibeara - Before Mrs. Nyakundi, Principal Magistrate on 29th March, 2011)

JUDGEMENT

The appellant Francis Chege Muthee was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. He denied the offence but after the full trial he was convicted and sentenced to death. This case was heard first by Mrs. Kasera who was then transferred and the succeeding magistrate Mrs. Nyakundi heard the case *de novo* at the instance of the appellant.

In the course of our preparation to write this judgment and while going through the record, we noted that after the evidence of P.W. 1 ending with the re-examination by the prosecution, the prosecutor applied to amend the charge to which the appellant raised no objection. The court then allowed the application as prayed.

The appellant in one of his grounds of appeal before us has raised issue with the proceedings in that, the learned trial magistrate erred both in law and fact by failing to appreciate that no evidence was adduced by P.W. 1 after the charge was amended, and this was prejudicial to him thereby occasioning miscarriage of justice. The appellant was unrepresented in the lower court just as he is not in this court.

It would appear that the amendment of the charge sought by the prosecution at that stage was informed by the evidence of the complainant. After the court accepted the application by the prosecution, and notwithstanding the reply by the appellant that he had no objection, the court was bound to invoke the provisions of Section 214 (1) (i) and (ii). It is provided therein,

“(i) where a charge is so altered the court shall thereupon call 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”.

The provision relating to the duty bestowed upon the court is mandatory while that of an accused person is discretionary. It was incumbent upon the learned trial magistrate to call upon the appellant to plead to the amended charge which was not done in this case. The omission was fatal. Having said so we do not consider it necessary to address the merits or otherwise of this appeal. We are of the view that on that ground alone this appeal should be allowed.

We have considered whether or not to order a retrial in the circumstances of this case. An order for retrial should only be made where the interests of justice require it. Each case must depend on the particular facts and circumstances of that case.

The offence with which the appellant was charged was serious and the learned trial magistrate was persuaded there was sufficient evidence upon which to found a conviction. We have considered that he is not to blame for the obtaining circumstances but at the same time note that, from the time of his conviction he has only spent just above three years imprisonment of the death sentence. The evidence adduced before the learned trial magistrate was also in our view sufficient to sustain a conviction.

The witnesses may still be available and the exhibits are also likely to be availed. We are of the view that this is a case befitting an order for a retrial. Therefore the appellant shall be released from prison and handed over to the officer in charge Karen Police Station for a retrial to be initiated. This should be done within seven days of the date hereof.

Orders accordingly.

SIGNED DATED and DELIVERED in court this **26th** day of May **2014**.

A.MBOGHOLI MSAGHA

L.A. ACHODE

JUDGE

JUDGE