REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL CASE NO. 1430 & 1431 OF 1992

PAUL KITUKU MUTETI.....1ST APPELLANT

SILVESTER MUSEMBI KIMEU.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 6209 of 1991 of the Chief Magistrate's Court

at Nairobi by U.P.Kidula – Principal Magistrate)

JUDGMENT

This appeal has a chequered history. It emanates from the Judgment of U.P. Kidula (Mrs), Chief Magistrate. The said judgment was delivered on 22nd October 1992!

The appellants, **PAUL KITUKU MUTETI and SILVESTER MUSEMBI KIMEU** were both convicted on two counts. On the first count, they were convicted for robbery with violence, contrary to **section 296 (2) of the Penal Code,** and they were thereafter sentenced to suffer death as by law prescribed.

On count 2, each of the appellants was convicted for handling stolen goods contrary to **section 322 (2) of the Penal code.** For that offence, the learned trial magistrate did not pronounce any sentence. Her said action is in accordance with the law, because it is not possible for a convict who has been hanged to also be imprisoned.

Following the judgment of the trial court, the appellants lodged an appeal to the High Court. The said appeal was, apparently, heard and determined by Patel and Oguk JJ. Their Lordships dismissed the

appeal, prompting an appeal to the Court of Appeal.

However, the Court of Appeal was unable to adjudicate on the said appeal because the Judgment of the High Court went missing.

After taking all possible action to trace the Judgment, but without any success, the Court of Appeal ordered that the appeal which had been lodged at the High Court, be heard *de novo*. The orders of the Court of Appeal were made on 13th July 2010; and it is the said orders which prompted the hearing before us.

When the appeal came up for hearing, the respondent informed the court that it was not opposing it. Mr. Mulati, learned state counsel, pointed out that the prosecutor was unqualified, and also that the court failed to comply with the provisions of **section 200 of the Criminal Procedure Code.**

We wish to make it clear that whilst the record of the proceedings before the High Court (relating to the original appeal) were missing altogether, the record of the proceedings of the trial court were made available to us.

A perusal of the both the original hand-written, as well as the typed versions of the proceedings, reveals that the plea was taken on 30th September 1991. On that date, the prosecutor was S.P. Mwangi.

In our understanding, the initials **S.P.** stand for **Superintendent of Police.** That would therefore mean that the prosecutor, on the day when the appellants took their pleas before the trial court, was of a rank that was higher than that of an Inspector of Police.

As at 30th September 1991, it was a legal requirement, pursuant to **section 85(2) of the Criminal Procedure Code,** that if the public prosecutor was a police officer, he could not be below the rank of Sub-Inspector.

In this instance, the prosecutor was definitely not below the rank of an Assistant Inspector or a Sub-Inspector. Therefore, the learned state counsel was not right to have submitted that there had been an unqualified prosecutor when the plea was taken.

The record of the proceedings shows that on 22nd November 1991, the trial commenced, at 12.00 noon. Two witnesses testified before the court took a lunch-break.

When the trial resumed at 2.45p.m, the prosecutor sought and was granted leave to consolidate the charge, with another charge, which was in a separate case **(No. 5823/1991).** The learned trial magistrate indicated, on the record, that the consolidated charge was read and explained to the accused. Immediately thereafter, **PW 3** was sworn, and he proceeded to give evidence.

Regrettably, the trial court did not comply with the provisions of **section 214 (1) of the Criminal Procedure Code.** That section empowers a trial court to 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 altered as aforesaid, 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 such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination."

The court, in this instance, did not have the appellants take a plea after consolidation of the charges. For all intents and purposes, the consolidation of the original charge, with the charge in Criminal Case No. 5823/1991 resulted in the creation of a new charge.
It was not sufficient that the said new charge be read and explained to the accused persons. The trial court should have taken their pleas anew.
Whilst it is arguable whether or not the failure to have the accused take pleas anew was prejudicial to them, the fact remains that the trial court failed to comply with a mandatory requirement of the law. The said failure renders the trial a nullity.

On that ground therefore, the state was right to have conceded the appeal.

We therefore allow the appeal, quash the convictions and set aside the sentences. We order that the appellants be set at liberty forthwith unless they are or either or them is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 19th day of May, 2011.

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FRED A. OCHIENG **MOHAMMED WARSAME**

JUDGE **JUDGE**