

appeal record that the charge was read to the accused persons after the oral amendment. Each of the two pleaded not guilty. The counsel who was representing the accused persons told the court that despite the amendment, he did not wish to apply to recall PW1 and PW2. The charge was amended in the middle of PW3's evidence because he differed with PW1 and PW2 on the number of stones of bhang found in possession of the accused persons. The number of stones on amendment changed from 400 to 464 stones. The court acted procedurally in the amendment.

The prosecution's case closed after PW3's evidence and submissions were made by the counsel. The court ruled that the two accused persons had a case to answer. On the date of defence case on 19/02/2008 the two accused persons failed to turn up in court. The court mentioned the case again on 4/3/2008. The 1st accused was present but the Appellant was absent. A warrant of arrest was issued against the Appellant. The Appellant failed to turn up on 18/03/2008 during the next date of mention. His counsel told the court that he was out of touch with his client. On 13/06/2008 the court proceeded with the case against the 1st accused without the prosecution withdrawing the charge against the Appellant. The 1st accused gave her defence and the court delivered its judgment on 30/06/2008. It was a misdirection on part of the court to proceed with the case of 1st accused without having that of the Appellant withdrawn. It was the duty of the court to remind the prosecutor to do the needful in the event that he did not know what to do or he may have forgotten to do so.

The Appellant was later arrested and arraigned in court on 17/3/2010 before the same magistrate. He was put on his defence and a second judgment prepared and delivered on 30/4/2010. The act of continuing and finalizing the trial of the Appellant in an already concluded file of another person (who was by then a convict) was unprocedural. The Appellant ought to have been prosecuted afresh in a separate trial. The whole prosecution of the Appellant amounted to a mistrial. I hereby set aside the proceedings, conviction and sentence. This is a case where retrial is the right order to make because it will serve the interests of justice. The prosecution confirmed that the witnesses who are police officers are available. The Appellant was opposed to the retrial for the reason that the exhibit may have been destroyed. This allegation was not confirmed by the state. The Government Chemist report is available in the appeal record. The Appellant was tried within a period of two (2) years. The trial would have taken a shorter period had he not absconded.

I find it appropriate that a retrial be held in this case. It is hereby ordered that a retrial be held within seven (7) days before a different magistrate.

F. N. MUCHEMI

JUDGE

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