



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KAKAMEGA**

**Miscellaneous Criminal Application 54 of 2009**

**LEVI KIBANDE ..... APPLICANT**

**V E R S U S**

**REPUBLIC..... RESPONDENT**

**R U L I N G**

The applicant filed the originating notice of motion dated 11<sup>th</sup> May, 2009 seeking the following orders:-

- (a) The lower court case (Vihiga Criminal Case No.787 of 2007) be stayed pending final determination of this application.*
- (b) The order of the trial court of 6<sup>th</sup> April, 2009 directing that the applicant be charged with the offence of robbery with violence be declared illegal, null and void and be set aside.*
- (c) The order remanding the applicant made on 6<sup>th</sup> April, 2009 by the trial court be set aside.*
- (d) The proceedings in the lower court be quashed and the appellant be set at liberty forthwith.*

The application is brought under *section 65* of the

Constitution and Part I of the Constitution of Kenya (supervisory jurisdiction and protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. The application is supported by the applicants affidavit sworn on 11<sup>th</sup> May 2009.

Mr. Chegenye, learned counsel for the applicant submitted that the applicant was charged with assault causing grievous harm. After two witnesses had testified before the trial magistrate, the magistrate directed that the applicant be charged with robbery with violence. A fresh charge was preferred against the applicant who was remanded in custody. This was a gross violation of the applicant's rights as enshrined in the Constitution. Learned counsel further submitted that the applicant is HIV positive and his Constitutional rights have been violated as it took two years to detect an anomaly in the charge.

MR. Karuri, learned State Counsel opposed the application and submitted that section 214 of the Criminal Procedure Code allows trial court to alter a charge before the end of the trial. The decision by the trial magistrate was within the law and that the applicant will not be prejudiced by the amendment of the charge as he has the right to recall the two witnesses who had testified for cross-examination. The trial magistrate disqualified himself after the charge was amended. Counsel further submitted that the prisons

have medical services for sick inmates.

The only issues for determination is whether the applicant's constitutional rights were violated and whether the trial magistrate's decision to have the applicant charged with Robbery with violence was illegal, null and void.

The lower court record shows that the applicant was arraigned before the Vihiga Senior Resident Magistrate on 24<sup>th</sup> May, 2007 when the plea was taken. The charge the applicant was facing was Grevious harm contrary to section 234 of the Penal Code. The particulars of the offence were that on the 17<sup>th</sup> day of May, 2007 at Kagolosi village, Gaigeda sub-location in Vihiga District within Western Province the applicant unlawfully did grevious harm to Christopher Govedi. The charge sheet further indicate that the applicant was arrested on 18<sup>th</sup> May, 2007 but was released on Cash Bail.

Initially the matter was heard by Mr. P.W. Macharia, Senior Resident Magistrate who took the evidence of PW1 on 9<sup>th</sup> July, 2008. The magistrate was later transferred and the case was to be heard by Mr. L. O. Onyina Senior Resident Magistrate who resolved to here the case afresh. On 18<sup>th</sup> December 2008 the learned magistrate took the evidence of PW1, CHRISTOPHER LUNGAFA GOVEDI and PW2, RUTH ADHIAMBO who is PW1's wife.

After taking the evidence of PW1 and PW2, the trial magistrate fixed the matter for further hearing on 24/8/2009. He further made the following observation.

*"The accused should have been charged with a more serious offence in view of the testimonies of PW1 and PW2."*

The trial magistrate directed that a charge of robbery with violence contrary to *section 296 (2)* of the Penal Code be preferred against the accused and fixed the matter for mention on 8<sup>th</sup> April 2009.

A substituted charge of robbery with violence was read to the applicant on 8<sup>th</sup> April, 2009 to which the applicant denied. The trial magistrate disqualified himself and referred the matter to the Chief Magistrate, Kakamega for hearing.

PW1's evidence was that on the 17<sup>th</sup> May 2007 at about 8.00 p.m. while outside his home he was attacked by five people who had a rungu and a panga. The attackers also took his KShs.3,700/= that was in his pocket. He was assaulted and he sustained injuries.

Given the above background the issue is whether the applicant's Constitutional rights were violated. The accused was granted a bond of KShs.20,000 with one surety or cash bail of KShs.5000/= when he was charged with grevious harm. He was remanded in custody when the charge of robbery with violence was preferred against him which is within the law.

I do not find that the applicant's Constitutional rights were violated. The matter was heard by a magistrate who was later transferred. The second magistrate who took over the matter opted to start the case de novo. Upon finding the prosecution evidence was skewed towards more serious offence the trial magistrate disqualified himself and this was quite procedural.

Was the decision by the trial magistrate to have the applicant charged with robbery with violence illegal, null and void? *Section 214* of the Criminal Procedure Code states as follows:-

*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.*

*(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to*

*the altered charge.*

The trial magistrate was within the law in directing that the applicant be charged with robbery with violence contrary to section 296 (2) of the Penal Code. The complainant's evidence on record did show that he was violently robbed of KShs.3,700/=. It is not for the applicant to decide which offence he is to be charged with. The trial court is empowered to have the charge amended or substituted before the end of the trial. It's up to the prosecution to prove the substituted charged.

The applicant's application lacks merit. There is no ground to quash the charge and have the applicant set free. The trial before the lower court should proceed at the Kakamega law courts. The application dated 11<sup>th</sup> May 2009 is hereby dismissed.

*Delivered, Dated and Signed at Kakamega this 24<sup>th</sup> day of September, 2009*

**SAID J. CHITEMBWE**

**J U D G E**