



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 104 of 2003

JOEL MUTINE MUTUKU.....1ST APPELLANT

BONIFACE SHITABULE ODORY.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 2298 of 2001 of the

Senior Principal Magistrate's Court at Machakos by S.M. Kibunja– Senior Resident Magistrate)

J U D G M E N T

The appellants, JOEL MUTINE MUTUKU and BONIFACE SHITABULE ODORY, were convicted for the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. They were thereafter sentenced to suffer death as by law prescribed.

When their appeals came up for hearing, the same were consolidated for hearing.

The learned state counsel then notified the court that the appeal was being conceded, on the ground that although the case was heard by two magistrates, the succeeding magistrate did not have the accused persons take their pleas when the trial begun *de novo*, before him.

In our considered view, the position taken by the learned state counsel is the correct one, because in the absence of the plea-taking, the trial started in the air, so to speak, as the court had no idea whether or not the accused person would plead not guilty. It is instructive to note that it is only in cases in which an accused person does not admit the truth of the charge that a trial would proceed.

It is an express requirement of section 207 (1) of the Criminal Procedure Code that;

“The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.”

By failing to have the plea taken, the learned trial magistrate flouted that provision of law. That action rendered the hearing of the appellant's case, a mistrial.

In the event, we do now hereby declare the trial of the appellants to be a nullity. The convictions are

hereby quashed and the sentences set aside.

The learned state counsel has invited us to order that there be a retrial. However, the appellants wish to be set at liberty forthwith.

We have given careful consideration to the two competing views. First, there is no doubt at all that the incident giving rise to the criminal charges which were preferred against the appellants, took place in September 2001. That is more than eight years ago. As the offence for which the appellants were tried attracted the death penalty upon conviction, the appellants were not entitled to bail or bond pending trial. In effect, the appellants have already been in custody for over eight years.

Ordinarily, when the period between the events giving rise to the case, and the date when a retrial is sought, is long, it may become difficult for the prosecution to secure the attendance of witnesses.

Also, the passage of time would normally result in witnesses losing the ability to clearly recall what had transpired.

However, in this case we are assured by the learned state counsel that the prosecution witnesses will definitely be made available, if a retrial is ordered.

We have also noted that a life was lost, in the course of the attempted robbery. The loss of human life causes the matter to assume very serious proportions.

Given the possibility that the appellants did admit their involvement in the matter, it appears to us that there is overwhelming evidence on record; so that if a retrial was ordered, there is a likelihood of conviction.

In the circumstances, a retrial would not be prejudicial to the appellants. Instead, we consider that the justice of this case dictates that there be a retrial. We do therefore order that the appellants be retried on a priority basis, by a magistrate other than Hon. Mr. S.M. Kibunja or Hon. J.N. Nyagah.

We also do order that the prosecution will not call, as witnesses, any persons who did not testify at the trial which has now been declared a mistrial herein. In particular, the prosecution will not call, as its witness, Margaret Katunge.

Dated, Signed and Delivered at Machakos, this 23rd day of September 2009.

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ISAAC LENAOLA

FRED A. OCHIENG

JUDGE

JUDGE