

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Revision 12 of 2008

1. CHARLES GATONYE NDUNG’U

2. ALEX MUSAU MUSEMBI

3. ISMAEL OBONYOAPPLICANTS

VERSUS

REPUBLICRESPONDENT

RULING ON REVISION

Charles Gatonye Ndung’u, Alex Musau Musembi Katua and Ismail Obonyo, hereinafter referred to as the applicants, were jointly tried on a charge of five counts. The first three counts (I,II and III) relate to the offence of robbery with violence contrary to Section 296(2) of the penal code. In the remaining counts (IV and V) the applicants were charged with the offence of attempted robbery with violence contrary to Section 297(2) of the Penal Code. At the close of the prosecution’s case, the applicants were acquitted under section 210 Criminal Procedure Code in counts I, II, and III. The trial magistrate did not mention the fate of the applicants in respect of counts IV and V. When the Deputy Registrar was shown this anomaly by the prison authorities, she immediately caused the file to be placed before this court under Section 363(2) of the Criminal Procedure for perusal and action in exercise of its supervisory powers of revision.

Under section 362 of the Criminal Procedure Code, this court is enjoined to call for and examine the record of any criminal proceedings of any subordinate court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court. I have perused the proceedings of the trial court in Mombasa C.M.CR.C.No. 186 of 2006 R =vs= Charles Gatonye Ndungu & 2 others. It is obvious from the aforesaid proceedings that Mrs. Jaden, the learned Senior Principal Magistrate acquitted the applicants of the offences stated in counts I, II and III under Section 210 of the Criminal Procedure Code. The learned Senior Principal Magistrate did not make a finding on counts IV and V. In other words, the applicants were acquitted for the offences of robbery with violence but were left in a limbo in the counts relating to the offence of attempted robbery with violence. The omission is a fundamental error in that the prison authorities cannot release the applicants because there is no such order. The problem is further complicated by the fact that the counts which were never touched relate to capital offences where the accused persons are not entitled to bond/bail pending trial. For the above reasons this court is entitled to step in to correct the error in exercise of its supervisory power of revision. At the close of the prosecution’s case, the trial court was enjoined by law to either acquit the applicants under S.210 or in the alternative to place them on their defence under section 211 of the Criminal procedure code. The law made it very clear so that the trial court had no discretion to leave the finding in limbo. After a careful consideration of the matter, I have come to the conclusion that the file be placed before Mrs. Jaden, the learned Senior Principal Magistrate

to make her finding according to law in respect of counts IV and V of the charge. In view of the fact that the learned Senior Principal Magistrate has been transferred to Malindi. I direct the Deputy Registrar to liaise with the learned Senior Principal Magistrate to fix a date when the matter can be mentioned before her in compliance with the above directives.

Dated and delivered at Mombasa this 18th day of July 2008.

J. K. SERGON

J U D G E