REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CRIMINAL APPLICATION NO 301 OF 2002

MUSA SHITI SABABU……APPLICANT

VERSUS

REPUBLIC…….RESPONDENT

R U L I N G

These two applications are consolidated. The two applicants Musa Shiti Sababu and Josewa Olopi face the offence of stealing c/s 275 of the Penal Code in the lower court. There is an alternative charge of handling stolen goods c/s 322(2) of the Penal code but only against the applicant Musa Shiti Sababu.

The case before the learned trial magistrate is part heard and the prosecution has closed its case. It is also on record that the defence of the applicant Musa Shiti Sababu is part heard before the learned trial magistrate, and that is after the learned trial magistrate had made a finding that both accused had a case to answer and that section 211 of The Criminal Procedure Code had been complied with. Until then, and even after the first accused had started his defence, the second accused was un represented.

The thrust of the two applications is that the learned trial magistrate should not have found that the applicants have a case to answer. I have also been asked to revisit and review that order. In respect of the second applicant there is an added prayer that the terms of his release on bond be varied. I have heard both learned counsel and read the authorities cited. Section 211 of the Criminal Procedure Code states as follows in part:

> "211(1) At the close of the evidence in support of the charge, and after hearing such summing up,
>
> submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person. Sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused……."

At the close of the prosecution case in this matter, no submissions were made or arguments put forward. It is clear that such a step is at the instance of either the prosecution or the accused or both. It is also clear that the same is discretionary on either party. It is not, with respect, the duty of the court to prompt any party to the proceedings to take a particular step.

The learned counsel for the applicants was then appearing for the first accused. He never indicated to the learned trial magistrate that he had any submission to make at the close of the prosecution case. The record is clear. When the court resumed he put his client to his defence who actually started

defending himself only for the case to be adjourned due to some technicality involving a certain document.

It was after the foregoing that the issue of the ruling of the trial magistrate made on 6th February, 2002 arose, and also the submission that she should disqualify herself.

A ruling as to whether or not the accused has a case to answer is not a mere procedural step but, a consideration founded on the evidence so far adduced by the prosecution. Having made such a finding therefore, the learned trial magistrate cannot revisit the same whether on her own motion or at the instance of nay party with a view to altering the same. The submission and approach taken by the learned counsel for the applicants was a misdirection and with respect, misplaced. The learned trial magistrate was right in refusing to "go back" on her ruling.

The applicants have asked that eh case be transferred to another court. The exchange of words between the counsel and the court is not part of the record. The allegations of bias and impartiality are serious and should be based on consent facts supported by evidence. It has not been alleged that the hearing was not in open court. Yet not a single independent witness has sworn an affidavit that such an exchange actually took place. It is instructive to note that even the second applicant who was in court never heard such an exchange. If he did he would have said so, in actual words, in his affidavit

I am inclined to believe that these allegations were an after thought after the applicants were put on their defences and were not made in good faith.

On the application to vary the terms of the bond granted to the second accused, I see no reason to interfere with the terms already set by the lower court which, in any case, his co-accused has complied with.

The end result is that this application is hereby dismissed and the trial shall proceed from where it stopped before the same trial magistrate. Orders accordingly.

Dated and delivered at Nairobi this 29th day of May, 2002.

A. MBOGHOLI MSAGHA

JUDGE