



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 107, 108, 109 & 110 OF 2017 [CONSOLIDATED]

(CORAM: R. E. ABURILI - J.)

FELIX OMONDI ODUOR.....1st APPELLANT

DENIS OMONDI SIAMBE.....2nd APPELLANT

GEORGE OPONDO OGOLLA.....3rd APPELLANT

KEVIN OCHIENG ODHIAMBO.....4th APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal against judgment, conviction and sentence Ukwala (SO) PM's court Criminal Case No. 12 of 2015 on 5/10/2017 delivered by Hon. R.M. Oanda, SRM)

JUDGMENT

1. The Appellants in this consolidated appeals are FELIX OMONDI ODUOR, DENIS OMONDI SIAMBE, GEORGE OPONDO OGOLLA and KEVIN OCHIENG ODHIAMBO. They were initially charged before Ukwala Principal Magistrate's court vide Ukwala SRM's Court Criminal Case No. 12/2015, with the offence of Robbery with violence contrary to **Section 296(2) of the Penal Code**.
2. One of the accused persons in the case raised issues with the trial court and as a result the trial Magistrate Hon. R.M. Oanda, SRM recused himself and forwarded the file to the Principal Magistrate's court at Siaya.
3. An order referring the matter to the PM's court at Siaya was made on 16/11/2015 and the file was placed before the Principal Magistrate Siaya on 24/11/2015 and it was mentioned before Hon. Wandere, Principal Magistrate, Siaya Law Courts. The Hon. Magistrate then on 25/11/2015 directed the file to be placed before the Presiding Judge of the High Court for directions now that Hon. Oanda had disqualified himself.
4. I have perused the court file and what I find are proceedings from 8/12/2015 where E.N. Ayuka, Resident Magistrate and on 5/1/2016 the Hon. H. Wandere, PM ordered the case to proceed *denovo*.
5. There is no order or directions by the High Court permitting or transferring the matter from Ukwala PM's court to Siaya PM's Court.
6. Only the High Court has jurisdiction under Section 81 of the Criminal Procedure Code to transfer a criminal case from one jurisdiction to another jurisdiction.
7. The Magistrate's court has no universal jurisdiction to transfer a case from one court to another court of concurrent jurisdiction save where the case is in the same court station in which case, case re-allocation or reassignment can be done between and among magistrates.
8. **Section 81 of the Criminal Procedure Code** allows the trial court itself to refer a matter to the High Court for directions on whether the case should be heard by another court of competent jurisdiction or by the High Court itself. The section provides:

“81(1) whenever it is made to appear to the High Court—

- a. ***that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or***

- b. *that some question of law of unusual difficulty is likely to arise; or*
- c. *that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or*
- d. *that an order under this section will tend to the general convenience of the parties or witnesses; or*
- e. *that such an order is expedient for the ends of justice or is required by any provision of this Code,*

it may order—

- i. *that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;*
- ii. *that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;*
- iii. *that an accused person be committed for trial to itself.*

(2) the High Court may act on the report of the lower court, or on application of a party interested , or on its own initiative.

9. That being the case, without a formal order of the High Court transferring this case from Ukwala Law Courts to Siaya Law Courts, the Magistrate who referred the case from Ukwala Law Courts to Siaya Principal Magistrate's Court did so without jurisdiction. In addition, the magistrate who heard and determined the criminal case had no such jurisdiction to do so. Jurisdiction is conferred by the Constitution and Statute not by the Presiding Judicial Officers or Judge.

10. In the premises, as the appellants' trial was without jurisdiction, I order that there was mistrial. I declare the proceedings in ***Siaya PM Cr. Case No. 143/2016*** a mistrial and quash those proceedings and order that the trial court file and record shall be returned to Ukwala Law Courts for a fresh trial of the accused persons/Appellants herein.

11. This appeal file is therefore closed and the Ukwala PM's court file to be returned forthwith together with a copy of the judgment in this appeal for the trial magistrates to take note of.

12. Orders accordingly.

Dated, signed and Delivered at Siaya this 11th Day of November 2019.

R.E. ABURILI

JUDGE

In the Presence of:

All the Appellants in person

Mr. Okachi, SPPC for the Respondent

Court Assistants: Brenda and Modestar