



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 33 & 36 OF 2018 [CONSOLIDATED]

KEVIN OUMA OLOO Alias REAGAN.....1ST APPELLANT

FREDRICK OTIENO ODINDO.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, conviction and sentence in Siaya PM's Court vide Cr Case No 369 of 2017 by Hon. J. Ong'ondo PM on 25th August, 2018)

JUDGMENT

1. The Appellants herein **Kevin Ouma Oloo alias Reagan** and **Fredrick Otieno Odindo** were jointly charged with 2 counts. In Count 1, they faced the charge of attempted murder contrary to **section 220(9) of the Penal Code. Particulars are** that on 30th May 2017 at Wino wines and Spirits in Bondo sub-county Siaya County the Appellants jointly with others not before court attempted to unlawfully cause death of **Aggrey Abwogi** by shooting at him using a heckler and Koch pistol serial No.119533 thereby causing him to sustain serious injuries. In Count 2, the appellants were jointly charged with the offence of attempted robbery with violence contrary to **section 297(2) of the Penal Code**. Particulars are that on the 30th May, 2017 at Wino Wines and Spirits in Bondo Township within Siaya County the Appellants jointly with others not before Court while armed with a heckler and Koch pistol S/No.119533 attempted to rob **Boaz Wanakacha** the owner of Wino Wines and Spirits Bar.

2. The first Appellant who was the 1st accused in the lower court also faced a third count of being in possession of a firearm without firearm certificate contrary to **section 4(2)(a) of the Firearm Act (Cap.114), Laws of Kenya** in that on 30th May, 2017 at about 11.30 hrs at Wino Wines and Spirits, Bondo Siaya County the appellant was unlawfully found in possession of a firearm a heckler and Koch pistol S/No.119533 without a firearm certificate.

3. The appellants were found guilty of attempted robbery with violence and sentenced to serve life imprisonment. The 1st appellant was also found guilty of being in possession of a firearm without firearm certificate contrary to section 4(2)(a) of the Firearm Act (Cap.114), Laws of Kenya and he was sentenced to serve seven years imprisonment which sentence was to run concurrent with the sentence imposed on count one. Both appellants were acquitted on count one of attempted murder after the trial court found that the bullet that fired the 1st complainant did not emerge from the firearm which the 1st appellant was found in possession of.

4. The court proceedings show that the appellants were charged before Bondo PM's Court vide Bondo PM Cr Case No 312 of 2017 and they took a plea on 9/6/2017. Later the matter was consolidated with Cr case No 351 of 2017 at Bondo on 7.7.2017 and on the same day the appellants applied that their case be heard by another court on account that the complainant came from Bondo town and on the part of the second appellant, he claimed that he had another case pending before the same court.

5. After hearing the application by the appellants, Hon Obiero PM ordered that the case be transferred to Siaya PM's Court for further orders and directions as the 2nd appellant had two more similar cases before Bondo law Courts and that one of the criminal cases was pending before the Hon M. Obiero, PM.

6. That is how the case file ended up before Hon Ongondo Principal Magistrate, Siaya, for hearing and determination.

7. The power to transfer criminal cases from one subordinate court to another subordinate court or from a subordinate court to the High Court is vested only in the High Court and not in a subordinate court. Section 81 of the Criminal Procedure Code 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.

8. In the instant case, there was a request by the accused persons for transfer of their case from Bondo PM's Courts to another court, and the trial court had no issue with that request. The trial magistrate however referred the trial to another court of concurrent jurisdiction that is Siaya PM's Court instead of the High Court.

9. Only the High Court has jurisdiction under section 81 of the Criminal Procedure Code to transfer a case from one subordinate Court to another subordinate court or to itself for hearing and determination. The High Court is also empowered by Article 165(6) and (7) of the Constitution to supervise subordinate courts and all bodies, authorities or tribunals exercising judicial or quasi-judicial authority.

10. In the absence of an order from the High Court transferring the criminal case from Bondo law Courts to Siaya Law Courts, the Bondo Law Courts acted without jurisdiction and the Siaya PM's Court too acted without jurisdiction by hearing and determining a case that it had no jurisdiction over. In the premises, and as jurisdiction is everything without which a court of law acts in vain, I find the trial of the appellants by Siaya PM's court to have been in vain. I quash the trial of the appellants and order for a retrial before Bondo Law Courts. The original trial court file together with all exhibits produced to be returned to Bondo law courts forthwith together with a copy of this judgment for the trial magistrates to take note of.

11. Orders accordingly.

Dated, signed and delivered at Siaya this 13th day of November, 2019.

R. E. ABURILI

JUDGE

In the presence of:

All the appellants in person

Mr Okachi Senior Principal Prosecution Counsel for the State

CA: Brenda and Modestar