

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISIONa

CRIMINAL REVISION NO. 61 OF 2017

JACKSON KIFOFO MZEE & 2 OTHERS.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Chief Magistrate at City court, Hon. R. A. Oganyo (Mrs) CM, forwarded the trial court file in **Milimani Cr. Case No. 1688 of 2008** with a view to determining the legality or correctness or propriety of the record therein. The action was taken pursuant to a ruling written by Hon. M. W. Kurumbu, R.M on 6th June, 2016, sitting as the trial magistrate in the case. In her ruling she noted that the trial was due for judgment but she had been unable to write one because the record of proceedings bore several charge sheets and it was not clear the charge sheet on which the trial was premised. She was particularly concerned that the charge sheets on record were neither signed nor dated as to enable her determine which amongst them was relevant in the trial. She thus referred the matter to the Chief Magistrate for directions. She had however in her ruling made a finding that there should be a retrial based on the charge sheet which the prosecution would direct and point out as the correct one.

When the file was placed before R. A. Oganya, C.M., she rightly directed that the file be placed before a Judge for directions on how the trial would proceed.

I have thoroughly perused the record of proceedings as forwarded. It contains five charge sheets. The only charge sheet which was signed and dated by the receiving magistrate is dated 23rd October, 2008. It bears the date the plea was taken. Other charge sheets were filed together with other official documents on the right hand side of the record of proceedings. None of them is dated or signed by the receiving magistrate. The only thing they bear is a stamp from the Police Station they were prepared from.

Apart from the date of the plea, there were two other dates on which the accused persons took plea. One was on 28th July, 2009 and five counts were read to the accused persons. The second date was on 29th June, 2011 on which date again five counts were read. Apart from one charge sheet which bears four counts, the other three additional charge sheets bear five counts each respectively. It is therefore difficult to deduce which charge sheet amongst the three the plea was recorded.

I thus concur with the learned trial magistrate that the record as it is would not have assisted her to write a judgment. The only thing that the court would do in the circumstances is to order a retrial. I say so because the correct procedure upon substitution of a charge sheet is for the magistrate receiving the new charge sheet to cancel the previous one and indicate that the same has been substituted. In addition, the magistrate must always record the date of the substitution on the old charge sheet. The date should correspond with the record that a substitution of the charge sheet was made and fresh plea taken accordingly. Simultaneously, upon receipt of the new charge sheet, he/she must sign and date the charge sheet with the current date of receipt. Failure to do so would cause confusion on the record as it becomes difficult to pick out which charge sheet the accused person was tried against. Ultimately, that would represent an irregularity on the part of the record of proceedings.

Accordingly, I find and hold that the entire trial was a mistrial. I hereby set aside the entire record of

proceedings including the entire bundle of charge sheets on record. I substitute the same with an order that the three accused persons be retried on a fresh charge to be presented to court by the prosecution. I direct that they appear before the Chief Magistrate, City Court on 24th May, 2017 for purposes of taking plea. The fresh trial shall be conducted in the same file Cr. Case No. 1688 of 2008.

The trial court record shall forthwith be remitted back to City Hall Court for necessary action.

DATED and DELIVERED this 9th day of **May, 2017**.

G.W. NGENYE-MACHARIA

JUDGE