



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
CRIMINAL APPEAL NO. 141 OF 2015

(Being an Appeal from Original Conviction and Sentence in Criminal Case No.17 of 2013 of the Chief Magistrate's Court at Naivasha before S. Mwinzi- SRM)

JOSHUA KARIANJAH WAIGANJO.....APPELLANT

-VERSUS-

R REPUBLIC.....PROSECUTOR

J U D G M E N T

1. The Appellant herein was tried before the Chief Magistrate's Court at Naivasha (**Mwinzi, Ag. SRM** as he then was). There were several amendments to the original charge sheet, the last one being on 28th February, 2014. The amended Charge Sheet presented by the prosecution on that date contains ten counts.
2. In counts 1 and 2 the Appellant was charged with Robbery with violence contrary to Section 296 (2) as read with Section 295 of the Penal Code. In counts 3 and 4 he faced the charge of Putting on the Uniform and designation of a police officer without written authority from the Inspector General, contrary to Section 101 (1) (a) of the National Police Service Act. These offences according to the particulars occurred in the months of June and September 2012, respectively, at Naivasha.
3. In counts 5, 6, and 7 the Appellant was charged with Personating a public officer contrary to Section 105(b) of the Penal Code. The particulars therein indicate that the offences were committed at Gilgil in January 2012, Kikopey Police Station in September 2012 and at Njoro Township in December, 2012 respectively.
4. Counts 8, 9 and 10 were in respect of Being in possession of Government Stores contrary to Section 324 (3) as read with Section 36 of the Penal Code. The offences in counts 8 and 9 were stated to have been committed at Njoro Township in December 2012 and January 2013 respectively, while the tenth count indicates that the offence was committed at Gilgil Township in January 2013. The full particulars of the counts were set out in the amended charge sheet.
5. It is useful in this case to set out the events of the trial in some detail. The record of lower court shows that by the date of the last substitution (28/2/2014), the case was already partly heard, having commenced before **Boke PM** on 9/7/2013. **Mwinzi, Ag. SRM** (as he then was) having earlier taken over the matter from **Boke PM** on 20/1/2014 complied with Section 200 (3) of the Criminal Procedure Code, whereupon the Appellant elected to proceed with the case without recalling **PW1**, the sole witness who had testified by the said date.
6. By the date of the substitution made on 28/2/2014, before **Mwinzi, Ag. SRM** three witnesses had

testified therefore. Several more testified but before the close of prosecution case, the trial magistrate acquitted the Appellant under Section 202 of the Criminal Procedure Code in respect of count 2. The court also subsequently acquitted the Appellant on count 1 under Section 210 of the Criminal Procedure Code, and placed the Appellant on his defence on the remaining counts.

7. At the end of the trial, the court rendered its judgment. Once more, the court acquitted the Appellant on Counts 4, 5 and 7, under Section 215 of the Criminal Procedure Code. However, the Appellant was found guilty and convicted on counts 3, 6, 8, 9 and 10. He was sentenced to six months imprisonment on each of counts 8, 9 and 10; one year imprisonment on count 6, and 5 years imprisonment on count 3. The court directed that the sentences would run concurrently.

8. Aggrieved by the convictions and sentence, the Appellant preferred an appeal to this court. The original Petition of appeal was filed through Aming'a Opiyo and Masese & Co. Advocates on 16/10/2015. The hearing of the appeal however proceeded on the basis of the amended grounds of appeal subsequently filed in person by the Appellant and admitted by the court at the hearing.

9. The amended grounds of appeal are as follows:

“1. THAT the learned magistrate erred both in law and fact when he convicted me in the present case yet failed to observe that there was no evidence to support a safe conviction, and shifting the burden of proof to me.

2. THAT the learned trial magistrate erred both in law and fact when he convicted me into present case by relying on contradictory and inconsistent testimonies by the prosecution witnesses.

3. THAT the learned magistrate erred in both law and fact when he misdirected himself to reject my defence exhibit marked and produced in court during the trial.

4. THAT the learned trial magistrate erred both in law and fact when he acted on defective charge-sheet to convict.

5. THAT the learned trial magistrate erred in law and fact when he failed to consider my cogent and plausible defence.

6. THAT the learned trial magistrate erred in law and fact when he admitted uncertified photos.”

10. During the hearing of the appeal on 8/3/2017, the Appellant's counsel Mr. Kamau argued the amended grounds of appeal and also relied on submissions filed by the Appellant with the new grounds. The gist of the Appellant's arguments hinged on grounds 1, 2 and 4 was that the trial court acted on and recorded a conviction on count 3 which had been withdrawn alongside count 4, after rejection by the trial court under Section 89 (5) of the Criminal Procedure Code, pursuant to a ruling given on 29/1/2013, to the effect that the charges were defective.

11. Further, that at the substitution done on 28/2/2014 the Appellant did not plead to the 3rd count. According to the counsel for the Appellant, by the substitution date, **PW1**, whose evidence was partly the basis for the conviction in count number 3, had already testified. In his view, this was prejudicial to the Appellant.

12. Concerning ground 3, the focus of complaint is the alleged letter of appointment in favour of the Appellant dated 29th May 2003 and allegedly authored by the Provincial Police Officer (P.P.O.) Rift Valley. By this letter the said PPO allegedly appointed the Appellant to the post a Kenya Police Reservist at the level of Assistant Commissioner of Police. The Appellant's complaint by his initial submissions before this court seemed to be that the trial court “rejected” the letter.

13. Other statements made subsequently on this appeal are to the effect that the said letter was “produced” by the Appellant in his defence but that the court merely marked it as **DMFI 1** and not as an exhibit. Thus according to Mr. Kamau, there is “*an error on the face of the record*”. He pointed out that the trial court in its judgment severally alluded to the Appellant’s failure to produce the said letter in his defence. In his opinion, the trial court failed to consider an exhibit before it, and evidence by **DW2**, instead proceeding to shift the burden upon the Appellant to prove his innocence.

14. Reinforcing the Appellant’s written submissions which dwell in detail on the evidence adduced by the prosecution, Mr. Kamau submitted that the prosecution evidence did not support the charges laid against the Appellant. He drew the court’s attention to the Court of Appeal decision in **Paul Mwangi Kariuki - Vs- Republic [2013] KLR**, in that regard. In urging the court to find that the conviction and sentence based on a defective charge sheet cannot stand, he called to his aid the decision of the Court of Appeal in **Jason Akumu Yongo -Vs- Republic [1983] eKLR**. He concluded that the court ought to quash the convictions and to set aside the respective sentences imposed by the trial court.

15. The appeal was opposed by the DPP through Mr. Mutinda. He challenged the Appellant’s assertion that during the trial, the Appellant produced in his defence the stated appointment letter, stating that no such record in the proceedings of the trial was identified by his counsel. Nor did the Appellant demonstrate the alleged error on the face of the record. Further he argued that the defence made vague submissions as to the particular defective charge. And besides, he argued, apart from highlighting the conviction in respect of the 3rd count, the Appellant’s submissions were silent on other counts.

16. Mr. Mutinda supported the findings and convictions recorded in the lower court’s judgment. He argued that it was the duty of the Appellant to ensure the marking of any exhibits produced at the trial, and discounted the claim that the trial court failed to consider the defence offered, instead shifting the burden of proof upon the Appellant. He finally argued that the appeal lacked merit and should be dismissed.

17. In his brief reply, Mr. Kamau stated that the gravamen of the appeal is that the defence exhibit in the form of the letter of appointment, and the Appellant’s key defence, was not admitted at the trial. He asserted that the appeal touched on all the counts for which convictions were recorded.

18. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -Vs- Republic [1957] EA 336** is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

19. With regard to counts 3, 6, 8, 9 and 10 in respect of which the Appellant was convicted, the prosecution case at the trial was as follows. In the period between January 2012 and January 2013 the Appellant presented himself to several persons as a police officer occupying the rank of Assistant Commissioner of Police (ACP). In particular, he introduced himself to Sergeant **Kariuki (PW1)** of the Anti-Stock Theft Unit Gilgil as the CID boss based at Naivasha, and that thereafter the said witness, under instructions of his commandant, escorted the Appellant to a church ceremony at Njoro on 27/5/2012. The Appellant on that date donned full police uniform and the insignia of an ACP and was photographed with several persons including **PW1**.

20. According to **PC Korir (PW2)** and **Sergeant Wambua (PW5)** the Appellant while dressed in full police uniform and an ACP badge, visited their station at Kikopey Police Patrol base on 28/9/2012. Introducing himself as an ACP based at the Anti-Stock Theft Unit, he reprimanded **PW2** and instructed **PW5** to take disciplinary action on the former for being on duty at the base whilst not dressed in full police uniform as required.

21. The Appellant was eventually arrested on 31/12/2012 by a team of police officers who included **PC Mwangi (PW3)** and **CIP Koyier (PW4)**. The officers conducted searches at the Appellant's residence at Eldama Ravine and Gilgil as well as the Appellant's father's residence at Njoro between 30/12/2012 and 1st January, 2013. They recovered police uniform and related accessories and police gadgets as particularized in the particulars in counts 8, 9, and 10. It is the prosecution case that, while the Appellant maintained that he was indeed a police officer, he was unable to furnish police with his police appointment/identification card. In addition, the nominal rolls in respect of Kenya Police Reservists in Nakuru did not include the Appellant's name.

22. When he was placed on his defence, the Appellant elected to give a sworn statement and called one witness **John Kana Mbijiwe (DW2)** who described himself as a Deputy Commissioner of police based in the Rift Valley Province as the PPO until 2014. The Appellant's defence was that he was appointed in May, 2003, as a Kenya Police Reservist of the rank of ACP by one **Peter Kimathi**, then PPO Rift Valley. His duties were to supervise all Kenya Police Reservists in the North Rift, in particular Kitale, Kapenguria and Nakuru. The said appointment letter was tendered in court.

23. He said that his personal file containing documents, including his application to be appointed to the Kenya Police Reserve, was recovered by police from his home. Regarding the police uniform and related regalia found in his possession, he asserted that these were regularly issued to him by the police quarter master. He admitted visiting Kikopey Police Patrol base in the course of his duties as a senior police reservist and being familiar with "*the sergeant from Kikopey Police Station*".

24. Commenting on documentation produced by **PW4** concerning the Kenya Police Reservist nominal rolls in Nakuru and disbandment of the KPR, the Appellant stated that only Kenya Police Reservists in urban areas were disbanded and that he had never been discharged, and that besides, he worked under the PPO, thus his name would not feature in a roll prepared in the OCPD's office.

25. **DW2** stated that he met the Appellant as a Kenya Police Reservist, upon taking over as PPO Rift Valley Province in July 2012, from his predecessor Deputy Commissioner of Police one **Munyambu**. The latter allegedly introduced the Appellant as a friend of the then Commissioner of Police. He stated that the Commissioner of Police ordinarily delegated his power to appoint Kenya Police Reservist to PPOs. That **DW2** confirmed the Appellant's position when the Appellant rang then Police Commissioner **Iteere** in his hearing. **DW2** claimed that the Appellant and **Mr. Iteere** were carrying on some business involving police stores and talked often. He said the Appellant was a police reservist always in uniform, and openly carried out police duties and was only arrested after **Mr. Iteere** retired from his position as the Commissioner of Police.

26. Upon my own analysis of the cases presented at the trial by the prosecution and defence, there was no dispute that the Appellant presented himself in the material period, and upon arrest, as a Kenya Police Reservist of the rank of ACP. Further it was not in dispute that he was in possession of police uniform, regalia and other accessories at the time of his arrest.

27. As I understood his complaints on this appeal, it is firstly, that the prosecution did not prove the charges upon which he was convicted; that secondly, his documentary exhibit, namely his appointment letter was not treated as an exhibit by the court even though he tendered the same at the trial; thirdly that the court erred by shifting the burden of proof on the Appellant and; finally, that one of the charges for which he was convicted had been earlier withdrawn for being defective and could not be the basis of a conviction.

28. I propose first to deal with the second and fourth (final) complaints raised by the Appellant on this

appeal. A perusal of the record of the early proceedings in the lower court reveals that lengthy submissions had been made in objection to the amended charges brought against the Appellant on 9/1/2013, in substitution of the original charge sheet of four counts (dated 2/1/2013) that initiated the prosecution.

29. Through his three counsels then, Dr. Khaminwa, Messrs Ombeta and Katwa Kigen, the Appellant argued *inter alia* that counts 3, 4, 5 and 7 as they stood defective as laid. On counts 3 and 4 the argument was that by June 2012, the office of the Inspector General was not occupied as no Inspector General had been appointed, hence the reference in the charges to such office was erroneous. On counts 5 and 7 it was stated that the complainants stated therein were wives of the Appellant and therefore could not be competent witnesses against the Appellant.

30. In her considered ruling on the matter, delivered on 29/1/2013, the initial trial magistrate stated *inter alia* that:-

“As for Count 3 and Count 4, they are to the effect that uniform was worn without a written authority from the Inspector General and are alleged to have been committed in the month of June 2012 and September 2012. Prosecutor argued that the National Police Service Act 2011 under which the charges were brought with summons in force by June and September 2012, the time the offences are said to have been committed. I may not be sure about that, however, it is a well known fact that our first ever Inspector General was appointed sometimes in late 2012 after even that September 2012. There is therefore no way he would have been expected to authorize something when his office was not in existence. I then agree with defence that those are defective charges to an extent the they mention Inspector General who was not existing by that time.

About the dates, that the charges state that they were committed on unknown dates, that is not important at this stage as Section 214 of the criminal procedure code says that inconsistency of time is not material.

Count 5 and Count 7 are said by defence that they are about accused person’s wives. That the complainants stated in those two (2) charges are accused person’s two wives. From the look of those two (2) charges, we are not able to tell that the complaints are accused’s wives, therefore the charges do not look defective and they will remain, unless prosecution wants to amend or decides to withdraw them.....

Consequently, prosecution is directed to amend Count 8 and Count 9. And for reasons already given Count 1, Count 3 and Count 4 are rejected under Section 89 (5) and accused discharged under same section for those counts but discharge contrary to section 89 (5) is not an acquittal, parties to note so.” (sic)

31. Pursuant to the ruling, the prosecution brought a further amended charge sheet on 29/2/2013. The prosecutor while laying the said charge sheet before the court stated:

“Before we fix a hearing date I have an amended charge sheet to present before court on Count 1, Count 3, Count 4, Count 6, Count 7, Count 9 and Count 10 in which we have given specific dates”

The Appellant sought time to consult his advocates who were absent but despite a brief adjournment they did not attend and the court admitted the charge sheet.

32. The charges were then read out and explained to the Appellant, but with regard to Count Number 3 and 4 the court reiterated its earlier rejection under Section 89 (5) of the Criminal Procedure Code because no amendment had been made thereto. Thus the Appellant pleaded to counts 1, 2, 5 to 10. This order of rejection is what the Appellant’s counsel has emphasized on this appeal.

33. The record of the lower court shows that on 9/7/2013 when the hearing was scheduled to start, after a long hiatus, the trial court rejected the prosecution attempt to bring a further amended charge sheet, in light of the timing and directed that the hearing proceeds, whereupon **PW1** testified.

34. The trial magistrate was subsequently transferred and the matter taken over by **Mwinzi (Ag.SRM)**. During the mention before him on 20/1/2014, the record reflects the following:-

COURT

Hearing on 3/2/2014.

S. Mwinzi

Ag. SRM

20/1/2014

ACCUSED

I have an application to make about harassment by police

S. Mwinzi

Ag. SRM

COURT

I wish to first of all take directions. Direction taken as per Section 200 CPC.

S. Mwinzi

Ag. SRM

ACCUSED

I have discussed with my advocate. The case can proceed from where it had reached.

S. Mwinzi

Ag. SRM

COURT

Matter to proceed as a part-heard. Proceedings to be typed before the next hearing date.

S. Mwinzi

Ag. SRM

20/1/2014”

35. The Appellant was not represented during that session but was represented by Mr. Kamau on the next scheduled hearing on 3/2/2014. There was no further reference to the proceedings of 20/1/2014, or indeed the evidence of **PW1**. Two witnesses, **PW2** and **PW3** having been heard on the 3/2/2014, the case was adjourned to 28/2/2014.

36. On that date, in the presence of Mr. Kamau the prosecutor addressed the court as follows:

“I wish to present an amended charge sheet in Count IX, X, XI. (sic) The particulars to remain the same.....”

Mr. Kamau did not object even though the amended charge sheet subsequently presented contained ten and not eleven counts, as earlier outlined in this judgment, and included counts 3 and 4, previously rejected by the preceding trial magistrate on 29/1/2013.

37. In the said charge sheet counts 9 and 10 were amended to disclose the proper Section of the Penal Code creating the offences therein as earlier directed by **Boke PM**. Additionally, counts 3 and 4 had also been amended accordingly.

38. However the original and typed record of the plea taking reads as follows:-

COURT

Charge sheet admitted. Charges read over and explained to Accused in English who states:-

Count I - Not true

Count II - Not true

Count IV - Not true

Count V - Not true

Count VI - Not true

Count VIII - Not true

Count IX - Not true

Count X - Not true

COURT

Plea of not guilty entered on all counts

S. MWINZI

Ag. SRM

PROSECUTOR

Two witnesses were bonded but are engaged in other court appearances.

S. MWINZI

Ag. SRM

MR. KAMAU

We need an indication as to the number of witnesses remaining and when they can come COURT

Adjournment to prosecution. Hearing on 20/3/2014.”

39. The hearing resumed and eventually, the prosecution was forced to close its case on 15/12/2014 whereupon the court acquitted the Appellant on Count 2 under Section 202 of the Criminal Procedure Code as the complainant therein was absent. In his oral submissions on 22/1/2015 Mr. Kamau in arguing a no-case-to answer submitted in respect of the remaining counts, including counts 3 and 4. Thus, his submissions before this court that these latter two counts remained rejected since 29/1/2013 is misleading and not supported by the record of proceedings.

40. As the trial magistrate intimated in her ruling of 29/1/2013, rejection of charges under Section 89 (5) of the Criminal Procedure Code resulted in a discharge and not acquittal. The defence did not object when the amended charge sheet re-introducing the 3rd and 4th count was presented before the succeeding trial magistrate on 28/2/2014. The Appellant's present argument that he was convicted on withdrawn charges (counts 3 and 4) is both erroneous and misplaced. However, upon a careful perusal of the record, this court is disturbed that while ten counts were preferred against the Appellant on 28/2/2014, the record of plea taking shows that he did not plead to counts 3 and 7.

41. Article 50 (2) b of the Constitution provides that **“the right to a fair trial includes the right of the Accused to be informed of the charge, with sufficient detail to answer to it”**. Under Section 134 of the Criminal Procedure Code, it is clear that the formal charge sheet laid before the court is intended to give the person charged adequate notice of the offences against him, and **“such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”** The information in the charge must be brought to the attention of the person Accused at plea time, hence the procedure set out in Section 207 of the Criminal Procedure Code.

42. Section 207 of the Criminal Procedure Code prescribes the procedure for plea taking as follows:-

“(1)The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.

(5)”

Subsection 3 above is reiterated in Section 208 (1) of the Criminal Procedure Code. Section 207 (1) of the Criminal Procedure Code is repeated in Section 214 (1) of the Criminal Procedure Code in respect of amended charges. (See also **Adan -Vs- Republic [1973] EA 445**).

43. In the case of **David Mutune Nzongo -Vs- Republic [2014] eKLR** the Court of Appeal considered whether it was mandatory when a partly heard case restarts *denovo*, for the court to ask the Accused to plead afresh to the charges. The court stated that it was not necessary, citing the case of **Peter Gachigwa Migwi -Vs- Republic [2013] eKLR**. What I find relevant to the instant case from the decision in **Nzongo** is that the Court of Appeal also considered the purpose of the process of plea taking as provided under Section 207 of the Criminal Procedure Code by stating that:-

“The purpose of the process of taking plea was elaborated in J.A.O. -Vs- Republic [2011] Eklr by this court as follows:-

The requirement under Section 207 of the Criminal Procedure Code for calling upon the accused person to plead serves the purpose of determining whether he admits the offence charged, in which case there would be a summary determination of the case, or denies the truth of it in which case a formal trial would be held. If there was no express denial but a refusal to plead, the trial would still proceed as if a plea of not guilty was entered.”

44. The foregoing is equally true with regard to the provisions of Section 214 of the Criminal Procedure Code which provides for the amendment of charges. In the present case, there were several charge sheets presented in court. On the first arraignment of the Appellant on 2/1/2013, the Appellant faced four counts namely, Robbery with violence contrary to Section 296 (2) of the Penal Code, two counts of Personating a public officer contrary to Section 105 (b) of the Penal Code, and Being in possession of Public Stores contrary to Section 324 (2) of the Penal Code. A first substitution was done by the prosecution on 9/1/2013 thereby introducing a charge sheet containing ten counts, including the previous counts.

45. The trial court in its ruling made pursuant to objections thereto rejected counts 3 and 4, while directing the prosecution to amend counts 8 and 9. On all these occasions the court properly called upon the Appellant to plead to the new charges as required under Section 214 of the Criminal Procedure Code.

46. Two errors however occurred on 28/2/2014 when the final amended charge sheet was presented. The most obvious is the failure by the court to call upon the Appellant to plead to all the charges in the amended charge sheet. The second error was that the court does not seem to have informed the Appellant that he was entitled to recall any of the three witnesses (not one as Mr. Kamau now asserts) who had already testified. Mr. Kamau who attended the session in the lower court did not request to recall any witnesses yet he now asserts that the Appellant was prejudiced by the omission. Obviously Mr. Kamau did not rise up to the occasion. But in light of several previous amendments, it was the duty of the trial court to ensure and record its compliance with Section 214 of the Criminal Procedure Code.

47. The Section states:-

“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that-

i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2)

(3)”

48. The fact that Mr. Kamau, himself the advocate who represented the Appellant at the trial, appeared during the hearing of this appeal to believe that some counts had remained withdrawn, underscores the duty of the court in the circumstances of this case to the Appellant to comply expressly with Section 214 of the Criminal Procedure Code. I am aware of the decision of the Court of Appeal in **Josphat Karanja**

Muna -Vs- Republic [2009] eKLR where the Appellant complained that he had not been given a chance to recall witnesses who had testified.

49. The court stated:-

“On non compliance with section 214 of the Criminal Procedure Code, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on 29th September 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of section 214 of the Criminal Procedure Code resulted into injustice to the appellant.”

50. Further, in **David Irungu Murage & Anthony Kariuki Karuri –Vs- Republic Criminal Appeal No. 184 of 2004** the Court of Appeal had this to say concerning the failure by the trial court to call upon the Appellant to plead to the amended Charges:

“The issue then that arises in these circumstances is whether the appellants had a satisfactory trial. We have carefully scrutinized the records of the two courts below and we are satisfied that the irregularities and the omission arising from the lack of opportunity to plead did not occasion a failure of justice and that whatever irregularities were committed were curable under section 382 of the Criminal Procedure Code.”

51. The Court of Appeal in **Nzongo** in reiterating its decision in **David Irungu Murage** state that:

“The court has used the test of whether any prejudice was occasioned by the failure to take plea in the case of David Irungu Murage & Another –Vs- Republic Criminal Appeal No. 184 of 2004 where it held that an accused person was not prejudiced when the trial proceeded on the assumption that he had pleaded not guilty.”

52. In the instant case, the trial court proceeded as if the Appellant had entered a plea of not guilty to all the charges on the charge sheet presented on 28/2/2014, including those not read out to him. And on the assumption that he did not desire to recall witnesses who had already given evidence. In my considered view, the fact that the substituted charge sheet of 28/2/2014 was the fourth since the arraignment of the Appellant, and included some counts which had previously been the subject of the objections by his former defence counsels, leading to their rejection by the court, is significant.

53. Moreover some key witnesses in the case had already given evidence by 28/2/2014. It is my considered opinion that in the circumstances of this case, the Appellant was prejudiced by these errors. In light of the peculiar circumstances of this case, it is difficult to say that the court observed the letter and spirit of Sections 207, 208 and 214 of the Criminal Procedure Code.

54. Regarding the question of the exhibit letter allegedly tendered by the Appellant during the defence case, I have also perused the typed and handwritten record of Appellant’s testimony on 20/7/2015. The typed copy reads in part:-

“Am Joshua Karianjahi Waiganjo now in Naivasha G. K. Prison. I wish to state that am a police officer in the Police Reservist category. I have a letter of appointment written by MR.

Peter Kimathi, PPO Rift Valley in 2003. It is reference No. SEC.POL.2/1/23/VOL 8/123 from police headquarters in Nakuru in May 2003 to Joshua Karianjahi Waiganjo ACP. It is through the OCPD. The letter appoints me as ACP Police Reservist to oversee activities of all police reservists in North Rift Valley especially Kapenguria in West Pokot, Kitale and Nakuru. The appointment was subject to review and was signed by Peter Kimathi was copied to the Commissioner of Police. I have the letter (DMFI 1)” (sic)

55. In attempting to confirm the correctness of the assertions by the Appellant on this appeal that the letter was indeed produced as an exhibit, I turned to the corresponding handwritten record of the day. The relevant portion tallies with the typed record set out above except for the last part in brackets. The only distinctly legible part of the bracketed abbreviation are the first letter (D) and last number 1 (D xxx1)

56. It seems possible that the middle letters (represented by the sign x) could be **MFI** or **Exh**. These are abbreviations used in proceedings for “marked for identification” (i.e. not produced) or “Exhibit” (i.e. produced as exhibit), respectively. The scrambled abbreviations in this case are superimposed one on another and although duly countersigned, apparently by the trial court, it is impossible to tell which abbreviation was retained as the correct one. The letter which is the subject matter of the markings had, from the record been shown to several prosecution witnesses during cross-examination such as **PW4** and **PW5**, but had not been marked at the time for identification, as is usually the practice.

57. Before me now, on this appeal, are the competing claims as to whether or not the letter was produced as an exhibit. In his judgment, the trial magistrate repeatedly stated that the letter was not produced as a defence exhibit. The recorded list of exhibits does not include the said letter, either as a document marked for identification or as a produced exhibit.

58. The trial court’s assertion that the letter in question was not produced may similarly be supported by the fact that the said letter is not among the trial exhibits attached to the original or typed record. However the failure by the court personnel to include the letter in the exhibit list even as a document marked for identification is confounding. Ordinarily, a trial court handles many cases and cannot be expected to recall off head whether a certain document was tendered as an exhibit or only marked as a document intended to be produced. Therefore the simultaneous preparation of a list of exhibits or documents marked for identification during the trial serves as an important record of the court.

Indeed it is a requirement in a trial. It is the duty of the trial magistrate to ensure that the list of exhibits and witnesses is accurately prepared during the trial.

59. Equally confounding in this case is the fact that a second letter which was also produced by the appellant on the same date is also missing from the original court file and typed record of appeal. The said letter was described by the Appellant in his defence statement to be a response dated 6/6/2013 **Ref.AG/CPD/CBI/25/13** to an inquiry he had made to the Attorney General in respect of a Commission of Inquiry allegedly formed by the President in 2012.

60. In light of these omissions in the record, it is difficult to tell whether, as the Appellant now asserts, the disputed appointment letter was exhibited before the trial court at the time of hearing. Equally, from the original and typed record it is impossible to confirm the observations of the trial magistrate in his judgment regarding the matter. Particularly, as I note that this may not have been the first contentious alteration of material parts of the record. In the ruling delivered on 29/1/2013, the initial trial magistrate decried the fact that someone had mischievously altered particulars objected to by the defence in count number 1 between the date of the hearing of objections and her ruling.

61. She stated:

“To my surprise when the defence counsels were making this application the registration number was indicated in the particulars as KBL 2012A and I was sure that it was indicated so because I read the charges to accused and I was also referring to the charge as the counsels were submitting but someone tried to change the number after we were through with the

application because now what I have someone overwrote on the last number '2' with a blue pen trying to cancel it so that to remain with three numbers as "201" without the last number '2'. This was very wrong.

As much as I can imagine who did the cancellation, I do not want to name names but that person destroyed the charge completely because he has decided to amend after the same has been challenged without waiting for court's ruling. Secondly, he has decided to amend without making application to amend and he has not even counter signed. He has defaced and tampered with count one and for that reason it cannot remain the way it is. It is rejected under Section 89 (5) of the Criminal Procedure Code." (sic)

62. Returning to the disputed appointment letter the same evidently formed a key plank in the Appellant's defence and the fact that this court cannot tell from the record what really happened at the trial is appalling. The nature of the irregularities in this case cannot in my view be cured by Section 382 of the Criminal Procedure Code, in the circumstances. In my considered view, the Appellant was prejudiced by the irregularities.

63. The failure of justice that occurred in this case was primarily caused by errors committed by the trial court. Thus, without even considering the weight of the evidence on record vis-à-vis the convictions, I am satisfied that the foregoing finding disposes of the entire appeal. I will therefore allow the Appellant's appeal on the basis that there occurred a failure of justice. The convictions recorded in the trial are quashed and the sentences and set aside.

64. As a consequence, the question falling next to be determined is what orders ought to be made. It is apparent that most of the procedural errors and omissions in this case were occasioned by the trial court, even though it can equally be said that the prosecution and defence counsel should also have displayed more diligence in the trial.

65. In my considered view, the trial in this case was vitiated by the defects I have earlier outlined. The charges facing the Appellant in in Count 3 are serious, as evidenced by the penalty provided. Counts 6, 8 – 10 are in respect of misdemeanors. The circumstances in which the offences were allegedly committed and the fact that they involve a national security organ is a matter of public interest. Indeed, prior to and during the trial, the general public's attention was riveted on the saga surrounding this and other similar cases which, to some, is reminiscent of **Nikolai Gogol's** famous satire "**The Government Inspector**" (now renamed "**The Inspector General**").

66. In the case of **Fatehali Manji –Vs- Republic [1966] EA 343** Court of Appeal for Eastern Africa outlined the circumstances in which a retrial may be ordered, by observing that:-

"In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecutor is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused." (See also **Muiruri –Vs- Republic [2003] KLR 552** and **Mwangi –Vs- Republic [1983] KLR 522**).

67. The successor of the above court, the Court of Appeal reiterated the principles in **Fatehali Manji** and stated in **Pius Olima & another –Vs- Republic [1993] eKLR** that:-

"Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- Ahmed Sumar –Vs- Republic [1964] EA 481; Manji –Vs-Republic [1966] EA 343; Mujimba –Vs- Uganda, [1969] and Merali & Others –Vs- Republic, [1971] 221. The principles that emerge are that a retrial

may be ordered where the original trial as was found by the High Court.....is defective, if the interests of justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.”

68. Applying the foregoing principles to this case, this court is satisfied that it is in the interest of justice for a retrial to be conducted. It is unlikely that the Appellant will suffer injustice thereby. There is no evidence that witnesses who testified at the trial, most of them being police officers, will not be available to testify again. Besides, it is my considered view that on a proper evaluation of the admissible or potentially admissible evidence a conviction might result.

69. In the circumstances, I am satisfied that this is a suitable case for retrial. I will direct that such retrial be held with dispatch, before the Chief Magistrate’s Court in Naivasha. For the avoidance of doubt, the retrial is ordered only in respect of counts 3, 6, 8, 9, 10 as presented in the amended charge sheet substituted on 28/2/2014. For the purpose of taking a fresh plea, the Appellant will be produced before the Chief Magistrate’s Court, Naivasha on 13th June 2017.

Delivered and signed at Naivasha, this 7th day of June, 2017.

In the presence of:-

Mr. Koima for the DPP

Mr. Kamau for the Appellant

C/C - Barasa

Appellant - present

C. MEOLI

JUDGE