REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: TUNOI, SHAH & LAKHA, JJ.A.)
CRIMINAL APPEAL NO. 38 OF 1993
BETWEEN

TITUS MULWA MUIA ....APPELLANT

AND

REPUBLIC ....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Justice Mbaluto & Justice Oguk) dated 18th December, 1992
in
H.C.CR.A. NOS. 783, 784 & 785 OF 1991)
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JUDGMENT OF THE COURT

The appellant with two others was convicted by the Senior Resident Magistrate's Court at Nairobi of robbery with violence contrary to ***section 296(2)*** of the Penal Code and each was sentenced to the mandatory death sentence. They all appealed to the superior court against their convictions. The appeals of two of them were allowed and their convictions were quashed and sentence set aside as there was no sufficient evidence to support the convictions. But the appeal of the appellant against conviction and sentence was dismissed. He now appeals to this Court against his conviction. Being a second appeal it lies only on a matter of law, not including severity of sentence.

The material facts in this case are shortly as follows. On August 14, 1989, the house of Norman Whelan in Hardy Estate, Nairobi, was raided between 9.30 a.m and 3.00 p.m. and several items of property stolen. In the course of the robbery his servant Charles Mukanzi Bukha was strangled to death. When the appellant with two others appeared before the Chief Magistrate on August 23, 1989 they were charged with murder. As the committal documents were not ready, they were not required to plead. After several mentions, on February 20, 1990, the prosecution applied to substitute a charge of robbery with violence contrary to ***section 296(2)*** of the Penal Code instead of murder. This charge was read and explained to the appellant and his two co-accused and each of them pleaded not guilty.

At the hearing before the Senior Resident Magistrate's Court the prosecution called twelve witnesses to prove the charge. The appellant and one of his co-accused each made an unsworn statement whereas the other co-accused elected to say nothing. That court convicted all the three accused persons as charged. But upon the hearing of the first appeal before the superior court, the convictions of the two of the accused persons were, as stated earlier, quashed.

In this Court, Mr. A.R. Kapila on behalf of the appellant, submitted that the decision of the learned Senior Resident Magistrate to substitute the robbery charge for the murder charge was wrong in law

amounting to an abuse of the process of the court and that the appellant was thereby prejudiced. Mr. Bwomwonga, the Assistant DPP, on behalf of the Republic, countered these submissions.

We have given most anxious consideration to the rival and respective submissions made before us. In the first place, we are unable to agree with the submission that there is no power to substitute a charge during committal proceedings under Part VIII of the Criminal Procedure Code, Cap 75. A cursory perusal of ***section 232(3)*** of the Code which falls under Part VIII thereof expressly empowers the court to make an amendment of the charge. Secondly, the committal proceedings had not commenced when the substitution of the charge was made because there is nothing on the record to show that, on that date, the committal documents were ready or that the learned Senior Resident Magistrate had read them as stipulated in ***section 232*** of the Code.

> Upon a comparison of the particulars of the charge of murder and robbery with violence, it is clear to us that the facts gave rise to two offences and the principal motive as disclosed by the evidence was stealing. In these circumstances, it was open to the Attorney-General as the prosecuting authority to elect the offence with which to charge the accused persons provided he did not offend the fundamental rights conferred by **section 77(1)** as protected by **section 84(1)** of the Constitution. The Court undoubtedly has the power to prevent anything which savours of abuse of process. In the case of **STANLEY MUNGA GITHUNGURI VS. REPUBLIC, CRIMINAL APPLICATION NO. 271 OF 1985, the High Court expressed itself thus:-**"Mr. Chunga argued that to grant the application would be tantamount to curtailing or interfering with the powers of the Attorney-General under section 26 of the Constitution. This argument of his compels us to say that he kept free wheeling for a long time before us because perhaps he did not understand the real purport of the application. No one has made any challenge to the powers of the Attorney-General, nor would any one succeed if he were to say that the Attorney-General's powers under ***section 26 c***an be interfered with. What this application is questioning is the mode (emphasis ours) of exercising those powers. No one will succeed in convincing us that the court does not have inherent powers to exercise supervisory jurisdiction over tribunals and individuals acting in administrative or quasi-judicial capacity."

We agree. We are satisfied that the learned Senior Resident Magistrate was entitled, in law, to substitute the charge as he did. We are satisfied that there is no evidence of any mala fides or trick in the substitution of the charge.

If, contrary to our decision, there was any error or defect in the proceeding, we are satisfied that under the curative provision of ***section 382*** of the Criminal Procedure Code there has been no miscarriage of justice.

The test on appeal is whether a failure of justice has been occasioned or not, i.e. whether such an irregularity has caused or not, any prejudice or embarrassment to the accused. We have carefully considered Mr. Kapila's submission in this regard and we cannot say that there could have been any prejudice or embarrassment since, even if the amendment changed the character of the proceedings, the amendment was explained to the accused and it is not that the trial on the amended charge proceeded forthwith but a hearing date of the amended charge was set down four months later which gave the accused ample opportunity for arranging representation even by his family.

What is more, the only question which remains for consideration is whether there was evidence to justify the conviction on the charge. We have already pointed out, no second appeal lies to this Court on matters of fact. We should only be entitled to interfere if, in our opinion, there was no evidence upon which the learned Senior Resident Magistrate could in law convict. All we need to say is there was evidence, particularly of the appellant's fingerprints having been found in the cabinet in the study room of the complainant's house. Furthermore, the appellant led the police two days after the robbery to a place at a fence near where he lived and showed them a radio which was properly identified as one of the items stolen from the house at the time of the robbery. The fingerprints clearly called for an explanation and in the absence of a reasonable explanation, the learned Senior Resident Magistrate was entitled to infer, as

he did, that the appellant who was a stranger to the complainant's household was one of the robbers. The first appellate court in an overall assessment of the matter was of the view that there was ample evidence to prove beyond any reasonable doubt that the charge of robbery with violence contrary to ***section 296(2)*** of the Penal Code was proved and that he was, therefore, properly convicted. On our part, we have reached the same conclusion.

The appeal is dismissed.

Dated and delivered at Nairobi this 26th day of May,

1998.

P.K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR