



IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Kneller, Hancox & Nyarangi JJA)

CRIMINAL APPEAL NO. 91 OF 1984

BETWEEN

REPUBLIC.....APPELLANT

AND

1. WARIARA KIMANI

2. TERESIA WAIRIMU KIMANI

3. ROSEMARY WAMBUI KIMANI

4. WILSON NGUGI IRUNGU

5. JANE GITUTO KARITHE.....RESPONDENTS

(Appeal from the High Court at Nairobi, Sachdeva J)

JUDGMENT

The decision of the High Court in Criminal Appeals 706, 707, 708, 709 and 710 of 1983, declaring the proceedings before the Chief Magistrate of April 25, 1983, a nullity (after which the respondents were discharged by Mr Aswani, Senior Resident Magistrate, as he then was; on August 8, 1983, and subsequently re-charged in Criminal Case 2513 of 1983) was, as we think, based on a misconception.

Section 230 of the Criminal Procedure Code, on which the High Court based the latter part of its judgment, having rejected all the grounds of appeal save that relating to sentence, says:

“A subordinate court shall hold committal proceedings in accordance with this Part where a person appears before that court charged with an offence(b) to which section 220 applies”

It will be noted that sub-paragraph (b) does not say “to which section 220 of the Penal Code applies”, but Mr Otieno, on behalf of the respondents to this appeal, argued that those words should be notionally supplied into sub-paragraph (b), because sub-paragraph (a) clearly imported the Penal Code, inasmuch as it referred to offences triable by the High Court and that can only mean offences under the Penal Code, since there are no offences created by the Criminal Procedure Code. Thus the second subparagraph is, as it were, infected with the same consideration as subparagraph (a). Otherwise Mr Otieno asserts the legislature would have inserted the words “this code” in sub-paragraph (b), as it did, for example, in section 174 of the Criminal Procedure Code.

The Criminal Procedure Code as it was before December 10, 1982, in the First Schedule, specified that no Court, other than the High Court, should try a case under section 220 of the Penal Code, meaning a charge of attempted murder. The amendment introduced by the Criminal Procedure (Amendment) Act, No 13 of 1982 dispense with committal proceedings for, amongst many other charges, the offence of attempted murder. It specifically provides (by section 12 thereof) for trial of such an offence by a First Class subordinate court presided over by a Chief Magistrate or a Senior Resident Magistrate. Therefore that part of the judgment of the High Court was *per incuriam*. Inasmuch as it was made without regard to the December, 1982, amendments.

“Section 220” in sub-paragraph (b) of section 230 of the Criminal Procedure Code means section 220 of the Criminal Procedure Code and not section 220 of the Penal Code, or of any other enactment. Subparagraph (b), as so construed, makes complete sense because there is provision in section 220 of the Criminal Procedure Code, as it now is, for a subordinate court to invoke committal proceedings if it considers the case before it unsuitable for trial by a subordinate Court. It follows that, the proceedings before Mr Rauf, the Chief Magistrate, as he then was, were not a nullity on that ground, whatever might otherwise be the position and we allow the Attorney-General’s appeal on all three grounds. We set aside the High Court order inasmuch as it declares that the proceedings before the Chief Magistrate were a nullity. Accordingly, the 4th ground of appeal to the High Court dated 3rd June, 1983, which was against sentence, is still outstanding and must be decided by that Court. No doubt the High Court will take into account , as well as the seriousness of the offence, the family relationship and the delay that has occurred in finalising this case, plus the fact that the respondents have been at liberty since 29, July 1983 and have reported to the authorities regularly. We make no decision at his stage on the rest of the judgment of the High Court, which deals with grounds 1 to 3 of he Memorandum of Appeal to it.

There is not prejudice to the respondents because when the first appeal against sentence is determined, they may then appeal, if they so wish, to this Court against all that part of the High Court judgment which deals with the appeals against their convictions. The proper order we should make (and we now make) is that this case, together with our judgment, be remitted to the first appellate court with directions to determine only ground 4 of the Memorandum of appeal filed therein on 6th June, 1983.

Dated and Delivered in Nairobi this 11th day of March 1986.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR