IN THE COURT OF APPEAL

AT NAKURU

(CORAM:NYARANGI, GACHUHI & APALOO JJA)

CRIMINAL APPEAL NO 75 OF 1986

WALIMULU…….APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

RULING

September 23, 1987, **Nyarangi, Gachuhi & Apaloo JJA** delivered the following Ruling.

The question has arisen whether the proceedings the subject matter of the present appeal were a nullity.

The background so far as we can discern from the court record is as follows:

On January 7, 1981, the appellant and another were arraigned of the charge of robbery with violence in three counts contrary to section 296(2) of Penal Code.

Each pleaded not guilty to the charge and the hearing was fixed for 6th 7th and 8th April, 1981.

On January 21, 1981 the appellant and the other were arraigned yet again of the same charge and each once more pleaded not guilty. On that same day however, the learned trial magistrate proceeded to put it on record as follows:

“The first accused refused to have his case heard before this court for the reason that I threatened to hang him. When he appeared before me for mention in the Nakuru court, he started making scenes there.

All I did was to request him to realize that this was a very serious offence which carried a death sentence and he would be well advised to have a serious and responsible attitude.

He has been making the same scene in court. He has been notified that the trial against him shall proceed even if he adopted a deliberate attitude to cause disturbance. I am quite satisfied that he is mentally fit and understands what is happening in the court. What he wants is to avoid the trial. At this stage he got up and left the dock and ran to the cell. Efforts were made to persuade him to understand that it will be in his interest to attend the trial but he has refused point blank to come out of the cell into the court and in the circumstances as I am absolutely satisfied the first accused is mentally fit to attend trial and understand the proceedings but he supposedly and thoroughly refuses to come into the court to attend it, I therefore order that the trial shall proceed in his absence.”

The appellant was convicted and sentenced to 7 year’s imprisonment on each count, to run concurrently.

He also was ordered to receive 8 strokes corporal punishment on each count.

His appeal to the High Court on the following grounds was summarily rejected under section 352(2) of the Criminal Procedure Code.

1.That he never pleaded guilty to the offence.

2.He asked the court if his case would be done by another magistrate and the court refused and he also refused because of the following points.

3.That the trying magistrate was unjust because he threatened his life that he will sentence him to death after he heard that he also refused his court not to hear the case.

4.When he was in court cells that complainant was brought by Trial Magistrate and he was shown to him and told that he was the accused.

Is that Justice? Or is that the normal procedure?

5.PW 2 was also brought at court cells and he denied me after he complained to the trial magistrate at the court cell.

6.PW 1 if he pointed him at court cells why was it not done inside the court?

7.That the trial magistrate never took any heed as far as complaints were oncerned to transfer his case to another law court of Kenya.

8.That in realising that trial could be improper, he readily asked the trial magistrate to transfer his case to another magistrate.

9.That he was asking the Honourable High Court to offer for a retrial before a competent magistrate.

10.That the sentence of seventeen (17) years six two strokes is excessive and harsh.

11.That he asked the honourable court to consider his case and possibly give any relief it deems fit.

Sub-section 2 of section 99 of the Criminal Procedure Code provides:-

> "The magistrate trying a case may, at any subsequent stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce his attendance in the manner hereinafter provided, but no such warrant shall be issued unless a complaint or charge has been made upon oath."

We turn to the first question whether the appellant in fact applied to the trial magistrate to be tried by a different magistrate. We are conscious of the need to avoid a judicial position which ties the hands of a trial magistrate beyond the provisions of the Criminal Procedure Code. The phrase used by the trial magistrate that the appellant:

"refused to have his case heard before this court….." would appear to represent the appellant's consequences of this refusal for a trial before some other magistrate otherwise one must see flaw in the reasoning of the magistrate who clearly omitted to put on record what acts constituted 'scene' and also the terms of exchanges between him and the appellant about a Kitale Case. The appellant on appeal is entitled to have all the evidence before the resident magistrate re-examined: *Mosee v Republic* [1980] KLR 112. In our judgment the appellant was not being discourteous in applying to be tried by another magistrate. An accused person shall not choose his court. But it is common for one reason or other for an accused to successfully apply to be tried by a magistrate other than the one who is seized of their cases. The magistrate misdirected himself in not appreciating the appellant's request, in not fairly considering it and

in not making a full note of what took place.

Accordingly the contentious matter is if the magistrate acted properly and justly in excluding the appellant from the entire trial. With profound respect to the trial magistrate we find ourselves compelled to differ from him.

A fundamental principle of our constitution – section 77(1) is that if a person is charged with a criminal offence the case shall be afforded a fair hearing within a reasonable time. The main criterion in deciding if there has been a fair hearing is whether the accused has attended the trial, and put his defence and called witness.

It is clear to us that the proceedings upon which the appellant was convicted and sentenced are a nullity and we so declare.

The appeal to the High Court was summarily rejected under section 352(2) of the Criminal Procedure Code.

The question therefore arises if any of the grounds of appeal came within sub-section 2 of section 352 of the Criminal Procedure Code. It is plain from the grounds of appeal that there are issues of law on which the appellant should have been heard.

Considering all these matters, we allow the appeal, quash the convictions and order that the appellant who has been in jail since December 31, 1980 shall be set at liberty forthwith unless otherwise lawfully held.

September 23, 1987

NYARANGI, GACHUHI & APALOO JJA