IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller JA, Chesoni & Nyarangi Ag JJA)

CRIMINAL APPEAL NO. 60 OF 1983

Between

MAINA WA KINYATTI ....APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from the High Court at Nairobi, Sachdeva & Abdullah JJ)

JUDGMENT

December 23, 1984 **Kneller JA, Chesoni & Nyarangi Ag JJA** delivered the following Judgment.

The appellant, Maina wa Kinyatti, was a Senior Lecturer in the History Department at the Kenyatta University College. On June 2, 1987, a team of police officers carried out a search in his house at the college in the presence of his wife, Mumbi wa Maina. During the search in the studyroom the police found a file (Ex 1) bearing the title "University Staff Union 1980" and they (police) alleged that they also found in the file a seditious document (ex 1 a). There were other files and books too. The file and the document were discovered by Seargent Mburu who was with Chief Inspector Mukanga and Chief Inspector Wanjau, both of whom also saw the file and the alleged document. The police took away with them the file documents together with other files and books of the appellant which they found in the study, but which were not of much significance in this appeal. They were all taken to the Criminal Investigation Department Headquarters.

When the search was conducted, the appellant was not present in his house so the police asked his wife to tell him that he should report to the CID Headquarters which he did on June 3, 1982, the day he was arrested although the charge sheet erroneously shows the date of arrest as June 2. That discrepancy is not complained of nor is it of any consequence to the case. On June 5, Chief Inspector Jerard Abok, who was the investigating officer took an inquiry statement from the appellant (Ex 5) which the appellant himself wrote. The appellant recorded a second statement while under charge and caution. On June 5 he was shown the publication (EX 1A) and was charged with being in possession of a seditious publication, contrary to section 57(2) of the Penal Code. The particulars of the offence did not then specify the seditious publication, but the substituting charge filed on June 27 1982 and denied the charge.

On October 18, 1982, the Chief Magistrate who tried the case found the appellant guilty, convicted him of the offence charged and sentenced him to six years' imprisonment. The appellant's first appeal against conviction and sentence was dismissed by the High Court (Sachdeva & Abdullah JJ). This is a second appeal, which the legislature has said must be only on a matter of law; see section 361(1) of the Criminal

Procedure Code.

The seven grounds of wa Kinyatti's appeal are that the learned trial magistrate erred and misdirected himself in law in rejecting the appellant's objection to the Chief Magistrate trying the case on the ground that he had heard a similar case in which the same witness whom he held to be credible had given evidence, and, that this error prejudiced the appellant and occasioned a miscarriage of justice and the learned judges of the High Court erred in law in not allowing this ground of appeal the two lower courts erred in law in concurrently holding that the appellant was in possession of the allegedly seditious publication in the absence of evidence proving that the appellant had knowledge of the existence of the said document in his files or that he had the full control of it and it was not proved beyond doubts that he was the only person with access to the room where it was found; the two lower courts erred in law in failing to treat as hearsay and reject the allegation by police witnesses that the appellant's wife told them that everything in the study belonged to her husband; it was an error of law for the prosecution to produce several irrelevant books at the trial which prejudiced the appellant; the trial magistrate erred in the law relating to the burden of proof which he shifted to the appellant in commenting that no evidence was led to support the allegation that other persons used the study; the trial magistrate further erred by relying on his own previous decision which could not be treated as an authority and the learned judges of the High Court erred in law by not appreciating that the magistrate's misdirection on the reasons for sentencing had caused him to award a sentence he could not have otherwise passed and the sentence could not stand in law. Mr . Onyango Otieno for the appellant has urged us for these reasons, which he forcefully argued, to allow the appeal, quash the conviction and set aside the sentence or in the alternative reduce the sentence to an appropriate period.

At the commencement of the trial, Mr . Otieno made what must have been surprising, though not unprecedented, application to the Chief Magistrate. He said that he had been instructed to raise the point that because the Court (it appears meaning the Chief Magistrate) had heard similar cases before in which some of the witnesses (whom he did not identify) had been heard and commented upon by the court, the case should be transferred to another court (we understand this to mean so that the Chief Magistrate could not preside at the trial). It is difficult to discern a single valid ground for the application as Mr . Otieno did not elaborate whether the appellant had an apprehension that he would not have a fair and impartial trial by the Chief Magistrate or the trial magistrate would be biased or he would take for granted the credibility of the witness who had testified before him in earlier cases. However, the Chief Magistrate, rejected the application on the ground that to allow it would set a dangerous precedent that could land the administration of courts in chaos and further that he had heard only one similar case and being an experienced judicial officer who had heard the same witnesses give evidence in similar cases he was able to decide the case dispassionately and on its merit, the facts and circumstances of the case in accordance with the law. This ruling formed a ground of appeal to the High Court, which was thoroughly considered and dismissed.

The transfer of a criminal case from one subordinate court to another is governed by section 79 of the Criminal Procedure Code, but the grounds for the transfer are not spelt out the way they are set out in section 81 of the same code. Section 81 specifies the ground upon which the High Court may, either upon an application or on its own motion, transfer a case from one subordinate court to another or to the High Court itself for trial. There is nothing to prevent a magistrate from stepping down from hearing a particular case either on his own motion or upon a proper application. An application under section 81 is by way of Notice of motion.

The reasons for the transfer under section 81 (1) are:

a. that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or
b. that some question of law of unusual difficulty is likely to arise; or
c. that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the same; or
d. that an order under this section will tend to the general convenience of the parties or witness; or
e. that such an order is expedient for the ends of justice or is required by any provision of this Code.

The application before the Chief Magistrate was not under section 81 so we need not say more about it. Section 79 of the Criminal Procedure Code reads as follows:

> "Any magistrate holding a subordinate court of the first class-
>
> > (a) may transfer any case of which he has taken cognizance for committal proceedings or trial to any magistrate holding a subordinate court empowered to hold committal proceedings or try such case within the local limits of such first class subordinate court's jurisdiction."

Both Mr . Onyango Otieno and Mr . Chunga agree that the application could have been made under section 79 and in our view section 79 is wide enough to have covered such an application as the Chief Magistrate holds a subordinate court of the first class. An application under this section may be made orally, and the grounds for it would include those listed in section 81.

It was argued for the appellant that although the matter involved an exercise of the Court's discretion, the discretion was exercised on wrong principles based on two irrelevant grounds namely, of causing chaos in the administrative machinery of the courts and the magistrate having dealt with several cases involving the same witnesses. It was further argued by Mr . Onyango Otieno that the consideration was not the Chief Magistrate's experience but the appellant's apprehension which once it was established the law requires that the case be transferred. We were urged to be persuaded by the Tanzanian case of *Republic v Hashimu* [1961] EA 656. That case was decided on the principles applicable to section 80 of the Tanzanian Criminal Procedure Code (cap 16) which is the equivalent of our section 81 and not on the Tanzanian equivalent of our section 79. It was a case where it was sought to effect a transfer by the High Court and not by a subordinate court. In the former the grounds on which the transfer may be effected are limited to these specified in the section whereas under our section 70 there is no limit to the grounds upon which the application for a transfer may be made and granted or refused. The appellant's application gave a specific reason and that is that the court had heard similar cases before in which the same witnesses as those who were likely to testify in this case had given evidence and been commented on by the court as being truthful.

In *Hashimu ibid* the Tanzania High Court (Saidi J) held that the accused person ie the applicant, must make out a clear case before a transfer of any trial is granted on his application and the apprehension in his mind that he will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred must be reasonable. Two High Court of Kenya Judges adopted what was said in *Hashimu* (Sachdeva J) in *Francis Henry Karanja v Republic* HC Cr application No 107 of 1976 (unreported) and Travelyan J in *John Brown Shileuje v Republic* HC Cr Application No 180 of 1980 (unreported). All these cases have not departed from what Hamilton CJ said *In the matter of an application by MS Patel,* (1913/1914)5 KLR 66, Patel, who was an advocate of the High Court of East Africa practicing at Lamu was summoned before the town magistrate at Lamu for assaulting his servant. Before the hearing he notified the magistrate that he intended to apply to the High Court for a transfer of his case to some other court under section 526 of the Criminal Procedure Code of the time. The magistrate proceeded to hear the case and Patel made his application.

One of the matters, among others, he alleged in the affidavit in support of the application was that the magistrate sent for the applicant in chambers and told him he considered the application an insult to the court and urged him to withdraw it, warning him that the result would be serious if he persisted with it. The applicant urged that he had formed a reasonable apprehension in his mind that the magistrate had formed an opinion adverse to his case. It was held that the true test for making an order for transfer was not whether or not the magistrate was biased but whether a reasonable apprehension existed in the mind of the accused from incidents which had occurred that he may not have a fair and impartial trial. A transfer was ordered. Hamilton CJ quoting the Calcutta High Court decision in *Dupeyron v Driver* ILR XXIII Cal 495 said at p68;

> "I am not here concerned with an issue as to whether the magistrate was in fact likely to be partial or impartial and I am perfectly prepared to believe that the accused would have

> received a fair trial at his hands. But the test to be applied in such cases as this has been settled in various cases in Indian courts and I would refer particularly to the judgment of the Calcutta High Court in *Dupeyron v Driver* ………where the judges say:
>
> "Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the facts of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer."

The Patel case has withstood the test of time and in our view is still the law on the question of the transfer of a criminal case on application by the accused person. It is not the strength of the ground as stated in the *Indian Code of Criminal Procedure* 1908 by Sir HT Prinsep and Sir John Woodroffe that weighs with a court but the reasonableness of the accused person's apprehension. If the accused shows that his apprehension is reasonable then he has set out a clear case. Mr . Chunga accepted the test laid down in *Hashimu*.

The grounds given by the Chief Magistrate in refusing a transfer were far from the established test. It was immaterial whether there would result chaos in the administration of courts; it was further irrelevant whether the Chief Magistrate dealt with many similar cases involving the same witnesses and whether he was sufficiently experienced so as to decide the case dispassionately. The test was whether the apprehension in the mind of the applicant/accused that he may not have a fair and impartial trial before the Chief Magistrate was of a reasonable character regardless of the fact that there may be no unfair or partial or biased trial in the matter. That was the test the trial magistrate ought to have applied.

On this point the High Court had this to say:

> "The mere fact that a magistrate has heard a similar case involving same witnesses does not necessarily disqualify him from hearing another case. Mr . Otieno does not even indicate specifically who the same witnesses were merely making a sweeping assertion that they are common to the two cases. Mr . Chunga clarified that the only common witness was Sergeant Mburu. In any event, any magistrate – and the learned Chief Magistrate is our most experienced magistrate is quite capable of deciding each and every case upon the testimony that is adduced before him. It would lead to all sorts of dangerous and far reaching consequences if magistrates started disqualifying themselves because they had heard similar cases or same witnesses before."

The learned judges then cited the High Court cases of *Francis Henry Karanja v Republic* and *John Brown Shilenje v Republic* from which they quoted in extension, and ended by finding that there was no substance in that ground of appeal.

We would assume that the learned judges in quoting from the two cases we have just referred to had in mind the correct test, namely, whether the appellant had made out a clear case by discharging on the balance of probabilities the burden of showing that the apprehension in his mind was reasonable. However, though the learned judges had the correct test in mind they applied an incorrect test. It was a wrong test because they referred to the fact that the Chief Magistrate was the most experienced magistrate available and capable of acting impartially and fairly which was immaterial. The learned Chief Magistrate and judges should have looked at the incidents before the Chief Magistrate and then asked whether in the light of those incidents the apprehension was reasonable. If it was necessary to name the prospective witnesses involved, the applicant should have been asked to do so. It was essential for the trial court to make a full inquiry into the matter before ruling on it.

The Chief Magistrate himself admitted that he had heard one similar case. In that case, according to Mr . Chunga's submission in the High Court, one police witness, Sergeant Mburu, was common to the present case. He was the one who found the seditious publication, the subject – matter of the prosecution the appellant/applicant faced, so Seargent Mburu was a star prosecution witness, who mattered to the applicant.

We are aware that a trial magistrate or judge unlike an assessor has a discretion, which the Chief Magistrate had, not to participate at a particular trial when the circumstances are such that bias might be suggested. However, that discretion must be exercised judicially and on proper principles:– *Mbogo & Another v Shah* [1968] EA 98. Here the discretion was exercised on wrong principles. The Chief Magistrate should have ordered a transfer of the case.

The learned judges ended their consideration of this ground of appeal by strongly urging advocates not to raise such objections save in very exceptional cases as they tend, in effect, to put a magistrate in an awkward situation. It is difficult to reconcile this with one of the principles firmly embedded in our system of jurisprudence that justice must not only be done but must be seen to be the done.

In an application of this nature, if the transfer is refused by the subordinate court the accused may, as in the case of bail, reapply to the High Court under section 81 of the Criminal Procedure Code. That was not done in this case.

Mr . Onyango Otieno argued that what was feared happened; Sergeant Mburu testified and the Chief Magistrate cited the other seditious case, *Republic v Wang'ondu* Criminal Case No 1096 of 1982, he had tried. This is so, but we can find no complaint against the evidence of Sergeant Mburu and the way the Chief Magistrate dealt with it except the objection to the admissibility of what the three police officers said they heard the appellant's wife say, a matter we shall deal with later in the third ground of appeal. Apart from the fact that the Wang'ondu case still had to pass through the appellate tests, there was nothing wrong in law or fact in quoting from it, but the practice is not one to be encouraged. The appellant has not established that he was in any way prejudiced and a miscarriage of justice was occasioned by the refusal to transfer his case and so the Chief Magistrate's decision had no effect on the outcome of the case.

We shall next deal with the third, fourth, fifth and sixth grounds of appeal and then consider the second ground.

Three police officers namely Sergeant Mburu, Chief Inspectors Mukangu and Wanjau who conducted the search of the appellant's house each testified that Mumbi, appellant's wife, in a conversation with Mukangu told him that'" everything in that room" ie the studyroom belonged to the appellant, (her husband). Mr . Onyango Otieno submitted that the learned Chief Magistrate and judges of the High Court should have treated that evidence as hearsay and rejected it because the words attributed to Mumbi involved an assertion of the truth of some facts stated in them and that they were so understood by the Chief Magistrate , who consequently held that the file Ex 1 and the seditious publication i Ex 1a were found in the study; they belonged to the appellant and were therefore in his possession within his knowledge. Mr . Chunga supported admissibility of the words as direct evidence of what the police officers heard Mumbi say or as part of the *res gestae* (section 6 of the Evidence Act cap 80) or previous statement proving the consistency of a witness (section 165 of the Evidence Act). Local case law on the issue is lacking.

Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence; *Cases and Materials on Evidence* by J. D. Heydon, 1975 p 5. The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact stated: *Archbold Criminal Pleading Evidence & Practice* 40th Edition p 809 para 1282. Mr . Onyango Otieno argued that since the maker of the statement was not a competent prosecution witness, so the prosecution could not narrate her statement as evidence of its truth because she could not be cross-examined so as to enable the court to consider her demeanour when deciding whether or not to believe what she was alleged to have said. This may be an excellent reason for requiring the maker of the statement to be called when that is reasonably possible but it may be a poor reason for rejecting the statement when it is impossible, impracticable or even highly inconvenient to call the maker. In this case the maker, Mumbi, is the appellant's wife, so though competent she could not be compelled to testify against her husband, the appellant. That was why the prosecution could not call her. However, the appellant himself called his wife as a defence witness and although from the record she

does not appear to have been asked in examination in chief about making the statement during the crossexamination, she denied saying the alleged words.

As stated in *Cases and Materials on Evidence, ibid* at p 311, the rule against hearsay is that express or implied assertions which are not made at the trial by the witness who is not testifying, and assertions in documents produced to the court when no witness is testifying, are inadmissible as evidence of the truth of that which was asserted (*Cross on Evidence* 1975 p 387: *Cowen and Carter Essays in the Law of Evidence,* p 1). That is the general rule. There are ample persuasive authorities that show that hearsay evidence may be admitted if the statement containing it is made in conditions of involvement or pressure and within proximity but not exact contemporaneity, as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused. We were referred to most of such authorities and we shall now proceed to consider them. The test was first laid by Hold CJ at *nisi prius* in *Thomson v Trevanion* (1893) Skin 402, which was a civil case but the test equally applies in criminal cases. In that case for a civil action for an assault on the plaintiff's wife, the wife was an incompetent witness, but the court held that what the wife said immediately upon the hurt received and before she had time to devise or contrive anything for her own advantage was receivable in evidence. In *Republic v Foster* (1834) 6 C & P 325, the accused was charged with manslaughter by the dangerous driving of a carriage. A witness was allowed to narrate what the deceased said immediately after he had been run down, and the report makes it plain that the report was received as evidence of the cause of the deceased's injuries. It was not received as a dying declaration because there was no evidence that the deceased was aware of the fact that he was in a dying condition; nor was there any question of the statement having been made in the presence of the accused. Some American courts have recognized the guarantee of truth provided by spontaneity and the lack of time to devise or contrive as can be seen from the case of *People v De Simone* (1919) 121 NE 761 in which the Court of Appeals of New York admitted evidence that a passerby immediately after shooting had shouted "he ran over Houston Street". The passer-by was not called . Mr . Justice Collin referred to that evidence as deeds and acts which are:

> "forced or brought into utterance of existence by and in the evolution of the transaction itself, and which stand in immediate causal relation to it."

That evidence was expressly not admitted as part of the *res gestae,* because it was not so interwoven or connected with the principal event (ie the shooting which the person did not see) as to be regarded as part of it. Both Mr . Onyango Otieno and Mr . Chunga sought each in his own way to rely on *Subramanian v Public Prosecutor* [1956] 1 WLR 965 (PC). The accused was charged with unlawful possession of ammunition. His defence was that he had been captured by terrorists and was acting under duress. The trial judge held that evidence of his conversations with terrorist were inadmissible unless the terrorists testified. The Privy Council allowing the appeal on other grounds stated that in ruling our peremptorily the evidence of conversation between the terrorists and the appellant the trial judge was in error. It added that evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

Mr . Onyango Otieno called in aid the West Indies case of *Sparks v Republic* [1964] AC 964; [1964] 1 ALL ER 727 (PC) where a small girl aged between three and four years complaining of a sexual assault said that "it was a coloured boy that did it." The defendant who was convicted of the assault was a white man aged 27 and evidence for the defence of what the child said was held by the Privy Council to be inadmissible, the child being too young to testify.

Mr . Chunga submitted that the case of *Ratten v Republic* [1972] 3 All ER 801 (PC) is strong authority for the proposition that where the requisite conditions and circumstances are fulfilled, a statement made by a person not called as a witness is admissible. In that case, about the time the accused's wife was shot by the discharge of his gun, which he asserted to be accidental., the telephonist at the local exchange received a call from the accused's house. The voice which was hysterical and sobbing, said "Get me the Police please." The telephonist's testimony was admitted at the trial and appeals to the Victorian Full Court and the Privy Council failed. The latter held that if the words were hearsay they were admissible

under the *res gestae* exception, but that they were not hearsay. Lord Wilberforce said:

> "In their Lordships' opinion the evidence was not hearsay evidence and was admissible as evidence of fact relevant to an issue.
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> The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on'"testimonially' ie as establishing some fact narrated by the words……"

The instant case can be distinguished from all the cases we have reviewed above on one ground in that, as we have already said, the maker of the alleged statement testified on oath at the trial, was examined, crossexamined and available for re-examination. We have already said that the trial court's record does not show that Mumbi was asked by the appellant through his advocate whether she actually told the police (CI Mukangu) that she knew nothing about the publication (EX 1a) and that everything in the study belonged to her husband. However, she was asked about it in cross examination and she said that she did not tell them that everything belonged to her husband.

The statement of Mumbi "I know nothing about it and everything in that room belongs to my husband' was a previous statement notwithstanding the fact that she was a witness and did testify at the trial. If she had in her evidence in chief made an identical statement that would at most only have bolstered up her credibility or established her consistency. It would not have been proof of the truth of the contents of the statement. The original statement still remained not made on oath or under crossexamination. On the other hand, the fact that her alleged previous statement was inconsistent with what she said under cross-examination merely neutralised her testimony and is not evidence of facts stated nor is it proof that she did not utter those words. The court had to assess her evidence after seeing her in the witness box and make its finding on it including her credibility or otherwise.

From the authorities reviewed, it is apparent that a statement made by an observer or participant is admissible as evidence in criminal proceedings if made on an approximately contemporaneous occasion so as to exclude any possibility of its having been concocted or contrived illegal to the maker's advantage regardless of whether or not he testifies at the trial. Such a statement may be proved as original evidence when the fact that it was made, as distinct from its truth (a) is in issue, ie whether or not it was made; (b) is relevant to an issue (regardless of whether it is true or false) or (c) affects the credit of a witness by either enhancing (as when he is consistent) or neutralising it (when he is inconsistent).

Under section 6 of the Evidence Act, facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places. This is what is referred to as "*res gestae*" which means""the transaction". Evidence to be admitted under this doctrine must be relevant to the transaction. What Mumbi said was relevant to and during the search for the publication. The words "I know nothing about it and everything in that room belongs to my husband" were facts necessary to explain a fact in issue of relevant fact ie the finding of the publication. They also rebutted the inference that Mumbi knew anything about the documents found or that they belonged to her. Such evidence was admissible under section 6 and 9 of the Evidence Act.

Mr . Chunga submitted that the said words were admissible under section 165 of the Evidence Act as proof of consistency by former statement. It could not be proof of consistency by former statement by Mburu or Mukangu or Wanjau, the three police officers, who testified that they heard Mumbi utter the words "I know nothing about it, everything in that room belongs to may husband or Maina' because the previous statement was Mumbi's and not theirs. Mumbi was not a competent witness of the prosecution (section 127(2), Evidence Act) so the prosecution could not set out on an expedition of proving consistency of her evidence by her alleged former statement. We agree with Mr . Onyango Otieno that in these circumstances, section 165 of the Evidence Act had no application.

On a careful consideration of the circumstances under which Mumbi is said to have uttered the words in question, it will be noted that the statement was an explanation forced out of her by the emotion generated by an event rather than a narrative. In this case there was a close association in time, place and circumstances between the statement and the crucial events. She made the statement before she had time to devise or contrive anything for her own advantage. The words were *de recenti* and not after an interval which would have allowed time for reflection and concocting a story. The lower courts found as a fact that the appellant's wife spoke the words "everything in that room belongs to my husband." We are bound by that finding of fact. That evidence was, for the reasons we have already given, admissible and was properly admitted.

Mr . Chunga contended that even if Mumbi's statement was admissible, the ground of appeal on it should be struck out because on the authorities of *Zaverchaud Dhanji Shah v Republic* (1956) 23 EACA 410 and *Raojibhai Girdhabhai Patel & Another v Republic* (1956) 23 EACA 536. As a general rule, the court does not permit a point of law to be raised for the first time on a second appeal, if the point could have been raised in the court below. We agree with that general proposition, but the respondent did not object to its being raised and argued until when he was replying to Mr . Onyango Otieno's arguments. The exceptions to the Zaverchand Dhanji Shah, *ibid*, are (a) when the point goes to jurisdiction, or (b) the point alleges a violation of natural justice or (c) it is a very important point of substantive law which ought to govern the case. The point raised in this case overlaps into a violation of natural justice as the statement was said to have been made in the absence of the appellant when he did not have a chance to be heard on its truth. It was also in the interest of justice that we heard the appellant on that ground, and striking out the ground was not the appropriate act so we dismiss the third ground of appeal.

The prosecution produced in court only five out of the 29 files and seven out of the 23 books which they collected from the appellant's house during the search. They were under no obligation in law or otherwise to produce in court each of the items taken from the appellant's library except for those relevant to the case. Mr . Onyango Otieno contended that the files and books produced in Exhibits 3 and 4 were so produced to support the prosecution case that the appellant had possession of the seditious publication. They were material prejudicial to the appellant which should not have been admitted. Mr . Chunga correctly pointed out that those books and files were not prohibited literature and therefore their production could not have been prejudicial to the appellant and at any rate the appellant had admitted being the owner of Ex 1 which he also accepted was in his study and the two lower courts' concurrent finding was that Ex 1a was found inside Ex 1, so that even when Ex 3 and 4 are disregarded, the finding on possession is unaffected. It should also be noted that no charge was preferred based on any of the contents of Ex 3 and/or 4. The relevant file was the Academic University Staff Union 1980 (Ex 1). We do not agree with Mr . Onyango Otieno that if the files and books in Exs 3 and 4 had not been produced the Chief Magistrate would not have arrived at the same finding on possession. The appellant denies only Ex 1a was among the documents in Ex 1 which he says are all his! We do not see any merit in the fourth ground of appeal and we are not satisfied that the appellant has established the alleged prejudice. That ground fails.

The fifth ground of appeal attacks the Chief Magistrate's statement in the judgment which reads:

> "The accused's wife talked about the study room being accessible to lecturer and students but the accused himself did not support that assertion. The implication of this statement is that if not planted by the police the document must have been left by other users of the study room without the knowledge of the accused. There is no evidence to support this hypothesis. Not a single Lecturer or student was called to lend authenticity to the claim that outsiders had access to this room The court finds that the accused's house is his private property and so is his study room with access only to his wife and normal social visitors whose movement is usually limited to sitting and toilet facilities. The court rules out any possibility that an outsider had slipped the document in the accused's file in the sitting room."

Mr . Onyango Otieno said that this was a misdirection in law which amounted to shifting the burden of proof onto the appellant and it also amounted to making findings not based on facts before the court.

Upon a careful reading of the Chief Magistrate's judgment, it is apparent that the said statement was made when the court was considering whether or not the seditious publication could have been planted in the appellant's file, Ex 1, without his knowledge by the lecturers or students who the appellant's wife had said also used their study room. An accused person is not guilty of being in possession of a seditious publication contrary to section 57(2) if he can establish a lawful excuse. So if it has been established that Ex 1a was planted in Ex 1 by someone else without the appellant's knowledge, the appellant would have had a lawful excuse for and hence the defence to having he seditious publication in his file and possession. What lawful excuse an accused has under section 57(2) is a matter specially within his knowledge and the burden of proof lies on him to show that lawful excuse on the balance of probabilities. When the Chief Magistrate made the statement complained of he did not shift the burden of proof but correctly stated it. He made the position clear by adding that he was aware of the general burden on the prosecution to proof the appellant's guilt. We agree with Mr . Chunga that the statement was within the provisions of section 111(1) of the Evidence Act. Consequently there was no misdirection in law.

The Chief Magistrate referred to the appellant's house as his private property and accessible only to himself, his wife and his social friends. Mr . Onyango Otieno argued that there was no evidence that the house was for social friends, the Chief Magistrate imported his own evidence in the case to the appellant's prejudice. In our view, as the case involved a search, the court had on the one hand, to consider the freedom of the individual and that his privacy and his possessions should not be invaded except for the most compelling reasons and, on the other hand, the interests of the society at large in tracking wrong doers and repressing crime and balance two interests. This was not a question of whether these considerations were or were not in evidence for it was the court's duty to bear in mind these matters. The statement was properly made and no prejudice to the appellant was shown to have been occasioned by it.

Did the Chief Magistrate in dealing with this case rely on what he had decided in another case as alleged in the sixth ground of appeal? When considering the law on sedition he cited the case of the *Republic v Wang'ondu s/o Kariuki* Chief Magistrate's Court Criminal Case No 1096 of 1982 which he had tried. It was argued for the appellant that this was improper as the *Wang'ondu* case could not form an authority for deciding the appellant's case. We do not think there was any error in the Chief Magistrate's reference to his own case, although it could still be appealed from. The appellant's case was not decided on the basis of Wang'ondu's case. We do not see any merit in this ground of appeal which we dismiss.

The core of this appeal is whether or not the appellant was, in law, in possession of the seditious publication (Ex 1a). This is the second ground of appeal. Section 57(2) of the Penal Code which creates the offence the appellant was convicted of does not have a definition of the term "possession" which is used in that section. However, section 4 of the Penal Code provides as follows:

> "possession"
> (a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person:"

Paragraph (b) is not relevant to this case. The possession intended by section 57(2) is that defined in section 4 of the Penal Code. Control let alone full control of the object or article in possession of the accused is not necessary nor is it a requirement of that definition. It is enough if the prosecution proves anyone of the following:

> (i) The accused was in actual personal possession of the publication; or
> (ii) He knew that the publication was in the actual possession or custody of another person; or
> (iii) he had the publication in any place (regardless of whether the place belongs or is occupied by him or not) for the use or benefit of himself or another person.

Being in personal possession includes actual holding or having the publication in one's custody.

Knowledge that the publication is in the actual possession or one's custody or of another person may be inferred from the circumstances and/or proved facts of the particular case.

In the instant case the following facts are either admitted or found proved:

1. House No 9 along Burundi Drive at Kenyatta University College, which was searched by the police on June 2, 1982 was occupied by the appellant, who lived there with his wife, Mumbi wa Maina.
2. The file, Exhibit 1, was found in House No 9 in the study–room;
3. The file, Exhibit 1, belongs to the appellant;
4. The search was conducted in the presence of the appellant's wife, except for the times, two or so, she went to attend to telephone calls;
5. The appellant knew the file Ex 1 was in his study room;
6. The seditious document Ex 1a was found in the appellant's file Ex 1;
7. Appellant admitted that he had other loose documents belonging to him in Ex 1;
8. No outsider or stranger placed Ex 1a in the file Ex 1;
9. The seditious document was in the appropriate file.

There were concurrent findings by the two lower courts on some of these matters of fact and others were proved. Since this is a second appeal where the legislature has confined the appeal to questions of law only (section 361(1)(a) of the Criminal Procedure Code, as this court said in the case of *Stephen M'riungi & three others v Republic* Cr Appeals Nos 134, 135, 136 & 137 of 1982, we have loyalty to accept the findings of fact as holdings of law or mixed findings of fact and law and we should not interfere with the decision of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable court could have reached the conclusion, which we cannot say nor were we urged to hold that that is the position here.

We are, thus, satisfied from the proven and admitted facts that the appellant was proved beyond reasonable doubt to have been in actual possession, in law, of the seditious publication, Ex 1a, within the meaning of section 4 of the Penal Code, and the inference of knowledge on his part that the seditious publication was in his file (Ex 1) is irresistible. Consequently, we reject the second ground of appeal.

The last ground of appeal which we have already set out is briefly that the learned judges erred in law in not holding that had the Chief Magistrate not misdirected himself when sentencing the appellant he would not have awarded the same sentence. Mr . Onyango Otieno has argued that the misdirections amounted to a matter of law and this court has power to deal with it. On the other hand, Mr . Chunga, referring to section 361(1) (b) of the Criminal Procedure Code, appeared to be admonishing us that this court has no power on a second appeal to consider the sentence and authorities like *Missiani v Republic* Cr App No 39 of 1979 (unreported), *Bharat Nathalal Shah v Republic* Cr App No 55 of 1982 (unreported) and *Mohamed Iqbal Kurji Meghji v Republic* Cr App No 76 of 1982 (unreported) were all decided before the Criminal Procedure (Amendment) Act No 13 of 1982 which imposed a total prohibition on this court hearing a second appeal concerning sentence.

The amended section 361 (1) reads as follows:

> "(1) Any party to an appeal from a subordinate court may, subject to subsection 8, appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of appeal shall not hear an appeal under this section–
> (a) on a matter of fact, and severity of sentence is a matter of fact: or
> (b) against sentence, except, where a sentence has been enhanced by the High Court, unless subordinate court had no power under section 7 to pass that sentence."

What the legislature has said is that:

> (1) any party to an appeal from a subordinate court may, subject to subsection (8), appeal on a matter of law to this court against a decision.

(2) The Court of Appeal shall not hear an appeal under this section on a matter of fact.
(3) The Court of Appeal shall not hear an appeal under this section against sentence, except where

(a) the subordinate court had no power under section 7 to pass the sentence,
(b) a sentence has been enhanced by the High Court.

It follows that under section 361(1) (b) the Court of Appeal has power to hear an appeal against sentence if the position is as in (3)(a) and (b) above. Under (a), the Court of Appeal can hear the appeal only if the High Court did not correct the error.

It has been held that where a subordinate court when passing sentence has taken into account matters irrelevant to the case the error is one of law and the appeal is on a matter of law: *Noor Daher & Another v Republic* Cr appeal no 125 of 1972.

On a second appeal this court deals with an error made by a subordinate court, even when it is a matter of law regardless of how it arose ie under section 361(1)(b) or otherwise, only when the High Court has not corrected the error or in dealing with the error the High Court too has erred and not otherwise. In this case the High Court found that the Chief Magistrate had misdirected himself when sentencing the appellant and it considered the specific misdirection. The learned judges said;

> "We agree with Mr . Otieno that there are certain misdirections in the notes on sentence since the appellant is not a lecturer in political science and could not be held directly responsible for the dissemination of the documents to students or other persons."

The matter extraneous to the case and which were misdirections were
(a) the chilling aftermath of the August 1st attempted coup;
(b) that the appellant was a political science lecturer;
(c) At the university of Nairobi;
(d) The contents of the seditious publication were divulged by the appellant to the political science student who had earlier appeared in the same subordinate court and repeated them in mitigation.

These irrelevant matters were such that they seemed to have removed the appellant from the Chief Magistrate's court and substituted him with somebody else whom that court sentenced but the High Court detected the errors and although the learned judges specifically refer only to (b) (c) and (d) we have no doubt they also considered (a), and after dealing with the misdirection they further said;

> "Nevertheless bearing in mind the gravity of the offence and all the surrounding circumstances of the case as a whole, we are of the view that the sentence is not so manifestly excessive as to merit interference"

With respect, the learned judges having detected the Chief Magistrate's misdirections should have interfered, set aside the sentence based on the wrong principles and either substituted it with their sentence or remitted the case back to another magistrate seized with competent jurisdiction to sentence the appellant. The offence the appellant was convicted of was serious. The failure by the High Court to remit back the case for resentencing by another competent magistrate was an error of the nature of procedural technicality and as the sentence itself is legal that error is of no consequence as it has in our opinion, occasioned no miscarriage of justice, the misdirections having been rectified and the sentence of six years' imprisonment maintained. It therefore now becomes academic and unnecessary for us to decide on the power of this court on a second appeal to hear and then not deal with a sentence under section 361(1) (b) of the Criminal Procedure Code. The sentence is legal and this ground fails.

During the hearing of this appeal Mr . Onyango Otieno informed us that the appellant's eyesight was fast deteriorating and might be lost. We have noted this sympathetically. We hope those under whose care the appellant is will take every necessary step to save his eyesight.

All the grounds of appeal except the first have failed. As to the first ground which has succeeded we have

held that no miscarriage of justice has been occasioned by the failure by the Chief Magistrate to transfer the case to another court.

The upshot is that the appeal is dismissed.

Dated and delivered at Nairobi this 23rd day of November , 1984.

A.A KNELLER

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JUDGE OF APPEAL

Z.R CHESONI

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JUDGE OF APPEAL

J.O NYARANGI

....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR