



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 108 OF 2014**

**JOHN MUHATIA VIDOTO ..... APELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(An Appeal from the Judgment of the Principal Magistrate Honourable B. MOSIRIA in Kapsabet Criminal Case No. 301 of 2012, dated 7<sup>th</sup> July 2014)***

**JUDGMENT**

1. The appellant was charged in two counts with the offence of Robbery with violence contrary to *Section 295* as read with *Section 296(2)* of the Penal Code.
2. In Count 1, the particulars were that on the night of 30<sup>th</sup> and 31<sup>st</sup> days of December 2011 at Mokwo village within Nandi County jointly with others not before court, while armed with dangerous weapons namely pangas and Rungus, the appellant robbed *Florence Mmboga* of a bag containing personal documents and a box containing clothes all valued at Kshs.3,000/- and at or immediately before or immediately after the time of such robbery used actual violence by hitting the said *Florence Mmboga* on the back and head with pangas and rungus thereby occasioning her actual bodily harm.
3. In the second count, it was alleged that on the 31<sup>st</sup> day of December 2011 in Mokwo village within Nandi County jointly with others not before court while armed with dangerous weapons namely pangas and rungus, the appellant robbed *Margaret Mugunda* of one 14 inch television set make Elector, one Sony Radio, one socket extension and one inverter all valued at kshs.17,500/- and at or immediately before or immediately after the time of such robbery used actual violence by hitting *Margaret Mugunda* with pangas and Rungus thereby occasioning her actual bodily harm.
4. After a full trial, the appellant was convicted in count 1 and was sentenced to death. The learned trial magistrate found that in count two, the element of violence had not been proved and she therefore convicted the appellant of the lesser charge of simple robbery. The sentence with regard to count 2 was held in abeyance in view of the death sentence imposed in count 1.
5. The appellant was dissatisfied with his conviction hence this appeal. In his amended grounds of appeal filed on 1<sup>st</sup> February 2016, the appellant complained that the trial magistrate violated his rights protected under *Section 200(3)* of the *Criminal Procedure code* and the right of representation by counsel as provided for in *Article 50(2) (g)* of the Constitution. The appellant also claimed that he was convicted on the basis of weak identification evidence.
6. The appellant prosecuted his appeal in person. He entirely relied on handwritten submissions which he

presented to the court. In his submissions, the appellant contended that the trial was conducted by two magistrates namely *Hon. R. Koech* (SRM) and *Hon. B. Mosiria* (PM) and that the succeeding magistrate did not comply with the provisions of *Section 200 (3)* of the *Criminal Procedure Code*; that the requirements of *Section 200 (3)* are mandatory and failure to comply with them made the trial a nullity; that the trial magistrate's failure to insist on the formal withdrawal of his advocate from the proceedings amounted to a violation of his constitutional right to be represented by an advocate; that the learned trial magistrate erred in convicting him on the basis of dock identification which is worthless.

7. The state contests the appeal. Learned prosecuting counsel *Ms. Mokuu* in her submissions contended that the appellant was properly convicted as the prosecution had proved the charges against him beyond any reasonable doubt. Counsel reproduced in her submissions the evidence that was presented before the lower court and urged the court to find that the appellant was positively identified as one of the two persons who had committed the offences in question.

8. Counsel in addition disputed the claim that the appellant's constitutional right to representation by counsel of his choice was violated during the trial asserting that it is the appellant who chose to act in person. She however conceded that the appellant's rights under *Section 200 (3)* of the *Criminal Procedure Code* had been violated as the succeeding magistrate did not inform him of his rights protected under that provision.

9. This being a first appeal to the High Court, I am duty bound to revisit the evidence presented before the trial court in order to draw my independent conclusions on whether or not the appellant's conviction should be upheld. But in so doing, I should be careful to remember that unlike the trial court, I did not have the benefit of seeing and hearing the witnesses and give due allowance to that disadvantage. See *Okeno V Republic (1972) EA 32; Njoroge V Republic (1987) KLR 99.*

10. I have considered the grounds of appeal, the evidence on record as well as the submissions made by the appellant and the state. I wish to start with the appellant's claim that his constitutional right to representation by an advocate of his choice was violated by the learned trial magistrate during the trial. The appellant has admitted in his written submissions that after his advocate failed to attend the court on several occasions, he opted to act in person. This is reflected on page 15 of the Record of Appeal. Having voluntarily chosen to act in person, the appellant cannot turn around on appeal and claim that his right to be represented by an advocate was violated. As correctly submitted by *Ms. Mokuu*, the appellant fired his own advocate and it was not therefore necessary for that advocate to formally withdraw from the proceedings. Nothing therefore turns on that ground of appeal.

11. Regarding the claim that his rights under *Section 200(3)* of the *Criminal Procedure Code* (the CPC) were violated during the trial, I have examined the record of the lower court. The record shows that on 19<sup>th</sup> March, 2014 *B. Mosiria* (PM) took over the conduct of the trial from *R. Koech* who had heard a total of six witnesses. The record further shows that the succeeding magistrate did not comply with the provisions of *Section 200 (3)* of the CPC before taking over the conduct of the trial.

12. Section 200 (3) states as follows:-

***“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right”***

*Section 200(4)* proceeds to provide that where an accused person is convicted on evidence not wholly recorded by the convicting magistrate, the High Court if satisfied there was material prejudice may set aside the conviction and order a new trial.

13. In this case, *Hon. B Mosiria* upon taking over the proceedings in the lower court did not explain to the appellant that he had a right to demand that any witness be resummoned and reheard. *Section 200 (3)* of the *CPC* is couched in mandatory terms. It is meant to safe guard the rights of an accused person to a fair

trial which right is guaranteed under *Article 50 (2)* of the Constitution. It is pertinent to note that this is one of the rights that cannot be limited – See *Article 25* of the Constitution.

In the circumstances, it is my view that failure of the succeeding trial magistrate to explain to the appellant his rights under *Section 200 (3)* of the CPC violated his right to a fair trial and in the words of the learned prosecuting counsel, this omission occasioned a miscarriage of justice. *Ms. Moku*a thus properly conceded that ground.

14. In view of the foregoing, I find it unnecessary to analyse the nature and weight of the identification evidence adduced at the trial since as stated earlier, failure to comply with *Section 200(3)* of the CPC constituted material prejudice to the appellant that cannot be wished away. It is not an irregularity that can be cured under *Section 382* of the CPC. It is an error that is sufficient to vitiate the appellant's conviction. On that ground alone, I find merit in the appeal. I consequently allow the appeal, quash the appellant's conviction in each count and set aside the sentence imposed by the trial court.

15. Having allowed the appeal, the next issue that presents itself for determination is whether or not the court should order a retrial. The law is that an appellate court should order a retrial if the interests of justice so requires taking into account the circumstances of each case.

16. In *Muiruri V Republic (2003) KLR 522*, the court of Appeal addressed this issue and held as follows:-

***“Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or the court's”***

17. Given the evidence on record and the gravity of the offences in question coupled with the fact that the conviction have been quashed due to a procedural defect in the proceedings owing to an error of omission by the learned trial magistrate, I am satisfied that the interests of justice requires that a retrial be ordered in this case. In the circumstances, I order that the appellant shall be retried. He shall be released into police custody at Kaimosi police station and shall be produced on 4<sup>th</sup> August, 2016 before the Principal Magistrate Court at Kapsabet for retrial by any magistrate of competent jurisdiction except *Hon. B . Mosiria* Principal Magistrate.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 29th day of July, 2016**

In the presence of:

The appellant

Ms. Moku for the state

Naomi Chonde – Court clerk