



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 93 OF 2014

[CONSOLIDATED WITH CR. APP. NO. 94 OF 2014]

1. JOSHUA KIREMI

2. MOSES KINYUA.....APPELLANTS

VERSUS

REPUBLIC RESPONDENT

(From the original conviction and sentence in criminal case No.04 of 2010 of the Chief Magistrate's Court at Maua by W.F Andayi – Principal Magistrate)

JUDGMENT

The appellants, **JOSHUA KIREMI** and **MOSES KINYUA**, were convicted for the Offence of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the offence were that on the 5th day of December 2009 at Maua location in Igembe District of Eastern Province, jointly with others not before the court while armed with pangas, robbed **BERNARD KIMATHI** of cash Kshs. 3000 and at or immediately before or immediately after the time of the said robbery used actual violence to the said **BERNARD KIMATHI**.

The appellants were tried and convicted of the offence. They were sentenced to death. They now appeal against both conviction and sentence.

The appellants was represented by M/s J.K Ntarangwi, learned counsel. She raised seven grounds in the supplementary petition of appeal which can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by failing to comply with section 200(3) of the Criminal Procedure Code.
2. That the learned trial magistrate convicted without sufficient evidence.

The state conceded the appeal and was represented by Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

The complainant was robbed by the appellants and some others.

The appellants denied any involvement in the offence.

This is a first appellate court as expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated Case of **OKENO Vs. REPUBLIC 1972 EA 32**.

This is a case where the learned trial magistrate failed to comply with section 200 (3) of the Criminal Procedure Code. The section provides 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.

When Hon. Andayi took over the conduct of the trial herein after Hon. Makungu had disqualified herself, he made an order that the matter was to start afresh. This was on 23rd September 2010. However, on 2nd March 2011 the same magistrate (Hon. Andayi) suo moto made an order that the prosecution case be closed and indicated that he was going to use the evidence on record. This was prejudicial to the appellants and resulted in a mistrial.

The conviction is quashed and the sentence set aside. I am making an order for retrial at Maua law courts by any other magistrate other than Hon. Makungu and Hon. Andayi.

The appellants to be escorted to Maua law Courts on 5th January 2017 for further orders by the Chief Magistrate.

DATED at Meru 20th day of December 2016

KIARIE WAWERU KIARIE

JUDGE