



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CRIMINAL APPEAL NO.135 OF 2014**

[consolidating Criminal appeal 135 &151 of 2014]

**1. JAMES KITHIA ITHAE**

**2. BENSON MUTHIORA.....APPELLANTS**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*( From the original conviction and sentence in criminal case No. 462 of 2013 of the Chief Magistrate's Court at Isiolo by Hon. J.M Irura – Ag. Principal Magistrate)*

**JUDGMENT**

**JAMES KITHIA ITHAE** and **BENSON MUTHIORA**, the appellants were charged with an offence of robbery with violence contrary to section 296 (2) of the Penal Code.

The particulars of the offence were that on 1<sup>st</sup> June 2013 at Isiolo township, Imenti Isiolo County jointly with others not before court while armed with knives robbed **JAMES MUTHAMIA** of a motor cycle Reg. Number KMCU 929 A valued at Kshs.71,000/= and immediately before or immediately after the time of the said robbery injured the said **JAMES MUTHAMIA**.

The appellants were found guilty of the offence and sentenced to suffer death. They now appeal against both conviction and sentence.

The appellants were in person. They raised several grounds of appeal. The grounds can be summarized as follows:

1. That the learned trial magistrate erred in law and in fact by denying them to reopen their case afresh under section 200 CPC.
2. That the learned trial magistrate erred in law and in fact by relying on circumstantial evidence.
3. That the learned trial magistrate erred in law and in fact by relying on an exhibit that was not recovered from them.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case were briefly as follows:

The appellants hired a boda boda motor cycle to ferry them. The rider was James Muthamia. They knew each other. They went and robbed him of the motor cycle. Later after their arrest, they led to the recovery of the engine from a garage in Meru town.

In their defence the appellants contended that they upon arrival at their destination, they parted company with Muthamia.

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 case was heard from beginning to the end by only one magistrate. Section 200 of the CPC provides as follows:

***(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—***

***(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or***

***(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.***

***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.***

***(3) 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.***

***(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.***

**The circumstances for invoking this section did not arise. This complaint is therefore misguided.**

In the case of **REPUBLIC V VERONICA WANJUE NJUE [2014] eKLR** circumstantial evidence was defined as follows:

***“Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved”.***

Clearly, circumstantial evidence is not illegal. There are instances when such evidence is the best evidence. In the instant case, the learned trial magistrate did not need to rely on circumstantial evidence for there was ample direct evidence with unbroken chain from Isiolo, where Muthamia was robbed of the motor cycle to where the engine of the motor cycle in issue was recovered.

Although the recovered exhibit was not found on the appellants, they led police officers to where it was recovered and evidence was adduced to the effect that they were the ones who had sold it there.

There was overwhelming evidence against both appellants. Their appeal is accordingly dismissed.

**DATED at Meru this 19<sup>th</sup> day of December, 2016**

**KIARIE WAWERU KIARIE**

**JUDGE**