



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 144 OF 2012**

**COSMAS MUNYWOKI KITONGA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original Conviction and Sentence in Machakos Chief Magistrate's Court Criminal Case No. 1728 of 2010 by Hon. M.W. Murage, CM on 16/10/2012)*

**JUDGMENT**

1. The appellant was charged with the offence of **Robbery with Violence** contrary to **Section 296 (2)** of the **Penal Code**.

Particulars thereof being that on the **29<sup>th</sup>** day of **July 2010** at **Eastleigh Area, Machakos Township** in **Machakos District** within **Eastern Province**, jointly with others not before court and while armed with offensive weapon namely; homemade pistol robbed off **Nora Kamande Muthiani** cash **Kshs. 17,200/=** and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **Nora Kamande Muthiani**.

1. He was tried, convicted and sentenced to death. He now appeals on grounds that ;-
  - i. The trial court erred in law and fact by convicting the appellant on patently inconsistent, contradictory and wholly incredible evidence.
  - ii. The trial court erred in law and fact by finding and holding that the appellant was identified as one of the persons involved in the robbery yet the alleged identification evidence placed before court was a mere dock identification lacking evidentiary value.
  - iii. The trial court misdirected itself and fell into a grave error of law by finding that the prosecution had proved its case beyond reasonable doubt yet the evidence tendered by the prosecution witnesses fell far below the legal threshold.
  - iv. The trial court erred in law and fact by disregarding the appellant's defence yet the prosecution evidence on record failed to displace the said defence.
  - v. The learned magistrate erred in law by failing to strictly adhere to the provisions of **Section 200 (3)** of the **Criminal Procedure Code**. The omission to apply the provisions of the said Section prejudiced the appellant leading to violation of his right to a fair trial.
2. The appellant relied upon written submissions. The State conceded to the appeal on the ground that the mandatory provisions of **Section 200 (3)** of the **Criminal Procedure Code** was not adhered to. **Mrs Gakobo, Senior Principal Prosecution Counsel** for the State however, asked

for an order for retrial. She argued that the evidence adduced was strong and likely to return a conviction.

3. This is a case that was heard by **J. Omenge, P.M** who recorded evidence of two (2) witnesses on the **25<sup>th</sup> April, 2012**. She was succeeded by **M.W. Murage, CM**. At page 30 of the proceedings it is indicated as hereunder ;-

***“Coram***

***Before M.W. Murage – CM***

***Prosecutor –I.P. Kavoo***

***Clerk- Mueni***

***Accused- present***

***Mr. Ngolya for accused***

*Section 200 explained to accused who replies - I will proceed from where the matter stopped.*

*M.W. Murage*

*Chief Magistrate”*

4. **Section 200 (3) of the Criminal Procedure Code** provides;-

*“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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”*

5. It is apparent that the appellant stated that he intended to proceed from where the matter had reached. There is no indication that he was made aware of his right of recalling any witnesses who had testified. In the premises it cannot be said that there was proper compliance with **Section 200(3)** of the **Criminal Procedure Code**.

6. **Section 200(4)** of the **Criminal Procedure** provides thus:-

*“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”.*

7. The appellant stated that failure to comply with **Section 200(3)** of the **Criminal Procedure Code** was prejudicial to him as his rights were violated, a fact the State agrees with.

8. In the case of *Mwangi versus Republic [1983] KLR 522 Hancox J.A Chesoni and Nyarangi Ag. J JA* held thus:

*“We are aware that a re-trial should not be ordered unless the appellate court is of the opinion that on proper consideration of the admissible and potentially admissible evidence, a conviction might result”.*

9. We have analyzed the evidence on record, without delving into the substance; we do note that it is strong. If the same evidence is adduced at trial it may result into a conviction. In the circumstances it is just to order a retrial. In that regard, we do order that the appellant be produced in the **Chief Magistrate's Court, Machakos** for retrial. The plea shall be taken on the **26/6/2014**.

10. In the meantime the appellant shall remain in custody.

11. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 24<sup>TH</sup> day of JUNE, 2014**

**L.N. MUTENDE**

**B.THURANIRA JADEN**

**JUDGE**

**JUDGE**