



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION CASE NO. 12 OF 2014

RICHARD MBALUKA NTHITU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

ORDER ON REVISION

1. By a letter dated 29th May, 2014, Mulu and Company Advocates have moved this court to exercise its powers under **Section 364 (1) (b)** of the **Criminal Procedure Code**.
2. The gist of the matter is that **Richard Mbaluka Nthitu** (accused) is charged with the offence of stealing contrary to **Section 275** of the **Penal Code**. The case was partly heard by the **Hon. Odawo, Resident Magistrate**. Following her transfer to another station, the succeeding magistrate, **Hon Kisiangani** purportedly denied the accused to exercise his right under **Section 200 (3)** of the **Criminal Procedure Code**. The accused purportedly applied to have the case heard *de novo* a request that was denied.
3. The defence reluctantly proceeded with the defence hearing. Counsel for the accused person faults the manner in which the magistrate conducted the trial. He cites instances where the prosecution objected to evidence being led in respect of a statement supplied by the prosecution in respect of **Patrick Munyoki Kilonzo** being used and instead allowed the prosecutor to produce a different statement. This in his opinion was a misdirection as the court did shift the burden of proof to the accused by ordering him to establish how he obtained the statement that were in his possession and on police letterheads.
4. It is upon that background that I have been asked to examine the record of proceedings in this matter in order to satisfy myself of the correctness of the court's order.
5. A perusal of the court record indicates that the court complied with **Section 200** of the **Criminal Procedure Code** where upon the accused in person elected to proceed from where the case had reached. **Section 200** of the **Criminal Procedure Code** Provides:-

“ 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 re-summon 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 re-summoned 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”.

6. It is mandatory upon the trial magistrate to inform the accused of the right to recall witnesses who have testified. It is discretionary for the accused to ask for re-summoning of such witnesses. This is a case where the record indicates that the court not only explained **subsection (3)** to the accused but she did explain the whole section.
7. In event of conviction where it is established that the accused person is materially prejudiced following non-compliance with **Section 200 (3)** of the **Criminal Procedure Code**, the High Court may set aside the conviction and order a retrial. (see **Section 200 (4)** of the **Criminal Procedure Code**.
8. This application has been made prior to the stage of conviction.
9. In the letter it is stated as follows:-

“The matter was taken over by the Hon. Kisiangani , Resident Magistrate. However, the accused’s right under Section 200(3) of the Criminal Procedure Code Cap 75 was denied. His counsel present for the hearing on the 20/5/2014 applied to have the matter start denovo, which application was denied by the court and without informing the accused of this right. Under the above quoted provisions, the duty on the decision on how to proceed with the matter lies with the accused because he is the one to be prejudiced by the outcome of the proceedings.”

10. Looking at the record it is apparent that the accused was not denied his right under **Section 200 (3)** of the **Criminal Procedure Code**. It is not alleged that he was prejudiced.
11. On the **20/5/2014** the Court indicates that his counsel, **Mr. Mburu** only notified the court that he was ready to proceed. The prosecutor in turn stated that he was also ready to proceed. The accused then testified on oath. He was cross-examined and re-examined by the advocate. At the end of his testimony his counsel applied to have him stepped down, a prayer that was granted by the court. There is absolutely nothing to suggest that he was disgruntled and/or expressed his discontent following the court order.
12. **Hon. Kisiangani, Resident Magistrate** , took over the case at the stage of defence hearing. PW2 was heard by **Hon. A. Adawo, Resident Magistrate**. Prior to the witness testifying on the **21st February, 2013**, counsel for the accused notified the court that she had not been furnished with statements. **Ms Kabiru** who was acting for the accused stated thus;-

“Let us stand down the witness and proceed later in the day once I go through the statement”

13. The court adjourned the case and ordered the state to supply them with all witnesses’ statement. Thereafter the case proceeded and the witness was duly cross-examined. The case was adjourned. **Mr. Mulu** came on record on the **12th April, 2013**. On the **3/5/2013** the case proceeded. **Ms Kabiru** was the one representing the accused. **PW3, PW4** and **PW5** testified. At no time/stage was application made expressing dissatisfaction on how the case was conducted when **PW2** testified.
14. If what is alleged in the letter did transpire, nothing would have been easier than the advocate demanding the record to reflect the same.

15. In the premises, I find the application premature. The court cannot have the order of the learned trial magistrate reversed. The file shall be placed before the trial magistrate forthwith for purposes of expeditious disposal of the case.

16. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 23RD day of JUNE, 2014

L.N. MUTENDE

JUDGE