REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 63 OF 2009

KENNEDY KALULAVU.....APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From original sentence and conviction in Criminal Case No.2970 of 2007 of the Chief Magistrates court at Thika by Hon. C.W. Meoli (Chief Magistrate)

JUDGMENT

The trial of **KENNETH KAVULAVU LIHANDA** commenced before Hon. U.P. Kidula, Chief Magistrate. However, after receiving the evidence of three prosecution witnesses, the learned magistrate ceased to hold that judicial office.

Thereafter, the trial resumed before Hon. C.W. Meoli, Chief Magistrate, as she then was.

Pursuant to the provisions of **Section 200 of the Criminal Procedure Code,** the succeeding magistrate informed the accused of his right to demand, if he so wished the recall of any of the witnesses who had testified before her predecessor.

The accused informed the court that he was happy to have the case proceed further from the stage it had reached. In effect, the accused did not want the whole trial to start afresh.

The accused asked the succeeding trial magistrate to recall **PW2.**

Regrettably, **PW2** was never recalled thereafter. Instead, the prosecution closed its case after calling **PW 4** and **PW 5**.

Bearing in mind the fact that **PW 2** was never recalled, Mr. Kabaka, learned state counsel conceded this appeal.

When making that concession, counsel pointed out that the failure to recall **PW 2** constituted a grave violation of the rights of the accused.

However the Respondent urged us not to set the appellant free. The Respondent asked us to order that the appellant be retried.

Mr. Kabaka told this court that the witnesses will be available, if a retrial was ordered. He also

pointed out that if the retrial were to result in a conviction, the appellant was likely to suffer the death penalty.

Therefore the Respondent submitted that justice demands the re-trial of the appellant.

In answer to the Respondent's request for a retrial, the appellant said that he had already been in custody for far too long. He was therefore opposed to his retrial.

We note that the appellant was arrested on 9th June 2007. That is six years ago.

All through the trial, the appellant was in custody, because at that time, the offence of Robbery with violence was not bailable. Therefore, there is no doubt that the appellant has already been in custody for a considerable length of time.

On the other hand, the offence with which he had been charged is a serious one. It attracts the death penalty as a sentence, if the accused was convicted.

In determining what justice demands, this court has conducted a delicate balancing act between the rights of the appellant, to a fair trial within a reasonable time, and the rights of the victims and of the society in general, to give evidence which would enable the court adjudicate appropriately on the matter.

Doing the best we can in the circumstances, we find that the interests of justice militate against a retrial.

Accordingly, we allow the appeal, quash the conviction and set aside the sentences.

We order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 25th day of July, 2013.

A.MBOGHOLI MSAGHA

JUDGE

FRED A. OCHIENG

JUDGE