



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL APPEAL NO.5 OF 2008**

**MICHAEL MASETE ALI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**(From the original conviction and sentence in Criminal Case No.227 of 2005 of the Chief Magistrate's Court at Nairobi**

**by M. W. Murage (Mrs.) - Senior Principal Magistrate**

**JUDGEMENT**

The appellant was charged with 8 counts, six of which was of robbery with violence contrary to section 296(2) and two attempted robbery with violence contrary to section 297(2) of the Penal Code. After full trial appellant was convicted in count 1 only and sentenced to suffer death as provided by law, hence this appeal.

It is clear that the trial commenced before Mrs. Muigai – Principal Magistrate on 9<sup>th</sup> January 2006. The said court took the evidence of six witnesses before the matter was taken over by another magistrate.

On 19<sup>th</sup> April, 2007 the case was listed before Mrs. Murage Ag. SPM. The prosecutor informed court that six witnesses had testified and that there were only two remaining witnesses before the case could be concluded. The prosecutor also sought direction as to the way forward from the said court. The appellant indicated to court that he wished to have the witnesses recalled. The said court then ruled section 200 complied with and proceeded with the case. It was then that the evidence of PW7 and PW8 was taken by the succeeding magistrate. The said court also took the defence of the appellant.

The question that arises is whether the succeeding magistrate truly and strictly complied with section 200 (3). It is clear that the trial court did not explain to the appellant of his rights under section 200. To be fair, to the trial court and appellant, there is no evidence to show that section 200 was complied with. It is clear, the appellant requested for the recalling of all prosecution witnesses who had given evidence before the magistrate who earlier recorded the evidence of PW1 to PW6. In that regard therefore, we think the appellant was prejudiced by the failure of the trial court to indicate whether the rights under section 200 was explained in a satisfactory manner to the appellant.

The appellant expressed a desire to have the witnesses recalled and that opportunity was not accorded to him. The failure to explain and accord the appellant an opportunity to elect on the mode and procedure clearly resulted in a miscarriage of justice. We therefore think the appellant was materially prejudiced by the failure to comply with section 200. Consequently we set aside the conviction and the sentence resulting therefrom.

The only question is whether we should order for a retrial. We have noted that the basis of the appellant's conviction was evidence of PW1 who allegedly identified the appellant at the scene. The appellant was arrested on 15<sup>th</sup> January 2005 and arraigned in court on 31<sup>st</sup> January 2005. The subject robbery occurred on 25<sup>th</sup> October 2004. It is not clear from the evidence on record as to the circumstances and why the appellant was arrested. There is no evidence that PW1 gave descriptions fitting the appellant to the police which led to his subsequent arrest. In any case, PW1 indicated that she did not identify the persons who attacked her. We therefore think the evidence on record is insufficient to sustain a proper conviction if we order for a retrial. Consequently, we feel there is no need to order for a retrial since the evidence on record cannot return a verdict of guilty. We refuse to order for a retrial. In that regard, we set aside the conviction and sentence recorded by the trial court and order for the immediate release of the appellant unless lawfully held.

Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of May 2011.

**J. KHAMINWA**  
**JUDGE**

**M. WARSAME**  
**JUDGE**