



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISC. CRIMINAL CASE NO. 23 OF 2009**

**LESIIT J.**

**REPUBLIC.....PROSECUTOR**  
**VERSUS**  
**KEN MATIBA MURIUKI.....RESPONDENT**

**RULING IN REVISION**

This matter was sent to this court under S.167 of the CPC for confirmation of the sentence of the lower court against the accused in this case s.167

**167. (1) If the accused, though not insane, cannot be made to understand the proceedings - (a) in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President's pleasure; but every such order shall be subject to confirmation by the High Court".**

The chief facts of this case are that the accused was arraigned before the PM at Isiolo PM's court. When the charges were read to the accused he admitted them when the facts were eventually read to him, the accused admitted them. The accused then told the court that he was 17 years old. He was swiftly sent for Age Assessment.

Before his age was assessed, the court formed the view that the accused was mentally unstable and sent him for examination. It took a long time to have the accused examined as to his mental status. The results were sent to court on 11<sup>th</sup> February 2011. The accused was deemed unfit to plead and the learned trial magistrate committed him to Mathare Mental Hospital for treatment. The accused was returned to court on 11<sup>th</sup> March 2011.

At that stage the court was bound to follow the procedure set out under s.163 (2) of CPC which stipulates.

**"163 (2) The Attorney-General shall thereupon inform the court which recorded the finding concerning that person under section 162 whether Inquiry by court as to soundness of mind of accused."**

The provisions were overlooked and the court proceeded to take the plea to the charge afresh to which the accused pleaded not guilty. The accused was then tried, convicted and sentenced to detention at the Presidents pleasure.

The learned State Counsel Mr. Mungai urged the court to confirm the sentence.

The conviction entered herein, and the subsequent order in sentence was founded on a defective trial. After child was returned from mental hospital the learned trial magistrate ought not have taken the plea afresh, or proceeded with the hearing before requiring the Attorney General to give an indication in writing whether the Republic intended to proceed with the proceedings against the accused.

I find that the omission rendered the proceedings defective. Accordingly and set aside the conviction and sentence under section 3

I have considered whether to order a retrial in this case.

There are various decisions of the Court of Appeal relating to the principles the court should apply when ordering for a retrial which the Court of Appeal made mention of in **Richard Omollo Ajuoga Vs. Republic H.C. Criminal Appeal No. 223 of 2003**. They are as follows:-

*“In the case of Ahmed Sumar Vs. Republic (1964) E. A. 481, at page 483, the predecessor to this court stated as follows:-*

*“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.*

*The Court continued at the same page at paragraph II and stated further:-*

*“We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.*

*Taking the queue from that decision, this Court in the case of Bernard Lolimo Ekimat Vs. Republic Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-*

*“There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”*

I have considered accused was of unsound mind. The proceedings speak for themselves that he never understood the proceedings against him in the first instant.

I considered that the accused has been in prison custody since his arrest in January 2011. That is a period of 11 months now. I considered that a substantial number of the stolen animals were recovered.

Considering all the circumstances of the case, I find that the interest of justice do not require that a retrial should be held in this case. I decline to order a retrial. I order that the accused be set free unless he is otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2011**

**J. LESIIT**  
**JUDGE**