REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Criminal Appeal 46 & 47 of 2007

JAMES ALUKONGO BUKHALA……1ST APPELLANT
EMMANUEL WEPUKHULU CHELOTI……..…2ND APPELLANT

~VRS~

REPUBLIC……..……PROSECUTOR

JUDGMENT

The two Appellants James Alukongo Bukhala and Emmanuel Wepukhulu Cheloti were jointly charged and convicted of two counts of robbery with violence contrary to section 296 (2) of the Penal Code and one count of rape contrary to section 10 of the Sexual Offences Act. They were sentenced to the mandatory death sentence in counts I and II and to ten (10) years imprisonment in count III. Being aggrieved by the judgment of Bungoma Senior Principal Magistrate, the two Appellants filed separate appeals which were later consolidated.

Mr. Shitsama appeared for the Appellants. The two petitions of appeal have similar grounds which were argued together. Precisely, the Appellants complained of the following issues:

- **Lack of positive identification;**
- **Failure to prove all the ingredients of the offence;**
- **Contradictory evidence;**
- **Dismissal of the defences without justification;**
- **Failure to comply with section 200 of the Criminal Procedure Code.**

Mr. Shitsama took the court through the grounds of appeal and urged the court to allow the appeal. On the other hand, Mr. Ogoti for the state responded to the grounds arguing that the case was proved to the standards required and that the conviction ought to be upheld.

It is our duty to examine and make a finding on the ground alleging non-compliance with section 200 of the Criminal Procedure Code. The reason being that the finding of the court on compliance or otherwise will determine whether other grounds of appeal need to be evaluated.

Section 200 (3) 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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

This case was first herd by one D. A. Okundi SRM – who heard the prosecution's case and put the accused on his defence. Mr. S. Mungai took over the matter on 25/02/2005 and the relevant court proceedings read as follows:

> ***"Court: Trial magistrate transferred. Section 200 of the Criminal Procedure Code explained.***
> ***Makokha: Case to proceed from where the other magistrate had reached. Hearing on 8/4/2005. Mention on 11/3/2005."***

The case was mentioned a few times before different magistrates but none of them took any evidence.

On 11/05/2005, Mr. Atuti took over the case and heard the defence case. He delivered judgment and imposed sentence. Mr. Atuti made no attempt to comply with section 200. He does not even mention it in his entire proceedings.

The section states that the succeeding magistrate ***"shall inform"*** the accused of his right. This is the right to re-summon and examine witness who have previously testified. If the accused is informed of his right, he will decide if he wishes to proceed and the court shall record what he says. The succeeding magistrate herein did not inform the Appellants of their rights. He made no attempt to comply with the said provisions. Failure to comply with the provisions denies the magistrate the jurisdiction to handle the case, and whatever he does in breach, renders the proceedings a nullity.

We therefore find that there was no compliance with the law herein and we accordingly declare the proceedings a nullity. The conviction and sentence are hereby set aside. The appeal is therefore founded on null and void proceedings. As such the other grounds of appeal need not be evaluated.

Section 200 (4) is instructive. It provides that on first appeal the court may order a retrial. This will, however, depend on the circumstances of each case. In this case, the Appellants were arraigned in court on 19/2/2004 when plea was taken. They were convicted in June, 2006.

This appeal was lodged on 24/5/2007 and has been pending until 4/5/2010 when we heard it. The Appellants have been in custody for seven (7) years. It is our considered opinion that a retrial in this appeal will not serve the interests of justice. The state did not apply for a retrial. We declare that no retrial will be ordered herein. The Appellants are set at liberty forthwith unless otherwise lawfully held.

……. **…….**
D. A. ONYANCHA **F. N. MUCHEMI**
JUDGE **JUDGE**

Dated and delivered this 3rd day of June, 2010

in the presence of the Appellants and the state counsel Mr. Ogoti and Mr. Mukisu for Shitsama for the Appellants.