



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA  
Criminal Appeal 72 of 2005**

GEORGE WEKESA JUMA .....APPELLANT

VS

REPUBLIC ..... RESPONDENT

**(Arising from original BGM CM CR. NO.1808/2004)**

**JUDGMENT**

The Appellant George Wekesa Juma was charged and convicted by a Bungoma Court for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He was sentenced to the mandatory death sentence. As expected, he was aggrieved by both the conviction and sentence which led to lodging this appeal.

The appeal was filed by the Appellant in person and later Mr. Ocharo came on record and argued the appeal. The grounds in the petition are as follows:

- a) **That there was no positive identification.**
- b) **That the charge was actuated by malice.**
- c) **That the charge was not proved to the standards required.**
- d) **That the alibi defence was not sufficiently considered.**

As an additional ground, Mr. Ocharo argued that section 200 of the Criminal Procedure Code was not complied with.

The Senior Principal State Counsel, Mr. Ogoti did not oppose the appeal. He half-heartedly agreed that section 200 of the Criminal Procedure Code was not complied with by the two succeeding magistrates.

Section 200 (3) of the Criminal Procedure Code, requires that a succeeding magistrate in a part-heard criminal case explains to the accused his rights of recalling witnesses. Whatever the accused decides, must be recorded by the court. Mr. R. Odenyo SRM heard three witnesses and put the accused on his defence. The case was later taken over by S. Shitubi PM who heard the defence of the accused. It is not clear who wrote the judgment but it appears from the record that it was signed by Mr. K. Ngomo SPM who also sentenced the Appellant. Neither Mrs. Shitubi nor Mr. Ngomo complied with section 200 (3). Failure to comply with section 200 of the Criminal Procedure Code renders the proceedings null and void. We therefore declare the proceedings of the lower court a nullity. For this reason, we shall not make any finding on the grounds of appeal because they are based on null and void proceedings.

The issue which now arises is whether we shall order a retrial. The Appellant was arraigned in court on 24/9/2003 which is about seven (7) years ago. Although the judgment is not dated, it appears the Appellant was convicted in July 2005 or thereabout. He lodged his appeal on 13/7/2005, seven (7) years incarceration is not a short time. It is our considered opinion that ordering a retrial will be prejudicial to

the Appellant. A fresh case is likely to take time before it is disposed of. We note that the state, probably for the same reason did not apply for a retrial. It is our finding that a retrial order will not serve the interests of justice and we decline to make such an order.

The Appellant is hereby set at liberty unless otherwise lawfully held.

**D. A. ONYANCHA**

**JUDGE**

**F. N. MUCHEMI**

**JUDGE**

Dated, Delivered and Signed at Bungoma. This 2nd day of June 2010 in the presence of the Appellant and the state counsel Mr Ogoti.