



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

Criminal Appeal 150 & 151 of 2008

JOHN MWANGI NDETO..... APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

AND

CRIMINAL APPEAL CASE NO. 151 OF 2008

STANLEY MURUNDE WAITHAKA.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

*(Appeals arising from the original conviction and sentence in the
Principal Magistrate's Court at Murang'a Criminal Case No.1070 of 2007
dated 20th May 2008 by T. W. Murigi Senior Resident Magistrate)*

JUDGMENT

The appellants herein, **JOHN MWANGI NDETO** and **STANLEY MURUNDE WAITHAKA**, were jointly tried on a main charge and two alternative counts. The main count is in respect of the offence of robbery with violence contrary to *Section 296 (2)* of the Penal Code. The particulars of the offence are that on the 1st day of May 2007 at Gakindu village in Muranga District within Central Province, being armed with dangerous weapons namely rungu, jointly robbed JOSPHAT MACHARIA KABUE of a radio, make Sonny valued Ksh.300/= and immediately before the time of such robbery used actual violence to the said JOSPHAT MACHARIA KABUE. The alternative count is in respect of the offence of handling stolen goods contrary to *Section 322 (2)* of the Penal Code. The particulars of the offence are that on the 1st day of May 2007 at Matithi Village in Murang'a District within Central Province, otherwise than in the course of stealing dishonestly retained or received one radio make Sonny, knowing or having a reason to believe it to be stolen or unlawfully obtained goods. At the end of the trial, the trial magistrate convicted the Appellants for the offence of simple robbery under *Section 296 (1)* of the Penal Code and sentenced each to 15 years imprisonment. Being dissatisfied, the Appellants each filed an appeal which appeals were ordered consolidated at the instance of Mr. Orinda, learned Senior Principal State Counsel. On appeal, the Appellants each put forward a total of eight (8) grounds.

When the appeal came up for hearing, Miss Ngalyuka, learned State Counsel, conceded the appeal on the ground that the trial court did not comply with the terms of *Section 200* of the Criminal Procedure Code. We treated this concession as a preliminary point which if we

agreed with, there would be no need to go into the merits of the appeal. Miss Ngalyuka urged this Court to order for a retrial because the Appellants would not be prejudiced in any case.

We have carefully perused the recorded evidence and it is apparent that S. Ndambuki, learned Principal Magistrate, heard the evidence of the five (5) prosecution witnesses. T. W. Murigi, learned Senior Resident Magistrate, took over the case from S. Ndambuki and received the defence evidence. The record does not show that T. W. Murigi, complied with *Section 200* of the Criminal Procedure. It was incumbent upon the magistrate taking over the case to explain to the accused person the importance of the section. Where there is no explanation by the trial magistrate of the importance of *Section 200* Criminal Procedure Code, then the proceedings shall be deemed as null and void as the Court could have denied the appellant a fair trial. We think Miss Ngalyuka correctly conceded to the appeal on this ground. We are satisfied that the appeal should be allowed.

We have been urged to order for a retrial. The Appellants did not oppose this suggestion. We have carefully perused *Section 200 (4)* of the Criminal Procedure Code and that this High Court is empowered to order for a retrial so long as no prejudice will be suffered by the Appellants. There is evidence that the Appellants were arrested on 2nd May 2007 and taken to court on 10th May 2007. Their trial started on 14th June 2007 and concluded on 20th June 2008. The trial took about a year to conclude. We are convinced that the Appellants will not be prejudiced if they are ordered to undergo a fresh trial.

We think Miss Ngalyuka rightly conceded to this appeal. We allow the appeal by quashing the conviction and set aside the sentences. The Appellants should be held in custody but should be taken to court to undergo a retrial on priority basis.

Dated and delivered this 13th day January 2009.

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE

In the presence of the appellants and Mr. Makura, Learned State Counsel.

J. K. SERGON

JUDGE