



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

**Criminal Appeal 66 of 2009**

**SIMON CHENENJE MBAYI ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**J U D G E M E N T**

The appellant was charged and convicted of the offence of personating a public officer contrary to **section 105 (b)** of the Penal Code. He was sentenced to serve 12 months imprisonment. The particulars of the offence were that the accused and two other co-accused on the 12<sup>th</sup> day of July, 2008 at Sabatia Market, Ibokolo Sub-location, in Butere District within Western Province falsely presented themselves to be persons employed in the public service namely Kenya Revenue Authority and assumed to inspect new motor cycles at Sabatia market.

Mr. Khayumbi, counsel for the appellant, submitted that the charge was incurably defective and the same does not support the offence as stated in section 105 (B) of the Penal Code. Counsel further submitted that the motor cycles or their number plates were not produced in court. The badge of the purported KRA officers that was found at the scene bore the name of the co-accused – Aggrey Embayi Saitoti who pleaded guilty.

Counsel for the appellant further submitted that section 200 of the Criminal Procedure Code was not complied with and that the appellant was not accorded the opportunity to defend himself.

Mr. Karuri, learned State Counsel, did not oppose the appeal.

The lower court record shows that PW1, DAVID KIMETI BOEN, a Kenya Revenue Authority officer testified before B.O. Ochieng, Acting Senior Resident Magistrate on 4-11-2008. PWII and PWIII testified before G. O. Oyugi Resident Magistrate on 20-4-2009. The prosecution closed up its case on that date. The appellant was put on his defence and the matter was fixed for defence hearing on 29.4.2009. On 29-4-2009 the matter was adjourned to 20-5-09 when the appellant did not attend court early when the matter was mentioned and a warrant of arrest was issued. When the appellant appeared later on the same day with his counsel, submissions were made and the court fixed the case for judgement on 22/5/2009 and the appellant was remanded in custody until when judgement was delivered on 22-5-2009.

It is clear from the proceedings of the trial court that section 200 of the Criminal Procedure Act was not complied with. When Mr. G. O. Oyugi, Resident Magistrate, took over the matter he never explained section 200 of the Criminal Procedure Code to the appellant. Further, the appellant was not accorded his right to defend himself as provided by section 211 of the Criminal Procedure Code. The case was fixed for defence hearing for 29-4-2009. The record does not show whether the appellant later decided not to call witnesses.

The prosecution evidence in its entirety was too weak to sustain a conviction. PW1 testified that he works at the Kakamega Kenya Revenue Authority offices as a revenue officer. He went to Butere Police Station to identify the three accused persons who had claimed to be Kenya Revenue Authority officers and noted that none of them was an employee of Kenya Revenue Authority.

PW2, Inspector Alloyce Mboya went to the scene after receiving a call from a member of the public that some people were cheating members of the public to be officers from Kakamega Kenya Revenue Authority office. He went to the scene and arrested the three accused PWIII was Sergeant Maurice Amwayi who investigated the case.

The prosecution did not summon the civilians whose motor cycles were allegedly being inspected by the appellant and his co-accused. It is not established whether indeed the appellant had presented himself to be a Kenya Revenue Authority Officer. Evidence as to what exactly the appellant and the other two accused did was not given.

In view of the fact that section 200 of the Criminal Procedure Act was not complied with and that the appellant was not given the opportunity to defend himself while at the same time noting that the prosecution evidence did not prove the charge beyond reasonable doubt, I do find that this appeal has merit. There is no reason to order a retrial as that will not serve any purpose. This appeal is allowed and the appellant is set at liberty unless otherwise lawfully held.

*Dated, delivered and signed at Kakamega this 30<sup>th</sup> day of July, 2009*

**SAID J. CHITEMBWE**

**J U D G E**