



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

**AT MOMBASA**

**Criminal Appeal 332 of 2005**

**HAMISI NDEGWA ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

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**JUDGEMENT**

The Appellant one Hamisi Ndegwa had been charged before the Senior Resident Magistrate Voi Law Courts with the offence of Stealing contrary to Section 275 Penal Code. The prosecution called a total of four witnesses and at the close of the prosecution case the Appellant was put to his defence and gave a sworn defence. In his judgement dated 15/12/2006 the learned trial magistrate convicted the Appellant and sentenced him to serve a prison term of four (4) months. The Appellant being dissatisfied with this judgement filed this appeal against both his conviction and sentence. Mr. Achungo appeared in the High Court for the Appellant whilst Mr. Monda appeared for the State.

Mr. Monda in his oral submissions to the court did concede the appeal. Having perused the proceedings of the lower court I am inclined to agree. The trial commenced on 28/2/2006 before Mr. Muneeni Senior Resident Magistrate who proceeded to hear all four prosecution witnesses. On 24.5.2006 the learned trial magistrate ruled that the Appellant had a case to answer. The defence hearing was postponed to 20.6.2006. On that day the Appellant appeared before J.M. Gandani Senior Resident Magistrate who noted at page 17:-

*“Court – Trial court on transfer. No replacement yet”*

Then on 29/8/2006 once again before J.M. Gandani (S.R.M.) the proceedings read as follows:-

*“Mwinzi (Counsel for Accused)*

*This is a criminal defence hearing. It was heard by Madam Mwangi until close of case. We are ready to proceed*

*Prosecutor – I have no objection*

*Court – Matter to proceed from where it stopped”*

The Appellant was then sworn and proceeded to give his defence. There is absolutely nothing wrong

with one magistrate taking over a hearing from another but there is a procedure clearly spelt out in S. 200(3) Criminal Procedure Code to be followed. This procedure was not followed at all in this case. S. 200(3) Criminal Procedure Code provides that:-

*“(3) 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”.*

The learned trial magistrate failed to inform the accused of his right to recall any of the prosecution witnesses in compliance with S. 200(3). Instead she simply proceeded to hear the Appellant’s defence. This in my view is a fatal omission by the trial magistrate which omission denied the accused his rights to a fair trial. On this ground alone his appeal succeeds. I therefore allow this appeal and hereby quash the Appellant’s Conviction. The resultant sentence is also set aside.

Dated and delivered at Mombasa this 29<sup>th</sup> day of September 2009.

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Mr. Ondari for Respondent State

Mr. Achungo holding brief for Appellant

**M. ODERO**

**JUDGE**

**29/9/2009**