

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Criminal Appeal 142 of 2006

ANDREW CHAROAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

We have seen the petition of appeal as well as the appellant's written submissions. We have also read carefully the trial proceedings, and taken note of the record of evidence.

Our view is confirmed by the submissions made by learned counsel, Mr. Ondari, who concedes this appeal.

It is clear that after change of presiding Magistrates, there was no compliance with the mandatory terms of S.200 Criminal Procedure Code, which requires that the accused be given a chance to recall witnesses.

Of more gravity is that there was an order made twice that the trial starts *de novo*. When the matter resumed on 11.05.06, the prosecution purportedly closed their case after adjournment was refused. The trial magistrate ought to have acquitted the accused at this point under S.202 Criminal Procedure Code. However, the trial court proceeded to put the accused on his defence. The accused was not called upon to submit on no case to answer. He was just placed on his defence. He gave an unsworn statement. Judgment was delivered in which he was convicted and sentenced.

It is clear that the conviction was based on evidence of the two witnesses whose proceedings had been set aside or abandoned. The two witnesses had to return to testify. They did not; and the prosecution was in effect closed their case without offering any evidence. To proceed on the basis of the earlier trial was a fatal misdirection and the entire proceeding was a nullity.

Secondly and more importantly, the trial court had no doubts as we also don't - that no linkages between the accused and the offence had been brought out. So, as a matter of law there was no basis for the conviction. We hold that the Learned Magistrate, in entering a conviction had misdirected himself.

Accordingly, we allow the appeal, set aside the conviction and sentence, and order that the appellant shall forthwith be set at liberty unless otherwise lawfully held.

Orders accordingly.

DELIVERED, DATED and SIGNED at Mombasa this 17th day of November 2009.

M. K. IBRAHIM

J. B. OJWANG

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