



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 348 of 2007**

**GEORGE MUTAHI MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal from the original conviction and sentence in the Senior Resident Magistrate's  
Court Mukurweini in Criminal Case No.647 of 2005 dated 9th October 2006 V. W.**

**Ndururu, Resident Magistrate)**

**JUDGMENT**

The Appellant herein, **GEORGE MUTAHI MWANGI** was tried on a charge of four counts. On the first count, the Appellant faced a charge of robbery contrary to *Section 296 (1)* of the Penal Code. In the second count he faced a charge of being in possession of bhang contrary to *Section 3 (2)* of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994. On the third count the Appellant was accused of assaulting a Police Officer contrary to *Section 253 (1)* of the Penal Code. In the last count the Appellant faced a charge of malicious damage to property contrary to *Section 339 (1)* of the Penal Code. After undergoing a trial, the Appellant was acquitted in count II but was convicted in counts I, III and IV. He was sentenced to serve nine (9) years imprisonment in count I. He was ordered to pay a fine of Ksh.5,000/= and Ksh.3,000/= in counts III and IV respectively. The Appellant was dissatisfied hence this appeal.

On appeal the Appellant put forward six (6) grounds in his Petition. He was of the view that the trial magistrate relied on the evidence of a single identifying witness without warning himself. The Appellant further complained that the evidence tendered did not prove the offences he was convicted of. The facts leading to this appeal are that on 11<sup>th</sup> October 2005 at about 7.00 p.m. John Murimi (P. W. 1) was walking back home having arrived at Karatina where he had gone to purchase some paint. On the way P. W. 1 met with the Appellant who was his village mate. The duo exchanged greetings as they passed each other. It is said after walking for some 50 metres, the Appellant came from behind and attempted to strangle P. W. 1. P.W. 1 said he heard the Appellant shout 'piga ngeta'. P. W. 1 fell down where upon the Appellant was joined by his accomplices to cover the complainant's mouth. In the ensuing struggle, the complainant lost an Erickson mobile valued at Ksh.5,500/=. The Appellant and his gang fled the scene when Mary Wamuyu (P. W. 6) raised alarm. P. W. 1 booked a report with P. C. Lameck Njeru (P. W. 7) who sought for the assistance of the area assistant chief, Joseph Maina (P. W. 5). The Appellant's house was raided. The Appellant refused to open but the Police broke the door. The Appellant picked a sword where upon he attempted to cut A.P.C. John Mai (P. W. 2). In the process, P. W. 2 was injured on the head. The Appellant's house was searched whereupon 65 rolls of bhang were recovered. The Appellant gave an unsworn statement in his defence. He said the area assistant chief and the Police broke into his house where they recovered 65 rolls of bhang. He said he did not commit the offence.

When the appeal came up for hearing Miss Ngalyuka, learned State Counsel, conceded the appeal on the basis that the magistrate who took over the case did not comply with the provisions of *Section 200* of the Criminal Procedure Code. I have perused the record of appeal and it is apparent that the evidence of P.W. 1 were presented before R. B. Mecha learned Resident Magistrate. There is no mention as to what happened to R. B. Mecha so that on 19<sup>th</sup> June 2006 V. W. Ndururu, learned Resident Magistrate took over the hearing of the case until the end. The Magistrate who took over the case did not comply with the provisions of *Section 200* of the Criminal Procedure Code. The Court of Appeal in the case of **MIGOT =VS= REPUBLIC [1991] K.L.R. 594** held that non-compliance with *Section 200* of the Criminal Procedure Code will render the entire proceedings and judgment fatal. Miss Ngalyuka did not wish to ask for a retrial because she felt it would be prejudicial to the Appellant in that he has served substantial part of the sentence. The record shows that the Appellant was sentenced to nine (9) years imprisonment on 9<sup>th</sup> October 2006. So far he has served about four (4) years. Assuming that so far the Appellant has earned his 1/3 remission, it means he only has three years to serve. I agree with Miss Ngalyuka that it will be unfair for the Appellant to undergo another trial.

**In the end the appeal is allowed. The conviction is quashed and the sentence set aside. The Appellant is hereby set free forthwith unless lawfully held.**

***Dated and delivered this 13<sup>th</sup> day of November 2009.***

**J. K. SERGON**

**JUDGE**