REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 289 of 2006

JOSEPH KINYANJU Alias KAMAU…….... APPELLANT

V E R S U S

REPUBLIC …… RESPONDENT

(CORAM: OJWANG, DULU JJ.)

(From the original decision in Criminal case No. 8554 of 2003 in the Chief Magistrate's Court at Kibera – Ms. Wasilwa PM).

J U D G M E N T

JOSEPH KINYANJUI alias **KAMAU**, the appellant, was charged before the subordinate court, jointly with two others, with 5 counts of robbery with violence. The particulars of count 1 were that on 12th November, 2003 at Ongata Rongai Township in Kajiado District within Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pistols, pangas and rungus robbed **LAMECH MOKUA MOMANYI** cash Kshs.15,000, five mobile phones valued at Kshs.25,000/-, piercing machine valued at Kshs.7000/- all valued at Kshs.47,000/-, and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said **LAMECH MOKUA MOMANYI.** The particulars of count 2 were that on 17th November, 2003 at Ongata Rongai Township in Kajiado District within Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pistols and pangas, robbed **JOEL KIPLAGAT SAWE** of T.V. set make JVC coloured 14 inch, cash 12,000/- all valued at Kshs.24,000/- and at or immediately before or after the time of such robbery threatened to use actual violence to the said **JOEL KIPLAGAT SAWE**. The particulars of count 3 were that on 17th November, 2003 at Ongata Rongai Township in Kajiado District within Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely pistols and pangas robbed **SIMON KARANJA MWAURA** of Kshs.2,500/-, ATM card for Standard Chartered Bank, ID card, all valued at Kshs.5000/- and at or immediately before or immediately after the time of such robbery wounded the said **SIMON KARANJA MWAURA**. The particulars of count 4 were that on 17th November, 2003 at Ongata Rongai Township in Kajiado District within Rift Valley Province jointly with others not before court while armed with dangerous weapons namely pistols and pangas robbed **DAVID MATITI MUKITI** of cash Kshs.1,400/- ID card, wallet and wrist watch all valued at Kshs.3000/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said **DAVID MATITI MUKITI**. The particulars of count 5, on the other hand, were that on 17th November, 2003 at Ongata Rongai Township in Kajiado District within Rift Valley Province jointly with others not before court while armed with dangerous weapons namely pistols and pangas robbed **ALLOYS MASILI MESENGULA** of a torch valued at

Kshs.200/- and at or immediately before or immediately after the time of such robbery wounded the said **ALLOYS MASILA MESENGULA**.

After a full trial, his two co-accused were acquitted on all the offences. The appellant was however found guilty of count 1, and was acquitted on the other counts. He was therefore convicted on count 1 and sentenced to death by hanging. Being aggrieved by the decision of the trial court, the appellant has appealed to this court against both the conviction and sentence.

At the hearing of the appeal, the appellant submitted that it was alleged that P.W.1 was attacked by 6 people. The appellant emphasized that the amount of money, alleged in the charge sheet to have been stolen, was different from that in the evidence of P.W.1. The appellant also submitted that, though there was an allegation of robbery of 5 mobile phones, P.W.1 stated in evidence that only one mobile phone was stolen. Even the investigating officer, P.W.5, stated that the money stolen was Kshs.6000/-, not Kshs.12,000/- as alleged. The appellant stated that the charge sheet should have been amended.

The appellant further submitted that he was arrested because of a disagreement with his wife. Therefore, the case was fabricated. The appellant also submitted that there was no adequate light for his identification. He submitted that his conviction was based on dock identification. The appellant, in addition, submitted that the identification parade was irregular, as the participants were hooded. The appellant also submitted that the last magistrate who handled the case, Ms Wasilwa, did not warn the accused persons of their rights to recall witnesses.

The learned State Counsel, Mrs Gakobo, conceded to the appeal on the grounds that, Ms Wasilwa, the magistrate who took over the case from Ms Makura, did not comply with section 200 (3) of the Criminal Procedure Code (Cap 75). Counsel asked for a retrial.

We have considered the appeal.

The learned State Counsel has conceded to the appeal on the ground that the succeeding magistrate, Ms. Wasilwa, did not inform the appellants of their rights under Section 200 (3) of the Criminal Procedure Code (***Cap. 75)***. We observe that on 3/1/2006 the accused persons were informed that the trial magistrate was not available. They are recorded as stating-

*"**I pray file does not start afresh."***

Then the court went on to record that the case would be heard on 8/3/2006 in court 5. The court also directed that the hearing would proceed where court stopped.

This particular case, before the subordinate court, had been heard by two previous magistrates. It was when the third magistrate Ms Wasilwa, came that the accused were recorded as having said that they did not want ***de novo*** hearing, because it had started de-novo 3 times already. However, even if the accused had stated that they did not want to have another ***de-novo*** hearing, the law requires that the succeeding magistrate complies with Section 200 (3) of the Criminal Procedure Code (Cap. 75) which provides.

*"**200(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 above provisions of the law are mandatory and have to be complied with. Failure to comply with same, denies the accused an opportunity to decide whether to recall any witness. The fact that an accused person states that he does not wish to have a **de-novo** trial, does not mean that he cannot ask that any particular witness be recalled. The succeeding magistrate should therefore have explained the provisions of Section 200 (3) to the accused persons. She failed to do so. The error by the learned magistrate rendered the whole trial a nullity. The conviction cannot therefore stand. We agree with the learned State Counsel.

Learned State Counsel has asked us to order a retrial. In our view, the evidence on record falls far short of proving that the appellant committed count 1, on which he was convicted. The case was heard **de-novo** three times. The evidence of the complainant P.W.1 was shaky. The incident occurred at night and the robbers were about 6. There were also about 5 customers in the chemist shop. Though P.W.1 claims there was florescent light in the shop, there is no description of the scene, no description of the brightness of the light, and no description as to where it was placed. There is no description of the period of time that P.W.1 observed the appellant to identify him. In addition, the appellant was not arrested because of a description given by the witness P.W.1. Though P.W.6, Inspector **MOSES MAINGI** the identification parade officer, stated that the members of the parade were not hooded, P.W.1, the identifying witness, clearly stated that the members of the parade had covered their heads with T- shirts. The identification parade cannot be relied upon, as no explanation was given for covering the heads of members of the parade with T-shirts. In our view, the evidence of identification by the single identifying witness, P.W.1 leaves a lot to be desired. It is dock identification. It cannot sustain a conviction. Therefore, there is no justification for ordering a retrial. Such an order will not be in the interests of justice, and will cause prejudice on the appellant by retrying him for no purpose.

Consequently, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be set at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi, this 15th day of May, 2008.

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J.B. OJWANG G.A. DULU

JUDGE JUDGE

In the presence of-

Appellant in person Ms. Gakobo for State

Huka/Mwangi Court Clerk.