



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT KISUMU**  
**Criminal Appeal 89 of 2007**

**SIMON AKONGO..... 1<sup>st</sup> APPELLANT**

**ALBERT KABOLA ISAAC ..... 2<sup>nd</sup> APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence in Criminal Case number 818 of  
2006 of the Principal Magistrate's Court at Maseno)*

**CORAM**

**Mwera, Karanja J. J.**

**Musau for State**

**Court Clerk – Raymond/Laban**

**Appellants in person**

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**JUDGMENT**

Simon Akongo, the first appellant, and Albert Kabola Isaac, the second appellant, appeared before the Senior Resident Magistrate at Maseno charged together with others with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, in that on the night of 21<sup>st</sup> / 22<sup>nd</sup> June 2006, at Mundichiri village North Bunyore location Vihiga District Western Province, jointly with others not before court while armed with offensive weapons, namely pangas, metal bars, sharp torches and axes robbed Obuyubi Omuhande of a radio cassette make Karaoke valued at Kshs. 4,500/=, a chicken, cash Kshs. 12,050/= and assorted shop goods all valued at Kshs. 48,140/= the property of

Mike Mwenje Bernard and at or immediately before or immediately after the time of such robbery murdered the said Obuyubi Omuhande.

In the alternative, the appellants were separately charged with handling stolen property contrary to Section 322(2) of the Penal Code, in that on the 22<sup>nd</sup> June 2006 at Kiwasi village District Western province, otherwise than in the course of stealing, the first appellant dishonestly handled or retained assorted shop goods knowing or having reasons to believe them to be stolen goods and that on the 22<sup>nd</sup> June 2006 at Eburnabo village Vihiga District Western Province, otherwise than in the course of stealing, the second appellant dishonestly handled or retained assorted shop goods knowing or having reasons to believe them to be stolen goods.

These alternative counts were defective and amounted to duplicity in terms of the decision in the case of **Selimia Mbeu Owuor & Another =vs= Republic NRB C/APP NO. 68 OF 1999 (unreported)**.

Nonetheless, the appellants were tried and convicted for the offence of robbery with violence and sentenced to death. Their co-accuseds had earlier been acquitted under Section 210 of the Criminal Procedure Code.

Being dissatisfied with the conviction and sentence, the appellants filed separate appeals on the basis of the grounds set out in their respective petitions of appeal.

The appeals were consolidated and heard together.

The appellants appeared before us in person and presented written submissions to augment their respective grounds of appeal.

The State was represented by the learned Senior Principal State Counsel, Mr. Musau, who raised a preliminary issue grounded on the provisions of Section 200 of the Criminal Procedure Code. He contended that the said provision was not complied with by the learned Senior Resident Magistrate, Mr. Nangea when he took over the case from the learned Ag. Principal Magistrate (as she then was), M/S A. C. Onginjo. The learned State Counsel therefore conceded the appeal and requested for a re-trial.

On the basis of the request for a re-trial, we deem it appropriate to consider and rule on the preliminary issue without necessarily going into the merits and/or demerits of the judgment of the lower court which ended up with the conviction and sentence being challenged by these appeals.

Our findings respecting Section 200 of the Criminal Procedure Code would dispose of the appeals without much ado.

A perusal of the lower court record shows that the trial commenced before the then acting Principal Magistrate upto the end of the case for the prosecution on the 24<sup>th</sup> January 2007. The learned Magistrate then placed the appellants on their defence on the 7<sup>th</sup> February 2007. Defence hearing commenced on 9<sup>th</sup> March 2007 before the Senior Resident Magistrate, Mr. Nangea. He complied with Section 211 of the Criminal Procedure Code without first and foremost complying with Section 200 (3) of the Criminal Procedure Code which provides:-

“ 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 re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right”.

We would herein echo the observation by the Court of Appeal in the case of **CYRUS M. KAMAU & ANOTHER =vs= REPUBLIC CR. APP NO. 87/88 OF 2006 AT NYERI (unreported)** where it stated regarding Section 200(3) Criminal Procedure Code that:-

“This section is clearly meant to protect the rights of an accused person and the duty to see that the rights is protected is placed on the trial magistrate and the burden to inform an accused of the right to have the previous witnesses re-summoned and re-heard is placed on the magistrate in mandatory terms. Pronouncing itself on that section, this court differently constituted..... had this to say:-

“ No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration”. See Ndegwa =vs= Republic [1985] KLR 534 at page 537 paragraph 15.

**The language used in the passage is flamboyant, but with respect, it summarizes well the purposes of Section 200 (3) of the Criminal Procedure Code”.**

We need not say more, the failure by Mr. Nangea to inform the appellants of their rights under Section 200 (3) of the Criminal Procedure Code was fatal and rendered the entire trial null and void. To that extent, we must allow the two appeals and order that the appellants be re-tried before any magistrate with competent jurisdiction other than M/S A. C. Onginjo or Mr. J. M. Nangea.

We are aware that an order for re-trial should only be made where the interest of justice require it and should not be ordered where it is likely to cause injustice to the accused person (**See Fatehali Manji =vs= Republic [1966] (EA 343).**)

We are also aware that a re-trial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the evidence, a conviction might result (**see Mwangi =vs= Republic [1983] EA 522).**)

The conviction of the appellants by the lower court is quashed and the resulting sentence set aside. They shall be held in custody pending a re-trial of the case.

Dated, signed and delivered at Kisumu this 30<sup>th</sup> day of July 2008.

**J. W. MWERA**

**J. R. KARANJA**

**JUDGE**

**JUDGE**

**JRK/aao**