



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Criminal Appeal 101 of 2007**

**JAMES MWITI MATE.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's Court at Karatina in Criminal Case No.991 of 2005 by P.C. TOROREY – Ag.P.M.)***

**J U D G M E N T**

The appellant, James Mwiti Mate was charged before the Senior Resident Magistrate's Court, at Karatina with the offence of shop breaking and committing a felony contrary to *section 306 (a)* of the Penal code and on count II of having or conveying suspected stolen property contrary to *section 323* of the Penal Code. Following a full trial the appellant was convicted and sentenced to four years imprisonment in respect of count one and one year imprisonment with regard to the second count. That conviction and sentence triggered this appeal.

The prosecution case was informed by the following facts. On 14<sup>th</sup> October, 2005 an electronics shop belonging to PW1 in Karatina town was broken into and several items listed in the charge sheet stolen. PW1's employee, PW2 discovered this on 15/10/05 when he went to open the shop in the morning. He informed the wife of PW1 who in turn called her husband PW1 who at the time was in Athi River Township. PW2 proceeded to report the incident to the police station. On 14/10/05 PW3 and 4 both watchmen in Karatina town had been approached by a person who wanted to be assisted to ferry some luggage that he had left behind Starbucks and Ibis hotels. They agreed and he went ahead with PW3 as PW4 was to follow later. That when they got to the location, they noticed a police land cruiser and that person ran away. The police officers in land cruiser recovered 2 luggages at the said location which contained the items in the charge sheet. Apparently PW3 recognized that person as he used to see him pass by his place of work regularly. PW3 and PW4 were however, arrested and gave information which led to the arrest of the said person. That person is the appellant.

In defence, the appellant gave unsworn statement and called no witness. The defence was to the effect that on the material night, he left work, went home and the following morning, on 16/10/05 police officers came to his house and did a search and recovered 2 cameras and he was taken to police station and charged. The appellant alleged that he had nothing to do with the offences that he was charged with.

Having carefully evaluated and considered the evidence, the learned Magistrate found the case against the appellant proved and proceeded to convict and sentence him as previously stated.

When the appeal came up for hearing, Ms Ngalyuka, learned state counsel conceded to the appeal on the grounds that the evidence of identification was doubtful and suspect. That there was no prove that the appellant was found in possession of the stolen items. That PW3 and 4 conceded that they never knew the appellant before, yet no identification parade was conducted. Those two witnesses were also arrested with the appellant and were released under suspicious circumstances.

The appellant was not averse to the position taken by the state counsel. Infact he welcomed it. Having carefully perused the record of the proceedings of the lower court, it is clear to me that this appeal must succeed. However it will not succeed on the grounds advanced by the learned state counsel but on the ground that section 200 of the Criminal Procedure Code.

The record shows that the trial of the appellant commenced on 25<sup>th</sup> May, 2006 before P.C. Tororey, SRM. She presided over the evidence of PW1 and PW2. Thereafter in unclear and unexplained circumstances, the case was on 18<sup>th</sup> September, 2006 taken over by Miss Kimemia BM, R.M who proceeded to hear the remaining prosecution witnesses, the defence, respective submissions wrote and delivered the judgment. However in taking over the case from her predecessor, the incoming trial Magistrate (Miss Kimemia, RM) failed to comply with the mandatory provisions of *section 200 (3)* of the Criminal Procedure Code.

From the record it is doubtful whether she was even aware of these provisions of the Law. It has been held severally that failure by the incoming Magistrate to invoke and comply with the aforesaid provisions of the law renders the trial a nullity. See KARIUKI VR (1985) KLR 504.

That being the case, my task has been made much easier. Accordingly, the appeal is allowed, the conviction and sentence imposed set aside.

How about retrial? It as been held that before an appellate court can order a retrial, it must be satisfied that the evidence on record if re-tendered at the retrial, a conviction is most likely to result. The evidence tendered in this case does not give me that comfort. As correctly pointed out by the learned state counsel, the appellant may very well have been found in possession of items stolen from the complainant according to the evidence of PW3 and 4. However, these witnesses who led to the arrest of the appellant never knew him before hand. The offence was committed at night and the appellant allegedly approached these witnesses to assist him carry some luggage. However before he could point out to them where the luggage was, he suddenly ran away on seeing the police. From the foregoing it is difficult to tell whether the items subsequently recovered by the police at some location in Karatina town were the same items that the appellant had wanted these witnesses assist him to ferry. Since the witnesses did not know the appellant and they were approached at night, it was imperative that a proper police identification parade be conducted. It was not and therefore the identification and or recognition of the appellant cannot be said to be free from possibility of error. It was suspect. The evidence of PW1 was all hearsay as the incident occurred in his absence just like the evidence of PW2. The evidence of PW3 and PW4 in their case was all but suspicion. As per their evidence the appellant never pointed out to either of them the goods that they were to carry. Their evidence that the appellant disappeared lacks corroboration as they met police officers immediately and talked to them at that material time but they never told them of disappearance of anybody. Indeed they told the police that they are looking for somebody.

In the event the evidence of PW5 and PW6 supports the appellants defence. Again it should be noted that the two cameras allegedly recovered from appellant's home were not in the charge sheet and nobody claimed their ownership.

Bearing all the foregoing in mind, I am satisfied that it will be futile to order a retrial in the circumstances of this case. Accordingly, I decline to do so with the consequence that the appellant shall forthwith be set at liberty unless otherwise lawfully held.

***Dated and delivered at Nyeri this 29<sup>th</sup> day of September, 2008.***

**M.S.A. MAKHANDIA**

**JUDGE**