



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI**

**Criminal Appeal 166 of 2007**

**DAVID MWORIA KINYUA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from original Conviction and Sentence of the Senior Principal Magistrate's Court at Nanyuki  
in Criminal Case No. 1909 of 2006 dated 30<sup>th</sup> May 2007 by Ndungu H. N. (Miss) – Ag. SPM)***

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

The Appellant, **David Mworio Kinyua** (to whom we shall refer to as the Appellant in this judgment) was charged in the subordinate court alongside one, **Joshua Mwiti** with one count of Robbery with violence contrary to section 296(2) of the Penal Code. He pleaded not guilty to the charges and the case proceeded to hearing initially before **Mr. E. G. Mbaya**, Senior Resident Magistrate and later on, it was taken over by **Miss Ndungu**, Ag. Senior Principal Magistrate. At the end of the trial, the Appellant was found guilty as charged convicted and sentenced to death as required by law. The Appellant was dissatisfied with the said conviction and sentence and hence lodged this appeal.

When the Appeal came up for hearing before us on 23<sup>rd</sup> July 2008 **Mr. Orinda**, learned Principal State Counsel conceded to the Appeal on two grounds; that Section 200 of the Criminal Procedure Code was not complied with during the trial and secondly, the complainant, PW1 was not sworn before he testified. Counsel submitted that the case was first heard by **E. G. Mbaya**, SRM before subsequently being taken over by **Miss Ndungu** Ag. Senior Principal Magistrate. The latter magistrate failed to comply with the mandatory provisions of Section 200 of the Criminal Procedure Code. Two, on 18<sup>th</sup> December 2006, when PW1 testified, the record does not show that he was sworn before being allowed to testify. All that is indicated in the proceedings on that occasion is “*PW1 – male Adult Christian states in Kiswahili.*” The proceedings were thus a nullity and learned state counsel urged us to so find.

As to whether there should be a retrial in the circumstances of the case, the learned state counsel indicated that the state was not seeking a retrial. That the evidence on record was scanty and full of contradictions that are not easily reconcilable. From the evidence this was not a robbery but a fight over a debt. In the circumstances if an order of retrial was to be made, there was no likelihood that a conviction may not be secured.

The Appellant for obvious reasons welcomed the state's gesture. Nonetheless he tendered written submissions in support of his appeal which we have carefully read and considered.

We have anxiously considered this appeal. The record shows that the case was first heard by **Mr. E. G.**

**Mbaya** who took the evidence of PW1 and PW2. Thereafter the case was taken over by **Miss Ndungu** who heard the evidence of PW3, PW4 made a ruling on no case to answer, presided over the defence and wrote the judgment.

Section 200 (3) of the Criminal Procedure provides in mandatory terms that:-

**“.... 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 reheard and the succeeding magistrate shall inform the accused person of that right .....**”

From the foregoing it is apparent that a duty is imposed on the succeeding magistrate to inform the accused person of his rights. In the instant case, much as there is indication that the succeeding magistrate when taking over the case from the previous magistrate had in mind this provisions of law, she never properly invoked them merely said **“caution under section 200 CPC given.”** This was insufficient and irregular. The court as required to explain to the accused and in detail those provisions of the law so that he may make an election. That explanation must be reflected in the court record. In the case of **Raphael v/s Republic (1969) E.A. 544.**

**“..... It is a prerequisite to the 2<sup>nd</sup> magistrate’s exercising jurisdiction that he should appraise the accused of his right to demand that witnesses or any of them be re-summoned and reheard .... if the second magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction and that trial is a nullity .....**”

Similarly in the case of **Kariuki v/s Republic (1985) KLR 504** it was held:-

**“..... The appellant having a right to re-summon and rehear the witnesses, of which right he was not informed, though a duty was imposed on the succeeding magistrate to inform the appellant of such right, we think that the assumption of jurisdiction by the said succeeding magistrate without informing the appellant of his right, was clearly wrong and the trial by the succeeding magistrate was a nullity .....**”

This is what happened in the instant case as well. Indeed all these authorities are on all fours in the circumstances obtaining in the instant case. Accordingly we hold and determine that the assumption of jurisdiction by **Miss Ndungu** without alerting the appellant of his rights under section 200 (3) of the Criminal Procedure Code was illegal and rendered the proceedings a nullity. The learned state counsel was therefore right in conceding to the appeal on this ground. The result we have reached is that the conviction recorded against the appellant in those circumstances must be and is hereby quashed and sentence set aside. This is sufficient to dispose off this appeal and we need not consider the other issue raised by the learned principal state counsel.

The trial in the subordinate court having been declared a nullity on the aforesaid ground, the proper course would be to order a retrial. However a retrial can only be ordered where the interest of justice requires it, where it will not occasion injustice or prejudice to the appellant and where the court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result. At the end of the day however each case must depend on its own particular facts and circumstances. See generally **Pascal Clement Braganza v/s Republic (1957) E.A. 145, Sumar v/s Republic (1964) E.A. 481, Manji v/s Republic (1960) E.A. 343 and Mwangi v/s Republic (1983) KLR 522.**

Having considered principles applicable when considering the issue of retrial we are satisfied that this is not a proper case for an order of retrial. As correctly submitted by the learned principal state counsel, the evidence tendered during the trial particularly that of PW1, PW2 and PW3 was so scanty that any reasonable tribunal directing itself to the facts and the law would not have returned a guilty verdict. Clearly this was a fight over unpaid debt owed to the appellant by the complainant’s brother. It appears that the appellant had been employed by the complainant’s brother at a site where he was constructing a

house. There was a fallout between the two and the appellant was chased from the construction site without being paid his accrued dues. When he came to demand the same and was not given, in self-help style he took the items particularised in the charge sheet as having been stolen from the complainant. That cannot be robbery with violence.

In our view, having carefully considered various aspects of this case, the evidence tendered and the period that the appellant has been incarcerated we do not think that it will be in the interest of justice to order a retrial. We decline to do so with the consequence that the appellant shall forthwith be set free unless otherwise lawfully held.

*Dated and delivered at Nyeri this 21<sup>st</sup> day of October 2008*

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**