REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 505 of 2006

HASSAN ABDALA IBRAHIM.....….....APPELLANT

-AND-

REPUBLIC…….…….
…….RESPONDENT

(An appeal from the Judgement of Principal Magistrate

Mr. J.G. Kingori dated 12th May, 2005 in Criminal Case No.1099 of 2004 at Garissa Law Courts)

JUDGEMENT

The appellant was charged with robbery contrary to s.296(1) of the Penal Code (Cap.63, Laws of Kenya); and the particulars were that he, together with another person not before the Court, on 24th November, 2004 at about 6.30 pm at Garissa Town within North Eastern Province, robbed *Fredrick Kuronya Aburuki* of Kshs.4,000/= and at, or immediately before, or immediately after the time of such robbery, threatened to use actual violence against the said *Fredrick Kuronya Aburuki.*

From the details of the charge, it is curious immediately, what would have been the basis for bringing the charge under s.296(1) and not s. 296(2) of the Act which provides for capital robbery. This point comes through in the submission of learned counsel *Mrs. Gakobo: "The appellant was lucky, for the offence disclosed was robbery with violence; but the charge was brought under s.296(1) of the Penal Code"*.

The learned Magistrate's finding is thus set out:

"At the time of stealing the complainant's money the accused and [his companion] splashed water on him, grabbed him and threatened him with violence forcing him to fail to raise alarm. I have absolutely no doubt that this amounted to simple robbery."

Clearly, the learned Magistrate's finding is *mistaken in law*; and he makes this finding against the background of an irregularity in the charge-sheet; the Magistrate ought to have drawn to the attention of the prosecution to this fundamental irregularity, in good time, so an amendment to the charge-sheet could have been effected.

As it is, the appellant who was, by the defaults of the prosecution and the trial Court, sentenced to a *five-year term of imprisonment*, now comes on appeal, seeking the setting aside of that sentence. But this Court's appellate hearings are not conducted as a formality; this Court considers *all the evidence*, as well as the *applicable law;* and this Court will not donate the impress of legality to an irregular trial, or to a sentence that does not emanate from the law.

The facts, as they emerge in the proceedings, show that *no valid trial* could have been conducted on the basis of s.296 (1) of the Penal Code. An irregular trial had been conducted, and this Court must vacate

it. This, in my opinion, will not prejudice the appellant, since, had he been found guilty under s.296(2) of the Penal Code, the applicable penalty would have been the death penalty.

I hereby *vacate* the trial which took place before the trial Court. This matter shall be remitted to the office of the Attorney-General, to take an appropriate decision by virtue of s.26 of the Constitution of Kenya, regarding the proper charge to be brought against the appellant herein. If the Attorney-General shall decide to prosecute the appellant according to law, he shall proceed without delay, and the matter shall be heard before a Magistrate other than the one who heard it in the first place. If the Attorney-General decides not to prosecute, then this matter shall be listed for *mention* before the High Court, for the purpose of discharging the appellant herein. In the meantime, the appellant shall remain in prison custody.

Orders accordingly.

DATED and DELIVERED at Nairobi this 13th day of October, 2008.

J. B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Huka

For the Respondent: Mrs. Gakobo

Appellant in person