

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 53 of 2006

BEN KIPLIMO TANUI:.....APPLICANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGEMENT

The Appellant BEN KIPLIMO TANUI had been jointly charged with ROBERT TANOE NKANAE with offence of robbery with violence contrary to S. 296 (2) of the Penal Code in that on 4th day of March 2001 at Jua Kali area along Eldoret Uganda road in Uasin Gishu district while armed with dangerous weapons namely simis and knives jointly robbed SERUNJOGI ABUBAKAR ALI of a motor vehicle **Reg. No. CCD – 00413** a Nissan Datsun Pick/up loaded with assorted motor vehicle parts and immediately before or immediately after the said robbery killed the said **SERUNJOGI ABUBAKAR ALI**. The appellant was the second accused and **ROBERT TANAKE** the first. During the trial Robert the first accused escaped and is still at large. Appellant was prosecuted alone thereafter and he was convicted and sentenced to death. Being dissatisfied by the conviction and sentence she preferred this appeal.

On the onset of the hearing of the appeal Mr. Omutelema conceded to the appeal on the grounds that the hearing was heard by two different magistrates. the one who succeeded the first did not comply with S.200 C.P.C. Secondly, he told court that accused had asked for recalling of three witnesses. The court allowed his application but the witnesses were never recalled. This infringed on his right. He therefore conceded to the appeal on those two grounds but prayed for a retrial. Mr. Kariuki for the appellant did not object for a retrial.

We have considered the appeal and gone through the proceedings. It is clear that the hearing was started by Mr. Wamwayi then a chief magistrate. Later hearing was taken over by Ms Muchemi another chief magistrate. Record does not show that she complied with provisions of S. 2003 C.P.C. Those provisions requires the succeeding magistrate to inform the accused his rights to chose for the court to either proceed from where the hearing had reached or have the case start afresh or recall some witnesses. This was not done. These provisions are mandatory and non-compliance with them is fatal to the case.

Also it is the accused's right to recall any witnesses. Appellant applied to recall three but they were never recalled. No reasons was given why they were not recalled. This infringed on the appellants rights.

For the above reasons we therefore allow the appeal quash the conviction and set aside the death sentence imposed. As for retrial the state counsel has told court that prosecution witnesses will be available. Mr. Kariuki did not object. We therefore order that the accused be retried by any other magistrate of competent jurisdiction in Eldoret. Hearing be on a priority basis.

Dated and Delivered at Eldoret this 31st day of May, 2007.

M.K.IBRAHIM

JUDGE

KABURU BAUNI

JUDGE