



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal No. 285 of 2004

BERNARD MUCHENDU NDIRANGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT OF THE COURT

The appellant was charged with robbery with violence contrary to Section 296(2) of the Criminal Procedure Code.

The particulars of the offence were that on the 29th January, 2003 the appellant, jointly with others not before court, while armed with a knife, robbed Boniface Nyakinga Nyaranji, a mobile phone make Motorola valued at Kshs.4500/- and cash Kshs.6000/- and at or immediately after the time of such robbery used violence to the said person. The case was partly heard before Mr. N. Ateya, Senior Principal Magistrate, as he then was, who recorded the evidence of two prosecution witnesses. Thereafter the hearing went on before Mrs S. Muketi Principal Magistrate who finalised the same and delivered a judgment convicting the appellant and sentencing him to death. The appellant was aggrieved by the said conviction and sentence and appealed against the same.

Mr. Gumo, Assistant Deputy Public Prosecutor conceded the appeal, and in our view rightly so saying that Section 200(3) of the Criminal Procedure Code was not complied with. That sub-section provides as hereunder:-

“(3) 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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

The record does not show that Mrs Muketi P.M. complied with the aforesaid provision of the law. That was prejudicial to the appellant. We are of the view that assumption of jurisdiction by the succeeding magistrate without informing the appellant of his right was clearly wrong and the trial by the succeeding magistrate was a nullity. In a Tanzanian case, **RAPHAEL V REPUBLIC [1969] E.A. 544** where the court was considering an appeal pursuant to a section of that country’s Criminal Procedure Code which is similar to our Section 200(3) it was held that:-

“(i) It is a prerequisite to the second magistrate’s exercising jurisdiction that he should appraise the accused of his right “to demand that the witnesses or any of them be resummoned and reheard” under Section 196 of the Criminal Procedure Code.

(ii) If the second magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction, and the trial is a nullity.”

Although Section 200(4) gives this court power to order a retrial where subsection (3) as above quoted was not complied with, Mr. Gumo said that the State was not seeking for a retrial. In the circumstances, we allow the appeal, quash the conviction and set aside the death sentence. The appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED at Nakuru this 13th day of February, 2005.

D. MUSINGA

JUDGE

13/2/2006

L. KIMARU

JUDGE

13/2/2006

Judgment delivered in open court in the presence of the accused person and Mr. Gumo, Assistant Public Deputy Prosecutor for prosecution.

D. MUSINGA

JUDGE

13/2/2006

L. KIMARU

JUDGE

13/2/2006