



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 1084 of 2003

**(From original conviction(s) and Sentence(s) in Criminal Case No. 2448 of 2002 of the
Senior Principal Magistrate's Court at Kiambu (M.W. Wachira (Mrs.) – SPM)**

JOSEPH NDUNGU MUTHONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

JOSEPH NDUNGU MUTHONI was charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the Penal Code and two counts under the **FIREARMS ACT** contrary to **Section 4(2) (a)** of said Act. Under the Firearms Act the Appellant was charged with **BEING IN POSSESSION OF FIREARMS** without a firearm certificate and **BEING IN POSSESSION OF AMMUNITION** without a Firearms Certificate. All offences are alleged to have been committed on 10th May 2002 at Thindigua Village, Kiambu. After the trial of the case by two magistrates, the Appellant was found guilty, convicted in the first count and sentenced to death. In the second and third counts, the Appellant was acquitted.

The appeal came for hearing before us on the 21st March 2006. The State conceded to the Appellant's appeal on the grounds that when the Appellant was placed on his defence by a different magistrate, **Section 200** of the **Criminal Procedure Code** was not complied with. The learned counsel for the State, **MRS. KAGIRI** urged us to order for a retrial stating that in fact the evidence before court was straight forward and overwhelming, that it clearly linked the Appellant to the offence and that witnesses in the case would be availed.

We have perused the record of the proceedings. It is true that the Appellant was tried by two magistrates. The first one was **MRS. ONDIEKI** who after hearing the whole of the prosecution case ruled that the Appellant had a case to answer. Thereafter **MRS. ONDIEKI** ceased to exercise jurisdiction and the matter was taken over by **MRS. WACHIRA**. **MRS. WACHIRA** proceeded to comply with the provisions of **Section 211** of the **Criminal Procedure Code**. She however overlooked the provisions of **Section 200** of the **Criminal Procedure Code** which were very crucial to the Appellant and which ought to have preceded those of **Section 211** of **Criminal Procedure Code**. As a result the Appellant's rights to determine how the trial should proceed as provided under **Section 200** of the **Criminal Procedure Code** were breached. We find that the lack of compliance with **Section 200** of the **Criminal Procedure Code** rendered the proceedings fatally defective. See **KARIUKI vs. REPUBLIC (1985) KLR 504.**

We accordingly declare the proceedings a nullity, quash the convictions and set aside the sentence.

We have been asked to order a retrial in this case by the State. The Appellant opposed the request by the State for a retrial. He submitted that he had been tried by more than two magistrates in the same case and had therefore suffered prejudice. He submitted that since it was the courts that were negligent, not only in failing to comply with **Section 200** of the **Criminal Procedure Code** but also at some point also failed to indicate the Court Coram. He said he had suffered prejudice and was seeking justice from this court.

We have perused the entire record of the proceedings and are attracted by remarks by one **MR. G. NJUGUNA**, Senior Resident Magistrate, Kiambu Law Courts made on 22/9/03 at page 20 of the proceedings.

He observed; -

“This matter was initially heard before me to a very advanced State (sic). After the court overruled the prosecution when the prosecution applied to change the serial of the firearm involved. The State entered a none (sic) prosequi. Accused was charged afresh in court No. 1. The original case was No. 1166/02...”

Mr. G. Njuguna made these remarks as the reason of declining to take over the trial of the case out of which this appeal arose. **MRS. WACHIRA** also made a similar remark in the judgment at page J3 of the Judgment. These remarks give credence to the Appellant’s submission that indeed, he had been tried by many magistrates. The Appellant had been tried before to an advanced stage before the case was withdrawn under **Section 82** of the **Criminal Procedure Code** and then he was charged afresh in the same case.

An order for retrial should not be made if it will cause injustice or hardship to the accused person. The offence was committed on 10th May 2002 and the Appellant has been in prison custody since. The Appellant has been tried twice for the same offence as is explicitly demonstrated in the lower court’s proceedings. The first case was withdrawn when the prosecution failed to succeed in an application to amend the charge sheet. In charging the Appellant afresh, the prosecution had a second bite of the trial and an advantage over the Appellant. Even though the prosecution is not to blame for the nullification of the trial court’s proceedings this time round, to subject the Appellant for trial three times over the same set of facts is in our view unwarranted, harsh and oppressive in the circumstances of this case.

This finding is also fortified by the fact that after considering the evidence adduced before the lower court, we are of the opinion that no conviction would result if an order for retrial was to be made by this court. The Appellant was arrested after a chase. Those who chased and arrested him were not witnesses. The Complainant and his workers who testified herein lost sight of him soon after they had been robbed. The witnesses later saw the Appellant at the scene of arrest therefore destroying any weight that could have been given to them for their ability to identify him as one of the robbers were identification parades subsequently conducted for the purposes. Their purported identification was not tested, improperly conducted identification parades and therefore was of little evidential value.

For those reasons, we decline to order a retrial and instead order that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 25th day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mrs. Gakobo for State

CC: Erick/Ann

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LESIT, J.

JUDGE

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M.S.A. MAKHANDIA

JUDGE