REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Criminal Appeal 170 & 171 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 17415 of 2001 of the Chief Magistrate's Court at Makadara (C.O. Kanyangi – SRM)

ANTHONY WAMBUA MULWA..…….....…..……..APPELLANT

VERSUS

REPUBLIC…… …….....….....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 171 OF 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 17415 of 2001 of the Chief Magistrate's Court at Makadara (C.O. Kanyangi – SRM)

MOSES MUTUKU KITHOME..……..….....……..……..APPELLANT

VERSUS

REPUBLIC…….....…… ……..….....RESPONDENT

J U D G M E N T

ANTHONY WAMBUA MULWA hereinafter referred to as the 1st Appellant and **MOSES MUTUKU KITHOME** the 2nd Appellant were the 1st and 2nd Accused persons during the trial in the lower court. Both were jointly charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** for which they were both convicted, and each sentenced to death. The 1st Appellant faced a second count of **BEING IN POSSESSION OF IMMITATION FIREARM** contrary to **Section 34(1)** of the **Firearms Act**. He was also convicted for the offence and erroneously sentenced to five years imprisonment. We say erroneously for the reason that having been sentenced to death, if that sentence was to be executed the second sentence of 5 years imprisonment would not be served. It was an error to allow both sentences to subsist at the same time. The Appellants were both aggrieved by their convictions and sentences and therefore lodged this appeal.

When this appeal came up for hearing on 25th July 2006, **Miss Opati** learned counsel for the State conceded to the appeal on a technicality that the trial was conducted by two magistrates. **Mr. Rinjeu**, PM took the evidence of PW1, and PW2, PW3 and PW4. Then **Mr. Kanyangi**, SPM took over the case to its finalization. **Miss Opati** submitted that the record did not show that the Appellants were informed of their rights under **Section 200(3)** of the **Criminal Procedure Code**. Counsel submitted that this rendered the proceedings defective but that the same was curable under **Section 382** of the **Criminal Procedure Code** to the extent that a retrial can be ordered.

The 1st Appellant represented himself in this appeal. **Mr. Obuo** however conducted the appeal on behalf of the 2nd Appellant.

In regard to the learned State Counsel's submission, Mr**. Obuo** agreed that the proceedings were vitiated by the lack of compliance to **Section 200(3)** of the **Criminal Procedure Code**. **Mr. Obuo** relied on the case of **Ndegwa vs. Republic 1985 KLR 534**.

We have perused the record of the proceedings of the lower court and have confirmed as the learned State Counsel submitted that indeed **Mr. Kanyangi, SPM** took over the case from **Mr. Rinjeu PM** now deceased, after the latter had heard the evidence of four prosecution witnesses. **Mr. Kanyangi** took over the case and placed the Appellants to their defence and wrote the judgment. At the time **Mr. Kanyangi** took over the case, the record does not indicate that he complied with the provisions of **Section 200 (3)** of the **Criminal Procedure Code**. The section provides thus: -

"***200 (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."***

In the case of **Ndegwa vs. Republic** Supra, **Madan, Kneller** and **Nyarangi JJA** held:-

"***No rule of natural justice, no rule of statutory protection no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration."***

That case emphasizes the importance of complying with rules which confer statutory protection to a citizen.

In the instant case the succeeding magistrate only heard the defence case and then wrote the judgment. It means that the preceding magistrate is the one who heard the entire prosecution case. The convictions in the case were predicated on visual identification by the eye witnesses of the incident who included the Complainant. In a case with similar circumstances as this one, **Njenga vs. Republic [1984] KLR 605**, **Hancox**, **JA, Chesoni** and **Nyarangi Ag. JJA** held: -

"***In a case depending on visual recognition where the principal witness is heard by one magistrate and the second identification witness by another we think it essential that the requirements of subjection (3) should be observed as it is for the protection of an accused person."***

We reiterate here that the provisions of **Section 200 (3)** of the **Criminal Procedure Code** should be observed as it is for the protection of an accused person. It is the duty of the court to inform an accused person of his rights to re-call witnesses or to start the case *de novo*. Failure to inform the accused person of his rights renders the proceedings a nullity. We agree that the Appellants were denied their rights in this case due to non compliance with the said section of the law. The charge against the Appellants was a capital one and the witnesses who testified before the succeeding magistrate took over were the key witnesses in the case. We take the view that perhaps if the succeeding magistrate had seen and heard these witnesses himself, he may have arrived at a different conclusion not necessarily a conviction. Accordingly we quash the conviction entered and set aside the sentence.

The State has urged us to order a retrial in this case on the basis that the evidence of identification on record was positive. Both the 1st Appellant and **Mr. Obuo** for the 2nd Appellant have opposed an order for retrial.

The principles applicable in determining the issue of retrial are now well settled. It is trite law that a retrial should not be ordered unless if an appellate court upon consideration of admissible or potentially admissible evidence is of the opinion that a conviction may result. See **MWANGI vs. REPUBLIC [1983] KLR 522**.

We have considered the evidence on record in this case. The evidence of identification which was the basis of conviction was not safe or free from error or mistake. The Complainant and his wife PW1 and PW4 in the case had a fleeting glance at their assailants under conditions that were not conducive for positive identification. The incident took place at night. The Complainant said he saw the assailants for two minutes. PW4 was ordered to lie down and the period of time she had the attackers under observation is not clear in the evidence. The Complainant apprehended the 1st Appellant later on but the date of the arrest was not indicated. That date was significant to enable the court determine whether it was so long as to justify a finding that the Complainant's ability to identify his assailant was minimized by reason of lapse of time.

In regard to the said count, the officer who recovered the imitation firearm was not called as a witness. The evidence of how and where the exhibit was recovered was not given. Also important the ballistic experts report was not properly adduced in evidence. From the evidence available, in this case we are of the opinion that no conviction will result if an order for retrial were made. We are satisfied that the interests of justice do not require the order being made. We are also satisfied that the Appellants who have been in custody since September 2001, during the pendency of the trial in the court below will suffer prejudice if a retrial is ordered. We decline to order a retrial. We order that the Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 26th day of October 2006.

…….

LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants

Mr. Obuo for the 2nd Appellant

Miss Opati for State

CC: Tabitha/Erick

…….

LESIIT, J.

JUDGE

…….**….**

MAKHANDIA

JUDGE