



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CIVIL DIVISION**

**CRIMINAL APPEAL 999, 1000, 1001, 1002 & 1003 OF 2003**

**JOSEPH GITUKU WANGAI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH GEORGE KIBUTHU NDUNGU.....  
.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH STANLEY MWITA NJUGI.  
.....APPELLANT**

**VERSUS REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH NATHAN MUGAMBI NYAGA.....  
.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH GEORGE NGARUIYA MUKORA.....  
.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH LEONARD MWAURA GICHICHIO.....  
.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

## J U D G M E N T

The Appellants JOSEPH GITUKU WANGAI (1st Appellant), GEORGE KIBUTHU NDUNGU ( 2nd Appellant), STANLEY MWITA (3rd Appellant), NATHAN MUGAMBI (4th Appellant), GEORGE NGARUIYA MUKORA (5th Appellant) and LEONARD MWAURA GACHICHIO were jointly with another charged with ATTEMPTED MURDER contrary to Section 220(a) of the Penal Code before Kiambu Chief Magistrate's Court on 15th May 2002. However on 24th October 2002, the prosecution unsuccessfully applied to substitute the charge of ATTEMPTED MURDER with that of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code.

The Appellants objected and the prosecution withdrew the Application. The Appellants were tried and convicted of ATTEMPTED MURDER contrary to Section 220(a) of the Penal Code. They were then all sentenced to life imprisonment. Being aggrieved by the conviction and sentence they lodged these appeals. All the appeals were consolidated having arisen out of the same trial. The facts of this case are that the Complainant, PW1, who is the sub-chief of TINGANGA village, was walking home with his brother GEORGE PW2 and a neighbour BENSON PW5 when they were confronted by a group of 7 men.

The group was armed with crude weapons including pangas, rungas, axe and hammer. PW5 ran away unharmed on seeing the group armed. PW2 was chased by two of them whom he identified as the 1st Appellant and the 6th Appellant. Eventually he ran to seek for help when he saw the group attack his brother, PW1, with all sorts of weapons. The Complainant identified the 2nd Appellant, 3rd Appellant, 4th Appellant, 5th Appellant and the 6th Appellant as his attackers. PW2 on his part said he identified the 1st Appellant, 2nd Appellant, 3rd Appellant and 6th Appellant as those he could identify in the group.

Eventually when the Appellants were arrested, the 2nd Appellant, 3rd Appellant and 6th Appellant were found with blood stained clothes, exhibits 4, 5, 8, 9 and 10. these were tested against the Complainant's blood and the DNA found to be from the Complainant's blood. In a parade on 14th May 2002 the Complainant identified the 4th Appellant as one of those who attacked him. From those the Complainant identified, only the 4th Appellant was unknown to him before. The Appellants all denied the offence in their defence.

I have purposed to consider a legal point which was not raised by any of the parties to this appeal. The fact that the Appellants were tried by two magistrates. The first trial magistrate, MRS. JANE ONDIEKI, Senior Principal Magistrate, as she then was heard the whole of the prosecution case. She then ruled that the Appellants had all a case to answer. MRS. ONDIEKI complied with the provisions of Section 211 of the Criminal Procedure Code giving the Appellants their rights and explaining to them the options available to them in giving their defence. Each of the Appellants informed the Court what options they wished to adopt in making their defence. MRS. ONDIEKI could however not complete the trial because she left the judiciary before taking the Appellants' defence.

On 30th October 2003, seven months after the court ruled that the Appellants had a case to answer, MRS. MARGARET WACHIRA, Senior Principal Magistrate took over the trial of the Appellants. MRS. WACHIRA proceeded to take their defence and finally wrote the judgment in which she convicted them of the offence charged. However, on 30th October 2003 MRS. WACHIRA did not comply with the provisions of Section 200(3) of the Criminal Procedure Code which are mandatory provisions of procedure. Section 200(3) of the Criminal Procedure Code provides: -

“200(3) where a succeeding magistrate commences the hearing of proceedings and part of the evidence had been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

The record of MRS. WACHIRA is wholly silent as to whether or not she informed the Appellants of their rights to re-call the witnesses for further cross-examination or to have the case started denovo. I must take it in favour of the Appellants that in fact there was no compliance with the said provisions. The provisions of Section 200(3) of the Criminal Procedure Code are meant for the protection of accused persons and they must be vigorously complied with. Failure to comply with the provisions is fatal to the prosecution

case. See MUDOOLA vs. REPUBLIC 1990 KLR 616 and NDETTWA vs. REPUBLIC CA No. 125 of 1984.

In both cases the appellate court found the violation of the statutory protection accorded to the Appellants under the said section was fatal the principle being that the trial court being the best person to do so, should itself see, hear, assess and gauge the demeanour and credibility of witnesses in its judgment. In the instant case the preceding magistrate took the entire prosecution evidence and the succeeding one only heard the defence case. In the circumstances I declare the original trial was defective and that there was a mistrial, set aside the conviction and the sentences.

Under Section 200(4) of the Criminal Procedure Code an appellate court may order a retrial if it is of the opinion that the Appellants have been unduly prejudiced in the retrial. I believe that the order for retrial should not be made if the evidence is insufficient to bring a conviction. I have carefully perused the record of the trial court and am of the opinion that on a proper consideration of the evidence a conviction may result. The Appellants were each sentenced to life imprisonment and have been in prison for less than two years.

I am convinced that they shall suffer no prejudice if an order for retrial were ordered I order that the Appellants should be tried again in this case. Due to the circumstances of the case we order that the retrial should be held at Nairobi Chief Magistrate's Court. The Appellants should be taken before Chief Magistrate's Court Nairobi for plea on the 2nd August 2005. In the meantime all the Appellants should be held in custody till then.

**Dated at Nairobi this 27th day of July 2005**

**LESIIT, J.**

**JUDGE**