



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**APPELLATE SIDE**

**Criminal Appeal 3 of 2005**

***(From Original Sentence in Criminal Case No. 12 of 2005 of the Resident Magistrate's Court at Kwale – F.W. Andayi Esq., Resident Magistrate)***

**TSUMA MWEMBE ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**Coram: Before Hon. Justice Mwera**

**Monda for State**

**Appellant in person**

**Court clerk – Kinyua**

**J U D G M E N T**

The appellant was charged under section 6 of the Witchcraft Act (Cap 67) in that on 12/12/2004 at Mitangoni village Mariakani, Kilifi he accused Malambo Dzumbe to be a witch. In a plea of guilty that followed the appellant was convicted and ordered to serve 3 years imprisonment w.e.f. 5/1/2005. He appealed on five grounds which put together amount to this:

That the learned trial magistrate did not consider the loss the appellant suffered – losing 2 wives. That the sentence was harsh and it did not take in regard factor in mitigation. So the appellant sought this court's acts that would enable him to be able (once again) to help his family.

In his submission the appellant repeated more or less what the petition of appeal contained leaving the rest to court. Similarly the Learned State Counsel left that bit – appeal on sentence, to the court.

Going over the lower court record leaves this court with the impression that the learned trial magistrate did not follow Section 207 Criminal Procedure Code (see ADAN VS R. [1973] E.A 445). The charge was read to the appellant in Kiswahili and he pleaded guilty. That was recorded. The prosecutor then reproduced the facts. But contrary to the procedure of asking if the facts were correct and if admitted by the appellant, a reply that should be recorded, followed by the court finding of guilt on admission of the facts, and accordingly convicting, the learned trial magistrate went ahead to conclude that the appellant was guilty. The record does not show that the prosecutor sought to treat him as a first offender or that the appellant had a chance to be heard in mitigation. The learned trial magistrate nonetheless went ahead to comment on the facts and hand down the 3 years prison term. That process adopted by the learned trial magistrate is irregular and invalid. He should acquit himself for action now and in future with the contents of section 207 Criminal Procedure Code and what Adan's case (above) laid down.

In sum the appeal was not unequivocal. The conviction is quashed and the sentence set aside. The appellant to be set at liberty forthwith unless otherwise lawfully held.

Judgment accordingly.

Delivered on 27/12/2005.

**J.W. MWERA**

**JUDGE**