

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 361 OF 2004

JOSEPH MWATHI RUTHI.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGEMENT

The provisions of section 200(3) of the Criminal Procedure Code are Mandatory. 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 summoned and re-heard, and the succeeding magistrate is required by law, to inform the accused person of that right.

As was decided by Osiemo and Etyang' JJs, in **Criminal Appeal No. 184 of 1995 James Kuloba Sisa versus Republic**, the failure to comply with the provision of S 200 (3) of the Criminal Procedure Code is fatal to the conviction.

Accordingly, the conviction herein is fatally defective, for non-compliance with S 200 (3) of the CPC. I therefore allow the appeal, quash conviction and set aside the sentence.

However, I am satisfied that the evidence on record appears to be overwhelming. Also the appellant is not averse to an order for retrial.

Accordingly, in the exercise of the authority bestowed upon me by section 200(4) of the Civil Procedure Code, I do hereby order that the appellant shall be retried.

His trial shall be presided over by any competent Magistrate, other than Ms Lucy Mutai, Senior Resident magistrate. I direct that the retrial shall be accorded priority by the trial court.

The appellant is directed to appear before the Magistrate's court on 3rd October 2004, for the mention of his case, for the purposes of setting down hearing dates.

Finally, I order that the appellant shall be released on a shs 200,000/= Bond, with one surety of like sum.

Dated at Nairobi this 23rd day of September, 2004

FRED A. OCHIENG

AG. JUDGE

Dated, signed and Delivered in the presence of
Appellant in person
Ms Okimu for Respondent
Mr. Odero – Court Clerk