



IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NOS. 61 AND 68 OF 2013 (CONSOLIDATED)

DAVID KIEMA1ST APPELLANT

JOHN MUTHAMA 2ND APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being appeal from the original conviction and sentence in Kithimani Senior Resident Magistrate's Court Criminal Cases No. 468 of 2011 by

Hon. D.G. Karani – PM on 1/11/2012)

(Before Beatrice Thurairaja Jaden J. and L. N. Mutende J.)

J U D G M E N T

1. **David Kiema** (1st appellant) and **John Muthama** (2nd appellant) were jointly charged with the offence of **robbery with violence contrary to Section 295** as read with **Section 296(2)** of the **Penal Code**.
2. Particulars of the offence were that on the 20th day of May 2011 at **Kitheuni sub location, Ikombe location** in **Yatta District** within **Machakos County**, jointly robbed **Peter Mutuku Musyoki** of a catapult, a torch, N.H.I.F. card, a note book and cash Kshs.270/= all valued at **Kshs.545/=** and immediately before the time of such robbery beat the said **Peter Mutuku Musyoki**.
3. Both appellants were tried, convicted and sentenced to suffer death. Being aggrieved by the conviction and sentence thereof they appeal on grounds that the learned trial magistrate erred in law and fact by:
 - i. Failing to comply with Section 200 of the Criminal Procedure Code.
 - ii. Convicting on evidence that was not credible.
 - iii. Relying on a charge sheet that was bad for duplicity.
 - iv. Convicting on identification evidence that was not free from error.
4. Brief facts of the case are that **Peter Mutuku Munyoki (PW5)** went to **Landmark Bar** to purchase cigarettes. While leaving he was followed by the appellants who had been at the bar. They attacked him, took away his catapult, notebook, a club (rungu), cash Ksh.270/= and in the process they injured him. He sustained a compound fracture of the right lower limb. They were arrested and stolen items were recovered.
5. In their defence the appellants denied having committed the offence. They gave an account of a sequence of events prior to their arrest.
6. At the hearing the appellants relied on their written submissions.

7. **Mrs. Gakobo**, the learned Senior State Counsel for the state conceded to the appeal on account of non-compliance with **Section 200** of the **Criminal Procedure Code**. She however asked the court to order a retrial considering the fact that there was sufficient evidence to secure a conviction.
8. We have carefully subjected the entire lower court record to scrutiny. It is apparent that the case was initially heard by **A.W. Mwangi, Principal Magistrate** who recorded part of the evidence in the trial. Having been transferred to another area of jurisdiction, **D.G. Karani, Principal Magistrate** took over the matter but failed to comply with **Section 200(3)** of **Criminal Procedure Code**. The appellants were not informed of their right to have witnesses who had testified re-summoned and re-heard. It is rightly asserted that the appellants rights were denied.
9. Having been prejudiced, the court may order a retrial in accordance with **Section 200(4)** of the **Criminal Procedure Code**.
10. The principle upon which an order for retrial may be granted was stated in the case of **Fatehali Manji versus Republic (1966)E.A. 343** as follows:

“In general a retrial will be ordered only when the original trial was illegal or defective...even where a conviction is initiated by a mistake of a trial court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interest of justice require it”.

11. Such an order would also be considered if the court opines that there is admissible evidence that would secure a conviction.
12. Having considered the evidence, we find that this is a proper case for a retrial. The conviction is quashed and the sentence set aside. The appellants shall be produced before the **Principal Magistrate’s Court at Kithimani** on the **18th September, 2014** for retrial.
13. In the meantime they will be held in custody.

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B. THURANIRA JADEN

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L. N. MUTENDE

JUDGE

JUDGE

DATED, SIGNED and DELIVERED at MACHAKOS this 9TH day of SEPTEMBER, 2014.

L.N. MUTENDE

JUDGE