



IN THE COURT OF APPEAL

AT ELDORET

CRIMINAL APPEAL 93 OF 2002

PETER NDUNGU APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court of Kenya at Eldoret (Tunya J) dated 28th May, 2002
In H.C.CR.A. NO. 91 OF 2000)**

JUDGMENT OF THE COURT

Mr. Chirchir, the learned counsel who represented the Republic in this appeal, readily conceded the appeal on two grounds. We think Mr. Chirchir was right in doing so. The first ground on which the concession was made was that during the trial before the first magistrate, Kadima Esq., a Sgt. Maina conducted the prosecution on behalf of the Republic. Sgt. Maina led Police Constable Salim Mohamed (P.W.3) through the latter's evidence. That was contrary to the principle set out in the well-known case of ***ELIREMA & ANOTHER VS. REPUBLIC*** [2003] KLR 537. On that ground alone, the appeal was bound to succeed.

The second ground on which Mr. Chirchir conceded the appeal is this. The trial of the appellant was conducted before two magistrates. Mr. Kadima heard the evidence of all the prosecution witnesses and ruled that the appellant had a prima facie case to answer. Mr. Kadima was thereafter transferred and he ordered that the appellant's case should proceed before Miss. L. W. Gitari, a Senior Resident Magistrate. Miss Gitari thereafter took over the trial. She ordered that the proceedings which had taken place before Mr. Kadima be typed out and when that was eventually done, she simply recorded that she explained to the appellant the provisions of **section 211** of the Criminal Procedure Code, after which the appellant chose to make an unsworn statement. The record is, however, wholly silent with regard to the provisions of **section 200** of the Code. Miss. Gitari was by law bound to explain to the appellant his rights under **section 200**. Those provisions are for the protection of the rights of an accused person and **section 200 (3)** of the Code specifically provides that the succeeding magistrate, which Miss. Gitari was, "..... **shall inform the accused person of that right**",

i.e. the right of an accused person to demand the resummoning and rehearing of all or any of the witnesses who have testified before the departing magistrate. Miss Gitari totally failed to comply with that section or at any rate there is no way of telling from the record whether she did or did not comply with the section. The charge of robbery with violence under **section 296 (2)** of the Penal Code which the appellant faced was an extremely serious one, carrying with it the death penalty and such serious lapses

on the part of a trial court are normally resolved in favour of an accused person. We must do so in the present appeal with the result that the conviction recorded against the appellant cannot be allowed to stand.

Mr. Chirchir, however, tried to persuade us that we should order a retrial and the basis of that contention was that when one looks at the recorded evidence, a conviction could well be had on the evidence. We can find no quarrel with that proposition but that is not the only point to be considered in such matters. The offence charged against the appellant was alleged to have been committed on the 29th day of May, 1999, that is nearly nine years ago. The appellant was arrested immediately thereafter and has been in custody since then. That is a factor which strongly militates against our ordering a retrial. Again even if we were minded to order a retrial, it would be wholly unrealistic to think that a fair trial could be held after such a long period. Accordingly, we agree with Mr. Otieno, learned counsel for the appellant, that it would not be in the interest of justice to order a retrial after so many years. We refuse to order a retrial as requested by Mr. Chirchir.

In the event, we allow the appeal, quash the conviction and set aside the sentence of death which was imposed upon the appellant. The appellant shall be set at liberty forthwith unless he is held for some other lawful cause.

Dated and delivered at Eldoret this 11th day of April, 2008.

R. S. C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR