



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Criminal Appeal 50 of 2005

VINCENT MPAKA CHIVOLI ----- APPELLANT

V E R S U S

REPUBLIC ----- RESPONDENT

J U D G E M E N T

The Appellant, Vincent Mpaka Chivoli was convicted by Kakamega Principal Magistrate's court of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The mandatory death sentence was imposed. He now appeals against conviction and sentence.

Ms Osotsi for the Appellant took the court through the grounds of appeal which were mainly points of law. The counsel submitted that the charge was defective because it did not state that the accused was armed with a dangerous weapon. Secondly that S.200 of the Criminal Procedure Code was not complied with by the magistrate who took over the case. There were no recoveries made of the stolen property and if any the same were not produced in court. There were contradictions on the value of the maize stolen between the two key witnesses.

The State conceded to the appeal on grounds that the charge was defective and that S.200 C.P.C. was not complied with.

On the issue of the charge, the drafter omitted the words: "***armed with dangerous weapons***" which is one of the ingredients of the offence of robbery with violence. PW1 said he was assaulted by his three assailants with their hands and fists. The magistrate proceeded to convict the appellant of the offence of robbery with violence. In the absence of this important ingredient, a conviction cannot be sustained. The omission of the said particulars in the charge is fatal. The charge as it is defective. The prosecution ought to have amended the charge during the trial.

In regard to S. 200 of the Criminal Procedure Code, it is noted that this case was heard by two magistrates. Ms J. Thuita heard PW1, PW2 and PW3. Mr. S. M. Kibunja took the case over on 23/02/05. He proceeded to take the testimony of PW4 and PW5 without complying with or even referring to S.200 CPC. S. 200 (3) requires that the succeeding magistrate explains to the accused his rights of recalling witnesses. The response of the accused whether he wishes to recall the witnesses who testified before the preceding magistrate must be recorded. Failure to comply with these

provisions is fatal to the prosecution's case. The non-compliance renders the trial a nullity.

Due to the defective charge sheet and non-compliance with Section 200 CPC renders the trial and the conviction null and void. For this reason, we set aside the conviction and sentence.

The State Counsel did not apply for a retrial. We believe the reason may possibly be that the appellant has been in prison custody for about four and a half years awaiting the determination of this appeal. In the interests of justice, the appellant should not be subjected to a retrial which if ordered would cause him more suffering through further incarceration. The accused is hereby set at liberty unless otherwise lawfully held.

Judgement delivered on the 17th day of December, 2009 in the presence of the Appellants, their counsel Ms Osotsi and the State Counsel in open court.

FLORENCE N. MUCHEMI

SAID J. CHITEMBWE

J U D G E

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