



REPUBLIC OF KENYA



**KENYA LAW**  
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**Odede v Republic (Criminal Appeal 27 of 2021)  
[2023] KEHC 20941 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20941 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL 27 OF 2021**

**JN KAMAU, J**

**JULY 27, 2023**

**BETWEEN**

**TONNY LOVONI ODEDE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon M. L. Nabibya (SRM) delivered at Hamisi in the Senior Resident Magistrate's Court in Criminal Case No 841 of 2018 on 4th April 2019)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged with the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#).
2. He was tried and convicted by Hon M. L. Nabibya, Senior Resident Magistrate and was sentenced to serve life imprisonment.
3. Being dissatisfied with the said Judgement, on July 2, 2019 he lodged this appeal. On August 30, 2022 he amended his initial Petition of Appeal. His Amended Petition of Appeal was dated and filed on August 30, 2022. He set out eight (8) grounds of appeal challenging both conviction and sentence.
4. His Written Submissions were dated November 2, 2022 and filed on November 4, 2022 while those of the Respondent were dated December 19, 2022 and filed on December 20, 2022. This Judgment is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & another vs. Associated Motor Boat Co Ltd & others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
7. Having looked at the said Grounds of Appeal and the respective Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Trial Court complied with the mandatory provisions of Section 200 (3) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya);
  - b. Whether or not the Prosecution proved its case beyond reasonable doubt;
  - c. Whether or not the sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.
8. Right at the outset, this court dealt with the issue of whether or not the Trial Court complied with the mandatory provisions of Section 200 (3) of the *Criminal Procedure Code* as a preliminary issue as it had a bearing on the other two (2) issues.
9. The Appellant submitted that the Trial Court failed to comply with the provisions of Section 200(3) of the *Criminal Procedure Code*. He asserted that Hon M. L. Nabibya took over the matter from Hon D. Ogal and read the Ruling placed him on his defence and proceeded to hear his case without informing him of his right under Section 200(3) of the *Criminal Procedure Code*. He argued that that violated his right vitiating the trial and rendering it a nullity and thus urged the court to quash his conviction and sentence on that account.
10. In that respect, he placed reliance on the case of *John Bell Kinengeni vs Republic* [2015] eKLR where it was held that the duty to see that the right in Section 200(3) of the *Criminal Procedure Code* was protected was placed on the trial magistrate in mandatory terms.
11. On its part, the Respondent relied on the case of *Office of the Director of Public Prosecutions vs Peter Onyango Odongo & 2 others* [2015]eKLR where it was held that Section 200(3) was not mandatory for the accused demand to be granted or to be allowed and that a succeeding magistrate was not supposed to deal with Section 200(3) of the *Criminal Procedure Code* in isolation of several articles of the *Constitution* dealing with the Bill of Rights as the aforesaid section was not exhaustive in itself. It was its contention that the Trial Court acted within its mandate as far as Section 200(3) was concerned and the appeal should ultimately fall in entirety.
12. A perusal of the proceedings showed that on December 18, 2018, Hon M.L. Nabibya, in his Ruling placed the Appellant on his defence, taking over the proceedings of the case from Hon. D. Ogal. On the next hearing date, that is February 12, 2019, the Appellant indicated that he had been supplied with full proceedings and was ready to defend himself.
13. It was this court's considered view that although Hon. M. L. Nabibya did not indicate in writing that he had explained to the Appellant the right under Section 200(3), the Appellant's conduct during trial



showed that he had understood the purport of Section 200(3) of the *Criminal Procedure Code* which provides as follows:-

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

14. Having said so, it was irrespective that the Appellant indicated that he was ready to proceed with the trial as he had been handling the proceedings himself. Section 200(3) of the *Criminal Procedure Code* was couched in mandatory terms so as to protect the rights of fair trial of an accused person.
15. Notably, the Respondent did not annex a copy of the decision of *Office of the Director of Public Prosecutions vs Peter Onyango Odongo & 2 others* (*supra*). Having obtained a copy from the Kenya Law Reports and read the same, it was evident that the Respondent intended to and indeed mislead the court. It set out the submissions by the petitioner therein and purported to pass it as a holding of the court. This is bad practise that must be frowned upon by courts and all parties. The court hereby censures the Respondent for having twisted facts of a case to advance its arguments.
16. In his decision that he delivered on December 17, 2015, Makau J (as he then) considered the constitutionality of Section 200 (3) of the *Criminal Procedure Code* vis a vis the rights of a complainant and rendered himself as follows:-

“Section 200 (3) of the *Criminal Procedure Code* (cap 75) laws of Kenya is constitutional and valid as it protects the rights of an accused person to a fair trial in terms of Article 50 of the *Constitution of Kenya 2010*, however the same is not exhaustive in that it is silent on the rights of the complainant in cases taken over by the succeeding Magistrate, however that notwithstanding the succeeding Magistrate has an obligation before making final orders to invoke the provisions of the Bill of rights to ensure the complainant's rights to a fair trial is factored in.”

17. It is clear that the learned judge expressly highlighted the mandatory nature of Section 200 (3) of the *Criminal Procedure Code* so as to protect the right to fair trial for accused persons while taking into account the rights of a complainant.
18. Notably, Article 50(2) (c) and (k) of the *Constitution of Kenya, 2010* provides as follows:-

“Every accused person has the right to a fair trial, which includes the right-

- c. to have adequate time and facilities to prepare a defence;
- k. to adduce and challenge evidence;

19. It was not compulsory that witnesses were to be recalled after a new magistrate took over a matter that had been partly heard by another magistrate because courts must also consider the prejudice that will be suffered by the complainant if witnesses are recalled. There may be difficulties of tracing witnesses or they may have died. However, it is mandatory that the accused person be informed of the right to resummon witnesses and to have the matter reheard. Failure to do that can render the entire trial a nullity.
20. In this case, the incoming magistrate erred in law by failing to inform the Appellant of his right under Section 200(3) of the *Criminal Procedure Code* and delving into the hearing of the defence case. This



denied the Appellant herein who was representing himself, having refused legal representation that was provided to him by the State, a fair trial.

21. It was immaterial that he informed the Trial Court that he was ready to proceed. It was incumbent upon the Trial Court to have informed him of his rights under Section 200 (3) of the *Criminal Procedure Code*. Without belabouring this point, this court found that it could not therefore analyse the evidence that was adduced during trial as the entire proceedings were unfortunately tainted.
22. The Appellant had asked this court to quash his conviction and sentence. Having found that the trial was a nullity, that was the only foreseeable consequence that could befall the Prosecution's case. The next question that arose was, what was the fate of the Prosecution's case?
23. An offence was said to have been committed by the Appellant herein. The witnesses were available. Not much time had passed and it was expected that the witnesses would still be available. In this respect, this court took the view that justice could only be served for both the secondary victims and the Appellant herein by having this matter heard afresh.
24. Section 354 (3)(a)(i) of the *Criminal Procedure Code* states as follows:-

“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may in an appeal from a conviction reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction (emphasis court).”
25. In the premises foregoing, Ground of Appeal No (6) of the Petition of Appeal was merited and the same be and is hereby allowed.

### **Disposition**

26. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Amended Petition of Appeal that was lodged on August 30, 2022 was merited and the same be and is hereby allowed. The Appellant's conviction and sentence be and are hereby set aside and/or vacated and/or varied as they were both unsafe.
27. It is hereby directed that the lower court file Hamisi Criminal Case No 84 of 2018 Republic vs Tonny Lovoni Odede be placed before the Head of Station on August 7, 2023 for allocation to another magistrate other than Hon M.L. Nabibya Senior Resident Magistrate to hear this case afresh.
28. In view of the fact that this is a 2018 matter, it is hereby directed that all efforts be made to expedite the hearing of the same so as to accord both the secondary victims and the Appellant herein a fair trial in the shortest time possible.
29. For the avoidance of doubt, the Appellant will remain in custody during the pendency of the hearing of the case afresh hence the need to expedite the disposal of Hamisi Criminal Case No 84 of 2018 Republic vs Tonny Lovoni Odede.
30. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 27<sup>TH</sup> DAY OF JULY 2023**

**J. KAMAU**

**JUDGE**

