



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CRIMINAL APPEAL NO. 4 OF 2019**

**SIMON MUTUTUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the judgement of Hon. W. Juma, CM, delivered on 17/01/2019***

***in the Chief Magistrate's Court at Narok in Criminal Case No. 433 of 2018***

***Republic v Simon Mututua)***

**J U D G M E N T**

1. The Appellant has appealed against his conviction and sentence of death in respect of the offence of robbery with violence contrary 295 as read with 296 (2) of the Penal Code (Cap 63) Laws of Kenya.

2. The state has supported the conviction and sentence.

3. In his petition to this court the appellant has raised fifteen (15) grounds of appeal.

4. I have perused the judgement, the memorandum of appeal (sic) the submissions of the appellant and that of the respondent. The appeal raises a fundamental issue that has not been raised by both counsel; which I hereby raise on my own motion (*suo motu*). That issue is whether a second succeeding magistrate can in law deliver a judgement that is written, dated and signed by the first magistrate in respect of the conviction of an accused person. The answer to the issue raised lies in the provisions of section 200 (1), (2) and (3) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

5. The foregoing issue arose in the following circumstances. The judgement of the trial court shows that Hon W. Juma, the Chief Magistrate, found the appellant guilty and convicted him on a charge of capital robbery on 10/12/2018. She did not deliver her judgement. Instead her judgement was delivered in open court by the Senior Resident Magistrate, Hon. H.I. Ng'ang'a on 14/12/2018.

6. Thereafter, Hon. H.I. Ng'ang'a stated that:

“Court

*I am of the view having delivered the judgement I remit the case to the trial magistrate for mitigation and sentencing.”*

7. Hon. H.I. Ng'ang'a then fixed the case for sentencing. The sentencing was not done until 15/1/2019; when the appellant mitigated before Hon. W. Juma. The court then adjourned the case for sentence to 17/1/2019.

8. On 17/1/2019 Hon. W. Juma in open court delivered the judgement on sentence by sentencing the appellant to death.

9. It is not clear from the record of appeal as to why Hon. H.I. Ng'ang'a had to deliver the judgement that had been prepared, dated and signed by Hon. W. Juma. No reasons are also given by Hon. H.I. Ng'ang'a for taking over and delivering the judgement of his predecessor (Hon. W. Juma). Furthermore, no reasons are given by Hon. W. Juma, in taking over the matter from her predecessor (Hon. H.I. Ng'ang'a) and then proceeded to deliver judgement on sentence.

10. The law in respect of one magistrate taking over a part case from another is set out in section 200 (1) (2) and (3) of the Criminal Procedure Code (Cap 75) Laws of Kenya. The provisions of that section provide as follows:

*“200 (1) subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises the jurisdiction, the succeeding magistrate may-*

*(a) deliver a judgement that has been written and signed but not delivered by his predecessor; or*

*(b) .....*

*(2) where a magistrate who has delivered judgement in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgement.*

*(3) 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 summoned and reheard and the succeeding magistrate shall inform the accused of that right.*

*(4) .....*”

11. The foregoing provisions are intended to protect the fair trial rights of an accused person, who has been convicted. This is clear from the provisions of section 357 of the Criminal Procedure, which confer on the accused the right to apply to the magistrate, who is seized with jurisdiction and who has taken over from the original magistrate in accordance with section 200 (3) of the Criminal Procedure Code; for release on bail pending the filing of an appeal in the High Court.

12. From the record of the proceedings, it is clear that Hon. W. Juma had taken the evidence of all the six prosecution witnesses and the unsworn evidence of the appellant. She then prepared, dated and signed her judgement but did not deliver it. Instead her judgement was delivered in open court by Hon. H. Ng'ang'a.

13. In view of the foregoing scenario, it is clear that Hon. Hon. W. Juma, had not ceased to exercise jurisdiction in the case. And that is why she again turned up to sentence the appellant. In the circumstances, I find that Hon. Ng'a ng'a could not in law take over the case from Hon. W. Juma. A magistrate who takes over a case from another magistrate can in law do so only in a case that is part heard in accordance with section 200 (3) of the Criminal Procedure Code, and not a case whose trial has been completed. Hon. H. Ng'ang'a therefore lacked jurisdiction to deliver the conviction judgement on behalf of Hon. W. Juma, with the result that his judgement is hereby quashed.

14. Additionally, in view of the foregoing, the judgement on sentence by Hon. Juma was without jurisdiction since she had not delivered the judgement in which the appellant had been convicted.

15. Furthermore, the provisions of section 200 (1), (2) and (3) of the Criminal Procedure Code are for the benefit of the accused person. They are intended to protect the fair trial rights of an accused person, who has been convicted. For instance, if the appellant was minded to file an application in the trial court for release on bail pending the filing of an appeal in the High Court; he had to do it before Hon. W. Juma, who was seized with jurisdiction pursuant to the provisions of the section 357 of the Criminal Procedure, which confer on the accused the right to apply for release on bail pending the filing of an appeal in the High Court.

16. In the premises, the appeal succeeds and is hereby allowed with the result that the conviction and sentence are hereby quashed.

17. The only issue remaining for consideration is whether I should order for a retrial of the appellant by a competent court. In this regard, there is the direct evidence of the complainant (Michael Kamau Njoro, Pw 1). Then there is the evidence of Samuel Njugana Githinji (Pw 3) and Joseph Kusero Kapune (Pw 2), who are the persons Pw 1 told that the appellant stole the sheep.

18. Furthermore, there is the evidence of the clinician (Lawrence Kaiwatei, Pw 5), who examined the complainant and found injuries namely tenderness and oedema on left thigh. He produced his P3 form as exhibit exh 1.

19. In addition to the foregoing evidence, there is the evidence of No. 83096 CPL Joshua Kiplangat (Pw 6), who acted on the evidence of Pw 1 and then proceeded to charge the appellant.

20. In his unsworn evidence, the appellant stated that he was a watch man at China Camp at Duka Moja. He proceeded to the tarmac road, where he boarded a motor vehicle, which had four passengers. He then asked the driver to drop him. Instead of stopping, the driver responded that they had to proceed. He then heard the driver say that some sheep were stolen at night and that one Mututua was involved. In response the appellant told the driver that Mututua was a family name. The appellant was then searched at Nairege Enkare by a police man and nothing was found on him.

21. He further stated that the case against him was framed by mzee Michael due to a land dispute between his father (the appellant) and mzee Michael.

22. I have considered the prosecution and defence evidence. I find that if the evidence of the prosecution is believed it might lead to the conviction of the appellant.

23. In the premises, I find that it is in the interests of justice to order for a retrial of the appellant, which I hereby do, pursuant to the provisions of section 354 (3) (a) (i) of the Criminal Procedure Code. The retrial will be conducted before a magistrate of competent jurisdiction excluding Hon. W. Juma and Hon. H.I. Ng'ang'a.

24. The upshot of the foregoing is that the appellant will be re-tried before another competent magistrate as indicated in the foregoing paragraph.

25. In the interim period, the appellant will be held in the remand custody pending his production in the court of the chief magistrate at Narok for trial purposes as soon as possible.

**Judgment signed, dated and delivered at Narok this 23<sup>rd</sup> day of September, 2020**

**in the presence of Mr. Kamwaro for the appellant and Ms. Torosi for the Respondent.**

**J. M. BWONWONG'A.**

**J U D G E**

**23/09/2020.**