



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.58 OF 2017

(Appeal Originating from Nyahururu CM's Court

Criminal Case No.1908/2011 by: Hon. A.P. Ndege – SRM)

GREGORY GITAU MWAURA.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

Gregory Mwaura Gitau (the appellant) was convicted for the offence of Grievous harm Contrary to Section 234 of the Penal Code.

The particulars of the charge are that on 14th day of 2010, at Makenzi Forest in Laikipia West District, unlawfully did grievous harm to John Lebon Maina by injuring his left eye.

Upon conviction the appellant was sentenced to serve life imprisonment.

Being dissatisfied with the conviction and sentence, the appellant filed this appeal citing eleven (11) grounds of appeal which can be summarized as follows:

- (1) The trial court erred in relying on the evidence of PW1, 2 & 3 on identification whereas the magistrate had no occasion to see them testify;**
- (2) That the court erred in making a finding that the complainant was injured by the nozzle of a firearm;**
- (3) That the court erred in relying on the uncorroborated evidence of two minors;**
- (4) The trial magistrate erred by giving probative value to hearsay evidence of PW4 & 6;**
- (5) The medical evidence was produced in contravention of Section 33 of the Evidence Act;**
- (6) The court erred by shifting the burden of proof to the appellant;**
- (7) That the trial court erred in relying on necessary evidence to convict the appellant;**
- (8) That the case was not proved to the required standard.**

Mr. Mwangela, counsel who urged the appeal on behalf of the appellant argued all the grounds together. Though not included in the grounds, the counsel added another ground and submitted that the appellant had all along been represented by counsel but along the way, counsel failed to attend court; that the trial court did not enquire why counsel did not attend but instead the appellant was invited to proceed with the case; that the trial court proceeded under Section 200 Criminal Procedure Code without offering the appellant's counsel an opportunity to address the court on how they wished to proceed; that another counsel came on record after the conviction and explained that the counsel who had been on record left the firm and did not inform the office of the pending case.

Mr. Mutembei, learned counsel for the State did not object to the raising of this issue at this stage. In response to this issue, Mr. Mutembei, urged that Section 200 Criminal Procedure Code was explained to the appellant and he intimated that the case proceeds from where it had reached.

I have perused the proceedings of the trial court. I have decided to consider the issue of representation and proceeding Under Section 200 Criminal Procedure Code even without addressing the other grounds because they are very key issues to the fair hearing of this case.

The record is clear that the appellant had been represented by counsel when the evidence of 5 witnesses was taken. The trial magistrate was then said to be on leave and the matter was mentioned severally before different magistrates and later Hon. Ndege P.M. took over the matter on 15/8/2014. On that day, Mr. Mbugua Advocate held brief for a Mr. Ndegwa for the appellant but sought an adjournment.

The prosecution also sought an adjournment because the two remaining witnesses were not present. However, for unknown reason, the court went ahead and purported to explain Section 200 Criminal Procedure Code to the appellant. The court recorded:

“Section 200 Criminal Procedure Code explained to accused in Kiswahili. The mode of proceeding upon change of magistrate explained to him in Kiswahili.”

First of all, Mr. Mbugua, the counsel holding brief for defence counsel had already sought an adjournment and so had the prosecutor. Mr. Mbugua was not invited to address the court on Section 200 Criminal Procedure Code. In fact it seems Mr. Mbugua may not have been present when the court invoked Section 200 Criminal Procedure Code. There is no reason why the court decided to proceed to explain Section 200 Criminal Procedure Code to the appellant in the absence of his counsel.

The appellant had not intimated to the court that he did not wish to proceed with his counsel and I find that it was a serious miscarriage of justice for the court to decide to proceed without the applicant's counsel and to make it worse proceed under Section 200 Criminal Procedure Code without allowing the appellant an opportunity for his counsel to be present. After all, the case was not proceeding to hearing that day.

In my view the appellant was prejudiced by the trial magistrate's failure to await the presence of the defence counsel or give the appellant more time to get counsel before complying with Section 200 Criminal Procedure Code.

Section 200 (3) 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.”

It is mandatory that the court informs the accused of his rights under that section and of course the accused would respond and the reply would be recorded.

In the instant case, the record does not show that the magistrate explicitly informed the appellant what his rights were under Section 200 Criminal Procedure Code i.e. whether he wished to recall any of the witnesses to testify or be cross examined. The trial court committed an irregularity in failing to strictly comply with the provisions which was prejudicial to the appellant.

For the reasons that the appellant was unreasonably denied legal representation which is his Constitutional right and that Section 200 Criminal Procedure Code was not complied with, I allow the appeal, set aside the conviction and sentence.

Should the court order a retrial? The general principles for ordering a retrial were adverted to in the case of ***Horace Makupe v Republic C.A. (Mombasa) (1984) KLR 523*** where the court said:

“In general, a retrial will be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of the insufficiency of the evidence or for the purpose of enabling the prosecution to fill up gaps in the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the appellant (or accused).” See also Ahmed Ali Sumar v Republic (1964) EA 481.

From a reading of the above decision, the factors to be considered before ordering a retrial are; whether there is an illegality or defect in the trial resulting from an error on the part of prosecution or a mistake of the court or where a trial is prejudicial to the accused; how long has the appellant served and whether witnesses can be found. The appellate court has a duty to ensure that the case is properly prosecuted, admissible evidence adduced and a conviction fairly entered.

In this case, the appellant was sentenced on 2/6/2015. So far, he has served 3 years imprisonment. He had been sentenced to serve life imprisonment and so the 3 years is a very small fraction of the life sentence. The appellant faced a very serious charge where the complainant suffered very serious injuries in that he lost an eye. The defective trial arose from an error made by the trial court. Having seen the record of the proceedings, this court is not able to hold that there is no evidence upon which a court properly directing itself could convict the appellant.

The two witnesses who were heard by the succeeding magistrate were a Doctor and the Investigating Officer. It should not be difficult to trace the two by formal witnesses. For the above reasons, I find that the appellant will not suffer any prejudice if an order of retrial is made

and I hereby order a retrial. I make the following orders:

- (1) This case be remitted back to the Chief Magistrate's court for the court to comply with Section 200 Criminal Procedure Code, where Hon. Mr. Ndege took over the proceedings in the Lower Court.*
- (2) The evidence of the last two witnesses i.e. the Doctor and investigating officer be taken in presence of the appellant's counsel.*
- (3) I further direct that the trial be expedited and heard within 6 months hereof.*
- (4) The appellant do appear before the Chief Magistrate on 2/7/2018 for directions and further orders.*

It is so ordered.

Dated, Signed and Delivered at NYAHURURU this 29th day of June, 2018.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Mutembei - Prosecution Counsel

Mr. Njogu holding brief for Mr. Mwangela

Tirian- Court Assistant

Appellant – present