



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 144 OF 2017**

**HAMISI SALIM MWAMZUZU.....1<sup>ST</sup> APPELLANT**

**JUMA ATUMAN MBITI alias MALACHU.....2<sup>ND</sup> APPELLANT**

**MWATUNDO MBITI MAGUO.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal arising from conviction and sentence in Kwale*

*Chief Magistrate's Court Criminal Case No. 216 of 2013*

*delivered by B. Koech Senior Resident Magistrate*

*on 14<sup>th</sup> July 2017)*

**JUDGMENT**

1. **Hamisi Salim Mwamzuzu, Juma Atuman Mbiti** alias Malachu and Mwatundo Mbiti Maguo referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants herein were charged with Robbery with Violence Contrary to Section 296(2) of the Penal Code. The particulars were that the Appellants on 10<sup>th</sup> January 2013, at about 7:45 a.m at Mbuguni location in Kwale County within Coast region jointly with others not before the court, armed with dangerous weapons namely panga and a jembe robbed Joseph Mwanthi Mutie of one motorcycle make Haojin Chassis No. LZL15PLA2CHA57306 and one Samsung mobile phone both valued at Kshs. 99,000/= and at or immediately before or immediately after the time of such robbery caused death to the said Joseph Mwanthi Muti.

2. They pleaded not guilty to the above charge and trial ensued which *resulted in their conviction and death sentence*. They were aggrieved with the whole judgment and each filed an appeal citing similar grounds which are as follows:

*(i) That the learned trial magistrate erred in both law and fact as there was no link between the Appellants and the crime committed.*

*(ii) That the learned trial magistrate erred in both law and fact by convicting them without the evidence of several key and crucial witnesses at the trial.*

*(iii) That the learned trial magistrate erred in both law and fact by not reading section 200(3) of the CPC to them.*

*(iv) That the learned trial magistrate erred in both law and fact by not considering their defence.*

3. A summary of the prosecution case is that the deceased and his wife PW1 Sarah Kanini Daudi had just started a charcoal business when on 9<sup>th</sup> January 2013 he was called by a friend informing him of charcoal for sale within Kwale county. He left Likoni their place in Kwale on 10<sup>th</sup> January 2013 at 5.30am using his motorbike reg. NO KMCU 150 R. He also went with his Samsung phone. He was never heard of again until his decomposing body was found at Kaya Lunguna Forest on 12<sup>th</sup> January 2013.

4. As investigations continued the deceased's Samsung phone was recovered from PW4 **Kanini Said Kassima** on 27<sup>th</sup> January 2013. He

had bought if from the 2<sup>nd</sup> appellant. The movements of the 1<sup>st</sup> and 3<sup>rd</sup> appellants were traced to the 2<sup>nd</sup> Appellant's home on 8<sup>th</sup> January 2018. This evidence was led by PW6 **Shaban John**.

5. The Samsung phone and the deceased's motorbike were recovered and the Appellants were then arrested and charged. The murder weapon (EXB7) was also recovered in the 1<sup>st</sup> appellant' Kitchen. PW9 **Dr. Francis Otieno** produced the Post mortem report in respect of the deceased (EXB6).

6. All the Appellants gave unsworn statements of defence and denied the charges. They each explained in detail how they were arrested.

7. When the Appeal came for hearing all the Appellants who were unrepresented relied on their written submissions. They mainly challenged their identification as the killers of the deceased. They also contended that the prosecution did not prove a case against them, as the evidence on the recovery of the mobile phone and motorbike was not sufficient. Finally they submitted that section 200 (3) Criminal Procedure Code was not complied with.

8. Mr Isaboke for the respondent opposed the Appeal submitting that the evidence was watertight. That the appellants in their unsworn statements of defence avoided indication of their whereabouts on the date the offence was committed.

9. Counsel further submitted that the 3<sup>rd</sup> Appellant led to the recovery of the deceased's motorbike. The Appellants were together in one house the previous night. He however urged the court to consider the **Muruatetu** case in assessing the sentence but should give them the maximum sentence as a life was lost.

10. This is a first appeal and this court has a duty to re -evaluate and reconsider the evidence adduced and arrive at its own conclusion. It has also to bear in mind that it did not see nor hear the witnesses and give an allowance for that. This was the holding in the case of **Okeno vs Republic 1972 EA 32**.

**“ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**Pandaya v R, [1957] E.A 336**) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (**Shantilal M. Ruwala v R, [1957] E.A 570**). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see **Peters v Sunday Post, [1958] E.A 424**.”**

11. The Court of Appeal further in the case of **Muthoko & Anor v Republic [2008] KLR 297** held as follows:

**“It was the duty of a first appellate court to analyze the evidence and come to its own independent conclusion being in mind that it did not hear or see the witnesses and making allowance for that.”**

12. I have considered the evidence on record, the grounds of appeal, the submissions by Counsel and the appellants. I have also considered the authorities cited. The appellants in their grounds of appeal and submissions raised an issue in respect to section 200 (3) Criminal Procedure Code which was not canvassed by the Respondent. It is so fundamental in the criminal procedure as it forms part of a fair trial. Upon perusal of the court record I find that this is an issue I need to deal with first as it may determine this Appeal.

13. The first magistrate who heard this case was Hon. E.K. Usui Macharia (Ag. SPM). She took the evidence of the first four (4) witnesses before she was transferred to another station.

14. The matter was taken over by Hon. Mr C.M. Maundu (SPM) on 4<sup>th</sup> August 2015. He duly complied with section 200(3) Criminal Procedure Code and all the appellants elected to proceed with the case from where it had reached.

15. The prosecution case closed on 13<sup>th</sup> December 2016, and vide a Ruling dated 20<sup>th</sup> March 2017. Hon. C.M. Maundu placed the Appellants on their defence. From this point the record is so uncoordinated. It is not even clear as to who delivered this ruling on 6/4/17 because the original notes are not in the same hand as those of Hon. C.M. Maudu. Whoever it was explained to them section 211 Criminal Procedure Code to which they responded and elected to give unsworn statements with no witness to call. The defence was fixed for hearing on 13<sup>th</sup> July 2017.

16. On 13<sup>th</sup> July 2017 this is what the record reads:

**Before Hon. B. Koech SRM**

**Prosecution M/s Wakoli**

**Court Assistant Mwakina**

**Accused 1, 2 & 3 all present**

**Wakoli Matter is for Defence hearing. I am ready**

**Accused 1 I am ready**

**Accused 2 I am ready**

**Accused 3 I am ready**

**Hon B. Koech proceeded to take their defence.**

17. Section 200 of the Criminal procedure code deals with instances where a criminal trial is handled by more than one magistrate. For ease of reference I shall refer to section 200(3) criminal procedure code which is relevant to this case. It provides:

**“ 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.”**

18. Hon B. Koech SRM had the mandatory obligation to inform the appellants that the trial Magistrate who had heard their case and who had placed them on their defence was no longer going to hear them and she was taking over the mater. She had the duty to inform them their rights under section 200(3) Criminal Procedure Code. Thereafter she would hear and record their responses and or requests. She would then give an opportunity to the prosecution to respond to any requests made by the Appellants. The court may or may not accede to any request made by the accused person, after due consideration of all the circumstances which must all be put on record.

19 On the importance of compliance with the said procedural requirement, I wish to refer to the case of **Office of Director of Public Prosecutions vs. Peter Onyango Odongo & 2 others High Court at Siaya Constitutional and Judicial Review Division Petition No. 2 of 2015 (2015) eKLR** where Makau J rightly expressed himself while considering whether **Section 200 (3)** of the **Criminal Procedure Code** was unconstitutional. The learned Judge delivered himself thus: -

**“ Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate’s predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable Court make a just decision.”**

20. The learned Judge further concluded that *“.....Section 200 (3) of the Criminal Procedure Code was 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.....”*

21. The appellant’s right to a fair hearing under **Article 50** of the **Constitution** was therefore infringed by the failure by the succeeding magistrate to comply with **Section 200(3)** of the **Criminal Procedure Code**. In essence all the subsequent proceedings were veiled with that unconstitutionality and cannot stand in law. It is for that reason that this Court will not deem it necessary to deal with the rest of the grounds in this appeal.

22. The upshot is that the Appeal is allowed and the following orders are made:-

**(i) Both conviction and sentence are set-aside.**

**(ii) The proceedings in Kwale Chief Magistrates Court Criminal Case No. 216 of 2013 conducted by Hon. B. Koech Senior Resident Magistrate, as from 6/04/2017 leading to the delivery of judgment on 4/07/2017 be and are hereby set aside.**

**(iii) The Kwale Chief Magistrates Court Criminal Case No. 216 of 2013 shall be mentioned before another succeeding Magistrate other than Hon. B. Koech who shall comply with Section 200(3) of the Criminal Procedure Code within 14 days of this judgment and proceed with this matter to it’s conclusion.**

Orders accordingly

**Dated, signed and delivered this 26<sup>th</sup> day of October 2018 in open court at Mombasa.**

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**HEDWIG I. ONG’UDI**

**JUDGE**