REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO.20 OF 2016

FRANKLINE MWITI.....APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

(From the original conviction and sentence in criminal case No. 852 of 2015 of the Chief Magistrate's Court at Meru by Hon. B. Ochieng – Principal Magistrate)

JUDGMENT

The appellant, **FRANKLINE MWITI**, was convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code and for the offence of gang rape contrary to section 10 of the Sexual Offences Act.

The particulars of the offences were that on 4th May 2014 at Mpuri sub- location, Imenti North District of Meru county, jointly with others not before court, robbed **BRIAN MWENDA MURIITHI** of his mobile phone valued at Kshs. 3000/= and immediately before the time of the said robbery used actual violence to the said **BRIAN MWENDA MURIITHI**. On the same day and place, in association with others not before court, intentionally and unlawfully caused his penis to penetrate the vagina of **M.M** without her consent.

The appellant was sentenced to suffer death in count one and in the second count he was ordered to serve 14 years imprisonment. He now appeals against both conviction and sentence.

The appellant was represented by Mrs. Ntaragwi, learned counsel. She raised seven grounds of appeal that can be summarized as follows:

1.That the learned trial magistrate erred in law and in fact by failing to take into account that the appellant was prejudiced by the failure to supply him with witnesses' statements.

2. That the learned trial magistrate erred in law and in fact by failing to start the matter de novo.

3. That the learned trial magistrate erred in law and in fact by failing to test the evidence of identification and recognition.

4. That the learned trial magistrate erred in law and in fact by failing to appreciate that the offences were not proved against the appellant.

5. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's defence.

The state opposed the appeal through Mr. Odhiambo, the learned counsel.

The facts of the prosecution case briefly were as follows:

The complainants met with the appellant who was in company of two other men. The trio beat and robbed the first complainant. They also beat, robbed and raped the second complainant. The appellant was both recognized and identified.

The appellant pleaded an alibi and denied any involvement in the offences.

This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32.**

When this matter commenced hearing on 10th December 2014, the appellant informed the court that he was ready for hearing. He raised the issue of statements for the first time through his counsel in an application for the matter to start de novo. This came too late in the day. The court would not have known that he had not been supplied with copies of statements. He is therefore estopped from raising this ground.

Section 200(3) of the Criminal Procedure Code 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.***

This is the procedure that the appellant is claiming was breached.

The appellant's case was heard by two magistrates and before the takeover by the second magistrate, the appellant was informed of his right under the provision of section 200 (3) of the CPC. He elected to have his case start de novo. The **Concise English Dictionary** defines the word **"any"** as:

> ***used to refer to one or some of a thing or a number of things, no matter how much or how many.***

In my understanding of this English word, it does not mean all. In the context of section 200(3) of the CPC it does not therefore mean all witnesses must be recalled. The issue of de novo is a creature of misunderstanding but not of the law. Under the section therefore, an accused person may elect to call some of the witnesses he may deem crucial and indicate whether he wants them recalled for examination in chief or for cross examination. Where one is not represented, the court has a duty to explain and elicit from him the intended purpose for the recalling of the witnesses.

Under the section, it mandatory for the succeeding court to inform the accused of his right what is not mandatory is what follows subsequently. In the instant case the trial court complied with the mandatory part of the section.

I have already observed that the section does not provide for the case to start afresh. However, the election of an accused ought not be dismissed with a wave of hand. My position is bolstered by the Court of Appeal decision in the case of **JOSEPH KAMAU GICHUKI vs. REPUBLIC [2013] eKLR** it said the following:

> ***This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence***

the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.

The prosecution did not indicate to the court of the challenges, if any, of recalling any of the witnesses. The ruling that was made was therefore prejudicial to the appellant. The trial therefore was a mistrial.

I will not address the other grounds raised for obvious reasons.

In the interest of justice, I hereby quash the conviction and set aside the sentence. I order a retrial before any magistrate of competent jurisdiction other than Hon. B Ochieng.

The appellant to be produced before the Chief Magistrate, Meru on 3.5.2017 for the plea taking and other consequential orders. Where possible, the trial should be on a day to day basis.

DATED at MERU this 27th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE