



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL APPEAL NO 285 OF 2010**  
**JOB BARONGO ANUNDA.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

*(Appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 5 of 2009  
(Hon. S.Muketi, Chief Magistrate) delivered on 11<sup>th</sup> November, 2010)*

**JUDGMENT**

The appellant was charged with three counts of wilful failure to comply with the applicable procedures and guidelines relating to the management of funds contrary to **section 45 (2) (b)** as read with **section 48 (1)** of the **Anti-corruption and Economic Crimes Act, No. 3 of 2003**. He was also charged with three other counts of abuse of office contrary to **section 46** as read with **section 48(1)** of the **Anti-Corruption and Economic Crimes Act**. In the alternative to these three other counts the appellant was charged with the offences of fraudulent acquisition of public property contrary to **section 45(1)(a)** as read with **section 48(1)** of the **Anti-corruption & Economic Crimes Act**.

He was convicted on all the three principal counts of failure to comply with the applicable procedures and guidelines relating to the management of funds. He was also found guilty of all the three alternative counts of fraudulent acquisition of public property contrary to **section 45(1) (a)** as read with **section 48(1) of the Anti-corruption & Economic Crimes Act**.

The appellant was fined Kshs 50,000/= on each of the counts he was convicted of; he was to serve 12 months imprisonment on each of those counts if he defaulted in payment of the fine. In addition, the appellant was also fined twice the amount lost as a result of commission of the offences he was convicted of.

He appealed against the decision of the lower court on nine grounds one of which was that he was prejudiced in his trial because the learned magistrate who concluded his trial did not comply with **section 200** of the **Criminal Procedure Code, cap 75** when she took it over from her predecessor who had taken part of the evidence; that provision of the law reads as follows:-

***200. Conviction on evidence partly recorded by one magistrate and partly by another***

***(1) Subject to subsection (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 that jurisdiction, the succeeding magistrate may—***

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

*(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.*

*(2) Where a magistrate who has delivered judgment 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 judgment.*

*(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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.*

*(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.*

The record shows that the trial began before **Hon. Lucy Gitari** who took the evidence of four prosecution witnesses. On 25<sup>th</sup> February, 2010 Hon Muketi took over the case and proceeded to hear six other prosecution witnesses before the appellant was put on his defence. The learned magistrate did not, however, make any reference to **section 200** of the **Criminal Procedure Code** when she commenced the proceedings from where her predecessor left and thereby effectively overlooked the mandatory procedural requirements of **subsection (3)** thereof; a plain reading of that provision enjoins the magistrate who takes over the hearing of a case whose evidence has been partly taken by another magistrate to inform the accused person of his right to have any witness who has testified before the previous magistrate recalled and testify afresh.

The state counsel conceded that the omission by the learned magistrate to comply with the provisions of **section 200(3)** was fatal to the appellant's trial and on that score alone the appeal ought to be allowed and a fresh trial ordered.

I agree with both the learned counsel for the appellant and the state that failure by the learned magistrate to comply with **section 200(3)** of the Criminal Procedure Code vitiated the appellant's trial. Without delving into the other grounds of appeal; the net effect of this omission was to render the entire trial a nullity.

There are a host of cases where it has been consistently held that failure by the court to comply with **section 200(3)** of the Criminal Procedure Code is fatal to an accused person's trial; in **Kariuki versus Republic (1985) KLR 504** the High Court (**Abdullah & Aluoch JJ**) held that under **section 200(3)** of the **Criminal Procedure Code**, an accused person is entitled to demand that any witness be resummoned and reheard and that a duty is imposed on the succeeding magistrate to inform the accused person of that right. Where the accused person is not so informed, so the court held, the trial is a nullity. (See page 506). The Court of Appeal has similarly held in **Malindi Criminal Appeal No. 57 of 2014, Joseph Kamora Maro versus Republic** and **Nyeri Criminal Appeal No. 21 of 2013 Henry Kailutha Nkaricha & Another versus Republic**. In the latter decision, the Court (R.Nambuye, P.O Kiage and F.Sichale JJA) cited previous decisions in which the Court has been categorical that, according to **section 200(3)** of the Code, the succeeding judge or magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and that a judge or a magistrate must comply with this statutory requirement irrespective of whether the applicant has made the application. Failure to comply, so has the court ruled, renders the trial a nullity.

In **Criminal Appeal No.106 of 2009, Bob Ayub versus Republic**, the Court of Appeal sitting at Kisumu explained further that the court's duty under **section 200(3)** is to the accused person and not to his counsel and thus it does not matter that the accused person is represented; it is incumbent upon the court to inform the accused person of his rights with or without legal representation. It has also been

noted that the initiative is upon the court and it is not necessary that any form of application should be made before the court discharges its statutory responsibility.

I need not belabour the point that the appellant's trial was a nullity and for this reason there is no need to consider the rest of the grounds of appeal; for the same reason there is no basis upon which this court can consider the evidence adduced at the trial and come to its own conclusions, as it always ought to whenever exercising its appellate jurisdiction. If the trial was a nullity, there is in effect no evidence to reconsider. I will, accordingly allow the appeal, quash the conviction and set aside the sentence.

**Section 200(4)** of the **Criminal Procedure Code** gives this Court the discretion to order for a new trial whenever it quashes a conviction based on the reason that an accused person was materially prejudiced for non-compliance with **section 200(3)** thereof. The record shows that besides police officers who testified the rest of the witnesses were from institutions which still exist to date; one of them is infact a state institution. There is no possibility that the state will have trouble tracing the witnesses if a retrial is ordered. Accordingly, I order that this case be remitted to the Chief Magistrates' Court at Nyeri for a retrial. Orders accordingly.

**Dated, signed and delivered in open court this 19<sup>th</sup> August, 2016**

**Ngaah Jairus**

**JUDGE**