REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 202 OF 2010

WILLIAM GACHUNIA NDIRANGU.....1ST APPELLANT

MWANGI WA KIHUNI….....2ND APPELLANT

VERSUS

REPUBLIC……....……..…..RESPONDENT

(Appeal against conviction and sentence in Nyeri Chief Magistrates' Court Criminal Case No. 4207 of 2004 (Hon. S.Muketi, Chief Magistrate) delivered on 15th July, 2010)

JUDGMENT

The appellants were amongst seven people who were charged with several offences ranging from stealing to forgery, making a document without authority and fraudulent false accounting contrary to **sections 275, 349, 357(a)** and **330(b)** of the **Penal Code, cap 63**, respectively; there were five counts in total and according to the particulars of offence in each of those counts, the offences were alleged to have been committed on diverse dates between 27th February, 2002 and 1st March, 2002 either at Othaya Farmers Co-operative Society Limited offices or at the Othaya water office in Othaya town in the then Nyeri District.

According to the charge sheet presented to court on 5th January, 2006, the appellants were named as 6th and 2nd accused persons respectively.

The court found the 2nd and 5th accused persons guilty of some of the counts with which they were charged; however, looking at the lower court's judgment, it is not clear whether the 1st appellant was convicted or acquitted because he was not mentioned in either of the outcomes of their trial. This is what the learned magistrate said in her judgment as far as the convictions and acquittals were concerned:-

> ***"…the court finds the 1st and 4th accused persons not guilty as charged on all counts and acquit them under section 215 of the Criminal Procedure Code.***
>
> ***The court however finds the 2nd and 5th accused persons guilty of stealing contrary to section 275 of the Penal Code and convict them accordingly.***
>
> ***The 2nd accused is acquitted in counts 2, 3, 4 and 5 there being no evidence to connect him under section 215 of the Criminal Procedure Code.***
>
> ***The court finds the 5th accused guilty of forgery and making a document without authority and***

convict him i.e. counts II and III.

The fifth accused is acquitted over counts 4 and 5 under section 215 of the Criminal Procedure Code there being no evidence."

Now that the 1st appellant has appealed, it can only be assumed that the court must have been talking about him in its judgment when it referred to the 5th accused person. Whether that was a proper assumption for the court to make is a subject that may be discussed elsewhere, if it will be necessary to go that far, but if we proceed on the understanding that that is what the lower court meant, then the two appellants were convicted of three distinct counts. The first appellant was convicted of the offence of forgery contrary to **section 349** of the **Penal Code**, which is count II in the charge sheet and whose particulars were that on the 28th February, 2002 at Othaya Farmers Co-operative Society Limited offices in Nyeri District within central province jointly with others not before court he forged receipt no. 697641 purporting it to be a genuine official receipt issued by Othaya Mukurweini water supply.

He was also convicted of the third count in the charge sheet, which was making a document without authority contrary to **section 357 (a)** of the **Penal Code**; here the particulars were that on the 28th February, 2002 at Othaya Farmers Co-operative Society Limited offices in Nyeri District within central province with intent to defraud without lawful excuse or authority jointly with others not before court the appellant made a receipt no. 697641 purporting it to be a genuine official receipt issued by Othaya Mukurweini water supply.

Both the 1st and 2nd appellants were also convicted of the offence of stealing contrary to **section 275** of the **Penal Code**; this was the first count with which they were charged and the particulars here were that on diverse dates between the 27th and 28th February, 2002 at Othaya Farmers Co-operative Society Ltd in Othaya jointly with others not before court, the appellants stole Kshs 217,000/= the property of Othaya Farmers Co-operative Society.

The appellants were fined Kshs 100,000/= on the first count and in default to serve 15 months imprisonment; the first appellant was fined Kshs 100,000/= for each of the 2nd and 3rd counts and in default to serve 15 months imprisonment on each of those counts.

The two appellants appealed against their convictions and sentences meted out against them; they filed separate appeals but which, on their application, were consolidated when the two appeals came up for hearing.

Amongst the several grounds they raised against the decision of the learned magistrate, was the ground that their trial was a mistrial because the learned magistrate who concluded their case did not comply with **section 200(3)** of the **Criminal Procedure Code, cap 75** when she took it over from her predecessor who had taken part of the evidence. I propose to deal with this question as a preliminary point of law because if it is true that the appellants trial was a mistrial there would be no need of ploughing through the evidence and evaluating it afresh since the trial would in effect be a nullity and hence no trial; if there was no trial, then there is no evidence which this Court should, as it always ought to, evaluate afresh and come to its own conclusions.

The record shows that the trial against the 2nd appellant and 4 other persons in **Criminal Case No. 4207 of 2004** started before Hon EJ Osoro on 1st February, 2005. The first prosecution witness did not, however, complete his evidence-in-chief and was stood down because he did not have certain documents which he had referred to in his evidence. Subsequently, and more particularly on 5th January, 2006 this case was consolidated with **Criminal Case No. 5285 of 2005**.

The consolidated case commenced afresh before **Hon L.W. Gitari** (Senior Principal Magistrate) who took the evidence from all the prosecution witnesses and even ruled that the appellants together with the rest of the accused persons had a case to answer. For some reason which is not evident from the record, Hon. Gitari did not conclude the matter as Hon Muketi took it over, heard the defence case and ultimately

delivered the decision of the court.

Counsel for the appellants submitted that though the appellants' trial was handled by three different magistrates, there is no evidence that two succeeding magistrates ever complied with **section 200(3)** of the **Criminal Procedure Code**. Relying on the decision in **Eustace versus Republic (1970) EA 393** counsel for the 1st appellant urged that a trial cannot be conducted by a succession of magistrates. In that case Court of Appeal for East Africa sitting at Dar-es-salaam interpreted **section 196** of the **Criminal Procedure Code of Tanzania,** which is in pari materia with section 200 of our own section 200 of the Criminal Procedure Code to say that, on its true interpretation, that section allows only one magistrate to continue and complete a trial began by another magistrate. The court stated that:

> ***"We do not consider that it can properly be read as authorising the conduct of a trial by a succession of magistrates. It may be noted, although we do not base our decision on this, that the proviso to subs. (1) refers to "the second magistrate", which appears to confirm that the section applies to only two magistrates."*** (See page 392).

The court held that since the trial had been presided over by three magistrates, the conviction and sentence were a nullity and that the trial as a whole was abortive.

Counsel also cited the High Court decision in **Kariuki versus Republic (1985) KLR 504** in which the 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).

Counsel for the state admitted that **section 200(3)** of the Criminal Procedure Code was not complied with when Hon. Gitari took over the case from Hon. E.J. Osoro but that there is no evidence that the appellants suffered any prejudice since the case commenced afresh before Hon. Gitari. The record would bear the state counsel right because it is clear that Mr Cyrus Kanyungu Gachoka who was stood down when the proceedings commenced before Hon. Osoro, testified afresh before Hon. Gitari after the two cases were consolidated and therefore there is no basis for the argument that section 200(3) was not complied with principally because the testimony given before Hon. Osoro was of no consequence. Even so, assuming that the appellants retained their right and they could exercise it under that provision of the law in those circumstances the best they could achieve was to have the witness testify afresh; this he did before the succeeding magistrate. I would agree with the learned counsel that considering that the case against the appellants commenced afresh before the succeeding magistrate, **section 200(3)** was not applicable and even if it was the appellants were not prejudiced in any way because the only witness who had testified partly before the previous magistrate testified again before the succeeding magistrate when the case commenced afresh before her.

The only point of contention, as far as compliance with **section 200(3)** is concerned, is when Hon Muketi took over the case from Hon Gitari. It has been submitted on the appellant's behalf that this particular provision of the law was not complied with but counsel for the state on the other hand has urged that it was. A reading of the record would help to resolve this dispute; the relevant part reads as follows:

> ***"4.5.10***
>
> ***Before S. Muketi-C.M***
>
> ***COURT: CIP Ogutu-Pros***
>
> ***Court Clerk: Wanjohi***
>
> ***Accused-present***
>
> ***Mr Muteithia for accused 1. Mr Muhoho for 2nd accused. Mr Kariuki for the 4th accused and***

Mr Wambugu for 5th accused. By consent section 200 of the CPC invoked and the matter to proceed from where it had reached.

Accused 1: Evidence sworn

Witness: Nil

Accused 2:

Evidence unsworn

Witness: Nil

Accused 4

Evidence: sworn

Witness: Nil.

Accused 5:

Evidence Sworn

Witness: Nil"

It is apparent from this portion of the record that the statement, *"by consent section 200 of the CPC invoked and the matter to proceed from where it had reached"* is not attributable either to any of the accused persons or to their representatives; its plain reading shows that it probably emanated from the court itself. A logical conclusion from these circumstances would be that there is no evidence that each of the appellants agreed that the case should proceed in the manner suggested by the court; in the absence of such there is force in the appellant's argument that **section 200(3)** of the **Criminal Procedure Code** was not complied with. They were not informed of their rights under that provision of the law.

It is quite possible that the trial could have proceeded from where it had reached when the last magistrate took over and ultimately disposed of this case. Circumstances may have dictated that this was the most appropriate course for the court; however, it had to be demonstrated that the appellants had been informed of their rights under **section 200(3)** of the **Criminal Procedure Code** irrespective of the decision the Court would have come to on the appellants' application.

In trials where the accused persons have not been informed of their rights under **section 200(3)** of the Code, it has been consistently held that such trials are a nullity; apart from the decision in **Kariuki versus Republic** *(supra),* the Court of Appeal has similarly held so 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.

I am compelled to reach the same conclusion in this appeal; having concluded that the appellants were not informed of their rights under **section 200(3)** and that there is no evidence that they consented to the progression of their case from where the last magistrate took over, theirs was a mistrial.

Ordinarily, in view of the conclusion I have come to, I would have been inclined to order a retrial;

however, it is worth noting that the trial against the appellants began in 2005 and it dragged on until July, 2010 when it was concluded. Six years have since elapsed. Subjecting the appellants to a fresh trial in these circumstances will certainly not be in their best interest or, at the very least, in the interest of justice. It is quite probable that the state itself may have difficulties tracing all or some of the witnesses considering that it is now over ten years since the offences are alleged to have been committed. Taking all these factors into account I can only allow the appeal as I hereby, quash the appellants' convictions and set aside the sentences meted out against them. It is so ordered.

Dated, signed and delivered in open court this 19th August, 2016

Ngaah Jairus

JUDGE