REPBULIC OF KENYA

IN HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEALS NO. 475 AND 476 OF 2010

PETER MUGAZI MUZIZA ……...…..…… 1ST APPELLANT

JOSEPH NJENGA NJUGUNA……..2ND APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(From original conviction and sentence in Criminal Case Number 4390of 2008in the Chief magistrate's court at Makadara before M.M. Muya (C.M) on 12th August, 2010)

JUDGMENT

These Appeals are consolidated. The two appellants were originally charged with three others with five counts of Robbery with Violence contrary to Section 296 (2) of the Penal Code. They denied the offences but after a full trial the two appellants were convicted of counts 1, 2, 3 and 5 and sentenced to death. Their co-accused were acquitted of all the offences. Aggrieved by the said convictions they lodged these appeals.

The record before us shows that the case was first heard by Hon. E. Muriithi (as he then was) who heard two witnesses. For reasons that are not on record, the matter was then placed Before T. Ngugi who noted that the matter was part heard and recorded that Section 200 of the Criminal Procedure Code had been complied with. All the accused persons including the appellants herein expressed the wish to proceed with the evidence on record. Our understanding is that the case would proceed from where Hon. Muriithi had stopped. However, the magistrate Hon. T. Ngugi, could not reach the matter on that day due to pressure of work and therefore ordered the same to be re-allocated.

Subsequently, the matter was listed for hearing before Hon. M. Muya (as he then was) who proceeded to take the evidence of 5 witnesses, heard the defence of the appellants and delivered the judgment herein.

At the hearing of the appeals before us the learned counsel for the Republic informed the court that she had looked at the record and noted that the succeeding magistrate had not complied with Section 200 of the Criminal Procedure Code and therefore she was conceding the appeals for that reason. However, considering the seriousness of the offence and the fact that judgment was delivered six years ago, she asked for a retrial. It was her position that the witnesses and the police file may still be available.

Both appellants expressed concern that they had been in prison for a long period and opposed a retrial. This court then allowed counsel for the Republic to find out whether or not the police file and the

witnesses were still available. As at the time of writing this judgment, that confirmation had not been received.

Section 200 (3) of the Criminal Procedure Code allows a succeeding magistrate to commence a hearing of proceedings where part of the evidence has been recorded by his predecessor. At that point, the accused person may demand that any witness be resummoned and be reheard and the succeeding magistrate shall inform the accused person of that right.

The directions under Section 200 (3) in this matter were given by T. Ngugi on 1st October, 2009. However the case was not heard on that day. When Hon. Muya took over the matter on 14th December, 2009 he did not give any directions under Section 200 (3) of the Criminal Procedure Code aforesaid. Our understanding of the said provisions is that Hon. Muya was the succeeding magistrate and not Hon.Ngugi. We say so because, Hon. Ngugi did not commence any hearing after Hon. Murithi had recorded evidence of two witnesses. It was Hon. Muya who took over the hearing and recorded evidence from the remaining witnesses.

It was incumbent therefore for Hon. Muya to take the appellants through the same motions as required under that section. Having failed to inform the appellants of that right, the proceedings that followed were vitiated.

The learned counsel for the Republic has requested that we order a retrial which has been opposed by the appellants. An order for retrial brings into consideration several factors but the guiding principle is that such an order will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant.

Other factors include illegality or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant and where the mistakes leading to the setting aside of the conviction were entirely the prosecution making or the court. – see **Muiruri vs. Republic (2004) klr 552.**

The other basic consideration is that a retrial should not be ordered unless the appellate court is of the opinion that, on a proper consideration of the admissible or potentially admissible evidence a conviction might result.

The appellants herein were arrested on 23rd October, 2008. They were convicted on 12th August, 2010. As at the time their appeals were heard about 5 years had elapsed from the date of arrest. That notwithstanding, the offences they were charged with and upon which the convictions were founded, were serious and going by the evidence on record, it would appear that the conviction may well have been well founded. We are told that the police file and witnesses may still be available. It has not escaped our attention that such offences are now bailable following the Constitution 2010.

In the interests of justice we are persuaded that this is a proper case for a retrial. Accordingly the convictions and sentence herein are set aside and a retrial shall take place against both appellants. The appellants shall be released from prison and escorted to Kayole police station so that the retrial is initiated.

Orders accordingly.

SIGNED DATED and **DELIVERED** in court this **20th** day of May **2014**.

A.MBOGHOLI MSAGHA **L.A. ACHODE**

JUDGE **JUDGE**