REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.219 OF 2012

(Arising from conviction and sentence in Narok SPMCR.C. No.138 of 2011 – Judgment by Z. Abdul, RM

EVANS TAI NYAOMA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant (EVANS TAI NYAOMA) was charged with Trafficking in a narcotic drugs contrary to **Section 4(a)** of the **Narcotic and Psychotropic Substances (Control) Act No.4 of 1994**. The particulars of the charge stated that on the 1st day of February 2011 at Kipangas area, along Bomet-Narok road, in Narok North District, he trafficked in 24 bags of cannabis, with a market value of 24,000/= by transporting it in a motor vehicle registration No.KBA 757G Scania Bus, in contravention of the Act.

The appellant denied the charge, and after a trial in which 5 prosecution witnesses testified, the appellant was convicted and sentenced to serve 10 years imprisonment.

The findings are challenged on grounds that:-

(1) The trial magistrate failed to remind the appellant of his legal rights under Section 200(3) Criminal Procedure Code thus rendering the entire proceedings a nullity.

(2) The accused was never accorded a chance to be heard or present his defence.

(3) The evidence was contradictory and the circumstances for identification were riddled with glaring errors.

(4) The prosecution did not prove its case beyond reasonable doubt.

At the hearing of the appeal, Mr. Ochang' appearing for the appellant submitted that the failure by the trial court to comply with provision of **Section 200(3) Criminal Procedure Code** was prejudicial to the appellant. He argued that although the advocate representing the appellant appeared in court and stated that they were ready to proceed from where the matter had reached, that was not enough. It is counsel's contention that, the trial magistrate ought to have informed the appellant of his rights and recorded his sentiments. He argues that even if counsel acted with instruction, he ignored the law, and the court had a duty to read the provisions to the appellant.

Although conceding the appeal, Miss Rugut on this limb argues that the defence counsel acted on instructions of the appellant and the non-compliance of Section 200(3) cannot arise. Certainly, the practice and understanding in the past has always been that an accused person communicates to the court through his counsel, and similarly that whatever counsel tells the court, is informed by instructions from his client. However the evolving jurisprudence arising from several decisions by Warsame and Lenaola JJ in **Kennedy Musyimi V R Machakos HCCA No.146 of 2008** is that the rights under **Section 200(3) Criminal Procedure Code** accrue personally to the accused person, and the trial court has a duty to inform the appellant personally of those rights, and must record his response.

Section 200 (3) Criminal Procedure Code provides:-

> **"Where a succeeding magistrate commences a hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right."**

In this instance, the trial begun before S.B. Atambo (SRM), who was transferred from Narok before completing the case. The matter was taken over by Z. Abdul and on 16/08/2012; Mr. Onduso who held brief for the appellant's counsel informed the court that his instructions were to proceed from where the matter had reached.

A reading of **Section 200(3) Criminal Procedure Code** which couched in mandatory terms places a duty on the court to inform the accused of those rights. To that extent then, the trial magistrate failed to comply with the provisions, and this was prejudicial to the appellant. Section 200(4) provides that **"where an accused person is convicted upon evidence not wholly recorded by the 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 prejudice detected is twofold:-

> **(a) The appellant was never given a chance to indicate whether he understood the implications of the options available to him including the right to recall witnesses.**
>
> (b) **Since the advocate holding brief for his counsel seemed so mixed up on instructions, it was important for the court to communicate the options to the appellant as a way of confirming that indeed his advocate had explained to him the provisions of Section 200(3). Consequently I find that the non-compliance with the strict provisions of Section 200(3) was prejudicial to the appellant.**

Secondly, it is submitted that the trial magistrate did not observe fairness, as only the prosecution case was heard, and at the end of the prosecution case when a date was given for defence to make submissions, the advocate holding brief for accused's counsel informed the court that he had instructions to take a date for judgment. This means that the court never made a ruling as to whether the accused had a case to answer, nor was the accused given an opportunity to defend himself.

Mr. Ochang' contention is that a fair trial means that both parties are heard, yet in this case the appellant was condemned unheard.

Miss Rugut concedes that the appellant was not given a chance to defend himself. She however points out that the evidence is overwhelming and urges this court to order a retrial.

Mr. Ochang' is opposed to a retrial arguing that the State has not indicated whether witnesses will be available. Counsel's contention is that the error was on the part of the court and that should not be a ground for retrial.

I have perused the record, and confirm that indeed upon close of the prosecution case, the provisions of

Section 211 were not complied with. This provision states:-

> **"211 (1) At the close of the evidence in support of the charges, and after hearing such summing up, submissions or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that , if he does so, he will be liable to cross examination, or make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).**
>
> **(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses."**

This provision is common knowledge to any judicial officer and I believe the non-compliance by the trial magistrate was not for lack of awareness of that provision. I think the trial magistrate was misled by counsel who held brief for appellant's counsel when he addressed the court and said his instructions were to take a date for judgment. Since this was not the magistrate who heard the prosecution case, it seems she acted in good faith, believing what counsel informed the court. Her only failure was that she did not check the record to see what stage the matter had reached – at least she would have then have known that the ruling had not been made on whether the appellant had a case to answer.

Be that as it may, the ultimate result is that non-compliance with **Section 211** of the **Criminal Procedure Code** means that it denied the appellant his right to be heard or at least make an informed decision on how he wished to defend himself. The upshot was that the court ended up writing a judgment without the benefit of evaluating evidence which the accused may have offered. The conviction was not safe and I quash it, and set the sentence aside.

I have read through the trial court's record and considered that the appellant has only served 1 year of his 10 year sentence, and I am persuaded that the cure in this matter lies in an order for re-trial.

I therefore direct that the case against the accused be heard afresh before any other magistrate, in Narok Court, other than the one who heard and determined this matter.

The appellant shall appear before the Narok SPM on 16th December 2013 for retrial directions.

Delivered and dated this 26th day of April, 2013 at Nakuru.

H.A. OMONDI

JUDGE