



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 65 OF 2009
(CONSOLIDATED WITH CRIMINAL APPEAL NO. 64/09)
JAMES KIARIE KAHIGO.....1ST APPELLANT
DENNIS MUTHAMIA MUTUKU.....2ND APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

(From original sentence and conviction in Criminal Case No.4353 of 2007 of the Chief Magistrate's court at Thika by Hon.C.W. Meoli (Chief Magistrate))

JUDGMENT

JAMES KIARIE KAHIGO and **DENNIS MUTHAMIA MUTUKU** were convicted for the offence of Robbery with violence contrary to **section 296(2) of the Penal Code**. Both of them were then sentenced to death.

One of the five issues raised by the appellants herein is the non-compliance with **Section 200 of the Criminal Procedure Code**. That issue arose from the fact that there was a change of the judicial officer who presided over the trial.

The trial commenced before Hon. U.P. Kidula, Chief Magistrate. After two prosecution witnesses had testified, the learned magistrate dropped out from the picture.

Thereafter, Hon. C.W. Meoli, Chief Magistrate, (as she then was), took over as the judicial officer presiding over the trial.

The first step which the succeeding magistrate undertook was to comply with the provisions of **section 200 of the Criminal Procedure Code**. The record of proceedings on 15th May 2008 reads as follows:

“COURT: Section 200 CPC complied with. Do the accused wish any witness recalled?

ACCUSED 1:

Let **PW 1** be recalled.

ACCUSED 2:

I do not wish to have any witness recalled.

PROSECUTOR

The witness, **PW 2**, is in Western. We have two witnesses.”

Thereafter, **PW 3** and **PW 4** testified.

It is at that stage that the 2nd accused informed the court that he wished to further cross-examine **PW 2**.

Having heard the request by the prosecutor, for an adjournment, and the 2nd accused’s request for the recall of **PW 2**, the learned trial magistrate noted as follows:

“COURT

Hearing adjourned. Further hearing on 27/6/08 for **PW 2** and 2 remaining witnesses.”

It is thus clear, from the record, that the learned trial magistrate was fully alive to the need to have **PW 2** testify further.

However, after **PW 5** testified, the prosecution closed its case, without having re-called **PW 2**.

In the light of the fact that **PW 2** was never recalled, this court asked the respondent whether or not that omission was fatal.

Miss Maswai, learned stated counsel, submitted that the failure to recall **PW 2** was not fatal.

The respondent invoked the provisions of **Section 358 (1) of the Criminal Procedure Code**, and asked this court to take further evidence, at this appellate stage.

It was the respondent’s position that if this court was not minded to receive the evidence of **PW 2**, then this court ought to direct the learned magistrate to take the further evidence of **PW 2**.

Pursuant to **Section 200(1) of the Criminal procedure Code**, a new magistrate or Judge can take over as the presiding judicial officer in a trial which commenced before his colleague.

Section 200(3) of the Criminal Procedure Code, instructs the succeeding magistrate or Judge on the procedure he is to adopt when taking over a case that had already been partially tried before his predecessor. This is what that sub-section provides;

“where a succeeding magistrate or Judge 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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

In accordance with the requirement that the succeeding magistrate shall inform the accused person of his right to demand that any witness be re-summoned and be re-heard, the learned trial magistrate asked the accused if they wish to have any witness recalled.

Although it is not explicitly clear whether or not the trial court notified the accused persons of their right to demand that any witness be re-summoned and be reheard, we find that the succeeding magistrate complied substantially with the requirement that the court should inform the accused that the said accused should inform the court if he wished to have any witness recalled.

At no time did the prosecution raise any objection or opposition to the recall of **PW 2**. The prosecution only informed the court that **PW 2** was in Western.

In any event, the learned trial magistrate directed that when the trial resumed on 27th June 2008, the further hearing would proceed, and **PW 2** would testify together with the other 2 witnesses who the prosecution had.

Thereafter, in her judgment, the learned trial magistrate made several references to the evidence tendered by **PW 2**. One of the said references was in the following terms;

“In her hiding place PW 2 said she saw both accused trying to remove the sewing machines, which turned out to be too heavy. During cross-examination, this witness remained firm and the initial trial magistrate made a positive note regarding her demeanor. PW 2 was, 2 days later, able to identify both men at an identification parade. PW 2 said that in her hiding place and by the light of the torch which the robbers had (held by 1st accuse). The narrative of this witness is lucid and flowing. It clearly shows that she did closely follow and witness the events of the material night. I have no doubt whatsoever that she was a witness of truth.”

Clearly, therefore, the succeeding magistrate was very much influenced by the evidence of **PW 2**. Indeed, the trial court made it clear that the evidence of **PW 2** and **PW 3** effectively displaced the defences.

If the evidence of **PW 2** had not been admitted so positively by the trial court, the evidence of identification may not have sounded so convicting, as the 2nd appellant had asserted that **PW 3**'s evidence was activated by love gone sour.

Regardless of whether or not the evidence tendered by the other witnesses, (excluding **PW 2**), would have been sufficient to convict the appellants, we must return to confront the issue whether the failure to recall **PW 2** was fatal or not.

The appellants assert that that omission as fatal. But the respondent suggests that that omission is curable, pursuant to **section 382 of the Criminal procedure Code**.

It is on that basis that the respondent invited us to order that further evidence be taken.

It is mandatory, under **section 200(3) of the Criminal procedure Code** that a succeeding magistrate or Judge shall notify the accused that he has a right to demand the recall of any witness who had testified before his predecessor.

Having complied with that mandatory requirement, and having directed that **PW 2** be recalled, the trial court was under an obligation to ensure compliance.

Secondly, as we have already demonstrated, the evidence of **PW 2** had a significant impact on the decision of the trial court.

By allowing itself to be influenced by the evidence of a witness whom the appellants had intended to question further, the trial court acted in a manner that was prejudicial to the appellants.

The appellants were convicted. That conviction was, partially, influenced by the evidence of **PW 2**.

If we were to order that **PW 2** be recalled to give further evidence before either this court or before the trial court, we would have to re-open the whole trial.

The situation is not comparable to that in which an appellant simply wants the appellate court to take into account the first report as recorded in the Occurrence Book. Such a report speaks for itself, especially

when the appellant had, during the trial, disputed his alleged identification.

But when a witness has to be re-called, the trial has to be re-opened, because it cannot be known what the accused person would want to ask the witness or what the witness would say in answer to the questions.

We appreciate that pursuant to **section 358 (1) of the Criminal Procedure Code**, the High Court may, when it is handling an appeal from the magistrate's court, take additional evidence or order the magistrate's court to take such additional evidence.

Section 358(4) of the Criminal Procedure Code provides that such additional evidence as is taken pursuant to that section shall be taken as if it were evidence that was taken at a trial before the magistrate's court.

The additional evidence would be certified by the magistrate's court, that had been directed to take it, and the High Court will then use the additional evidence, (together with what was already on record), to dispose of the appeal.

It appears that the framers of **section 358 of the Criminal Procedure Code** had very serious thoughts on the matters concerning additional evidence to be taken at the stage of appeal.

However, we are of the considered view that if we were to direct that additional evidence be taken herein; and if we thereafter use that evidence in determining the appeal, we would not have been sitting on an appeal *per se*. We say so because the learned trial magistrate would not have given any consideration to evidence which was never presented before it. Therefore, a consideration of the additional evidence, at this stage would constitute the first decision of a court, which encompasses all evidence.

We would never know that the trial could have held, if the additional evidence had been tendered before it.

We therefore decline to direct that additional evidence be taken either by this court or by the magistrate's court.

The omission by the trial court was so prejudicial to the appellants that we deem it to be fatal to the conviction.

Accordingly, we allow the appeals, quash the convictions and set aside the sentences on both appellants.

We order that the appellants be set at liberty forthwith unless they are or either of them is otherwise lawfully held.

Dated, Signed and Delivered at Nairobi, this 25th day of July, 2013.

A.MBOGHOLI MSAGHA

JUDGE

FRED A. OCHIENG

JUDGE