



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**(CORAM: F. GIKONYO J)**  
**CRIMINAL APPEAL NO 183 OF 2008**

**PATRICK MWENDA.....APPELLANT**

**Versus**

**REPUBLIC.....RESPONDENT**

*(Appeal from the judgment by M.S. GIDALI, SRM in MERU CMCCRC NO 755 OF 2007 dated 25.8.2008)*

**JUDGMENT**

**INTRODUCTION**

**Background Information**

[1] Mr Patrick Mwenda, the Appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that; on the night of 7<sup>th</sup>-8<sup>th</sup> July, 2007 at Kathita Bridge, Meru Township, jointly with others before court, while armed with dangerous weapons namely AK 47 rifles, axes and rungas, the Appellant robbed PETER GACHAMBA of Kshs. 5,000 cash, a mobile phone make Sagem 3020 valued at Kshs. 5,000, an ID Card, a wallet and a note book all valued at Kshs. 10,000 and at or immediately before or immediately after the said robbery, injured the said PETER GACHAMBA. The Appellant denied the charge and the matter proceeded to full hearing. He was then convicted for simple robbery and sentenced to 14 years imprisonment.

**The Appeal**

[2] Being aggrieved by the said conviction and sentence, he filed this appeal. The first petition of appeal filed by the Appellant in person carried 8 grounds. The Appellant, through his advocate, filed Supplementary Grounds of Appeal which contained 7 additional grounds. M/S Nelima argued the appeal on behalf of the Appellant.

**Appellant's Arguments**

[3] M/S Nelima urged that the proceedings as conducted by the trial magistrate were nullity, for they did not comply with section 200 of the Criminal Procedure Code (hereafter CPC). The trial was commenced before J.R. Karanja, CM who left station midstream. M.S.G. Khadambi, SRM

took over the trial at the stage of defence hearing. The charges that the Appellant faced were very serious and the subsequent trial magistrate did not have the benefit of seeing the witnesses. Counsel relied on the treatise by Bwonwong'a M. *Procedures in Criminal Law in Kenya* (East African Educational Publishers), where the author posits that failure to comply with section 200 of CPC was fatal. The trial court should have ordered a re-call of the witnesses who were alive.

[4] She continued: that the trial magistrate convicted on insufficient evidence. According to her, the complainant only said that he identified the Appellant using some light. The incident took place at mid night and it was dark. The source of light and the intensity of the light were not mentioned at all. PW4 said that he saw the complainant being assaulted and PW3 stopped the vehicle they were riding in. According to counsel, PW4 was not truthful as he said he did not let the Appellant off his sight. The question counsel asked was; what happened when the vehicle stopped? It was not clear the person they chased was the Appellant. She relied on the case of **CA AT NAKURU CRA NO 59 OF 2005 & 400 OF 2007**.

[5] Moreover, the complainant just said that the five people were holding things which looked like guns. In all these, the trial magistrate expressed doubt as to whether the Appellant or any member of the gang had a dangerous weapon. She nonetheless, convicted the Appellant. She contended that the Appellant did not have any weapon or stolen items, which raises doubt of his membership in the gang which attacked the complainant.

[6] The amount of money and the make of the phone are not mentioned by the complainant. Further, the complainant did not mention that he suffered any injury except in the hip. The P3 Form does not mention that either.

[7] One other thing: the Appellant was not given an opportunity to cross-examine the doctor due to language barrier. The doctor testified in English language yet there was no interpretation. As if that was not enough, the trial magistrate did not afford the Appellant ample time to conclude the application he had made in the High Court.

[8] In light of all the lapses she has submitted on, Counsel is convinced that the prosecution did not prove its case beyond any reasonable doubt.

### **The State Opposed Appeal**

[9] M/S Mwangi argued the case by the State. She opposed the appeal on the following grounds:

- 1) That the proceedings were not a nullity. Section 200 of the CPC was complied with. The complainant was deceased at the time Khadambi took over the trial, and it would have been prejudicial to fair trial if the court insisted on starting the case *de novo*.
- 2) PW1 and PW2 gave very clear evidence. the question is; why did the Appellant run away after hearing gun shots from the police officers?
- 3) The charge is one of simple robbery given that section 179(2) of the CPC allows the court to convict for the offence disclosed.
- 4) The Appellant was given ample time to prepare his defence and the submission that he was not, is just misguided. He did not have questions to put to the witnesses.
- 5) Finally, the sentence was proper and appropriate. For those reasons she asked the court to dismiss the appeal.

### **COURT'S RENDITION**

[10] I am alive to the court's duty to re-evaluate the evidence recorded by the trial magistrate and

come to its own conclusion and findings. On this duty, see **OKENO v REPUBLIC**. But, given the issues raised herein, I propose to go to the question of section 200 of the CPC which I admit bears important preliminary significance. I suggest that I deal with the issue *in limine*.

### **The question of section 200 of CPC**

[11] This is quite a substantial issue, and if it is properly raised and argued, could as well determine the entire appeal, especially if the court forms the opinion that section 200 of the CPC was not complied with thus causing material prejudice to the Appellant. I will consider only the parts of section 200 of the CPC which are relevant to this case. Section 200 of the CPC entails the following:

- a) The succeeding magistrate may act on the evidence recorded by his predecessor, or re-summon the witnesses and re-commence the trial;
- b) Where the succeeding magistrate commences the hearing of the proceedings and part of the evidence had 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; and
- c) 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, set aside the conviction and may order a new trial.

[12] The Hon Chief Magistrate J.R. Karanja (as he then was) recorded the entire evidence tendered by the prosecution-for all the six prosecution witnesses. The said Hon Chief magistrate even put the accused to his defence. The succeeding magistrate took over the proceedings at the stage where the Appellant was to present his defence. But on 25.2.2008 when the case had been fixed for hearing, the Appellant applied to the court that he wished the case to start *de novo*. The prosecution objected to the application on the sole reason that the complainant had since passed on. The succeeding magistrate then ordered for the proceedings to be typed and supplied to the Appellant. The typed proceedings were supplied to the Appellant on 25.3.2008.

[13] In spite of this provision, the Appellant insisted that he needed the case to start *de novo*. He gave his reason that, after reading the proceedings, he noted that some questions he had asked were not noted. The prosecution opposed that application yet again, and advanced reasons that; the Appellant had been put to his defence; it was impossible to start *de novo* as the complainant was reportedly dead; and the other witnesses cannot be traced. The succeeding magistrate ruled on the matter and disallowed the Appellant's application. The reasons advanced by the succeeding magistrate included:

- a) That typed proceedings had been supplied to the Appellant;
- b) The Appellant had the opportunity to cross-examine witnesses; had been put to his defence; and had the chance to tell his story;
- c) That the complainant has since died;
- d) That the other witnesses cannot be found;
- e) That section 200(3) of the CPC is not couched in mandatory terms, but a matter of the discretion of the court; and
- f) That in the circumstances, it was not in the interest of fair trial for the case to start *de novo*.

[14] The Appellant was dissatisfied with the ruling by the succeeding magistrate and he filed application NO 16 OF 2008 in the Chief Magistrate's Court for review of the ruling. He filed yet another application NO 48 OF 2008 in the High Court. All these were efforts to vindicate his right to re-summon witnesses who were heard by the predecessor trial magistrate.

[15] Faced with this type of situation, what I should address my mind on is: what does section 200 of the CPC require? And was it complied with by the succeeding magistrate? The answers to these two questions will guide the court in deciding whether the succeeding magistrate properly exercised its discretion, and if it did not, whether the Appellant was materially prejudiced as to warrant the setting aside of the conviction and sentence herein.

[15] It is not in doubt that, under section 200 of the CPC, the succeeding magistrate may act on the evidence recorded by his predecessor, or re-summon the witnesses and re-commence the trial. That entails exercise of discretion in deciding which course to take where the evidence on record was wholly or partly recorded by another magistrate. But, needless to state that the discretion of the court should be exercised judicially upon defined legal principles. Section 200 of the CPC requires that: Where the succeeding magistrate commences the hearing of the proceedings and part of the evidence had 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.* There are two critical things here: 1) the right of the accused person to demand that any witness be re-summoned and re-heard; and 2) the obligation of the court to inform the accused of that right. The two elements are essential and are aimed at securing a fair trial for the accused person and for the course of justice generally. Thus, the discretion of the trial court is circumscribed within these requirements.

[16] The reasons given by the trial magistrate are in general, plausible factors for the trial court to consider in deciding if the case should start *de novo* and which witnesses should be recalled. But are they proper grounds for refusal to re-summon witnesses in the circumstances of this case? The first intuitive instinct that the court feels is that a dead witness cannot be re-summoned. And that, obviously, is a ground for the trial court to refuse a re-summon of the deceased witness. The trial court, therefore, was right in pointing out that aspect in her ruling. What about the other witnesses? The fact that the complainant was dead cannot offer a blanket reason not to re-summon the witnesses who are still living. Other reasons for not re-summoning the witnesses must be provided. The prosecution merely stated that the other witnesses could not be found without giving specific details and reasons for the non-availability of those witnesses. Four prosecution witnesses testified on 25.9.2007, the fifth on 22.10.2007 and the last one on 27.11.2007. The Appellant made his first application for the case to start *de novo* on 25.2.2008, which was exactly six months from the time the first witness gave his testimony. That aside, the succeeding magistrate had the opportunity to inform the accused person of the right to ask for the re-summoning and re-hearing of any witness on 17.1.2008 when she effectively took over the trial and assigned the case a hearing date. She did not discharge that obligation. The issue could have been dealt with at that initial and opportune time and ordered re-summoning of some or all the witnesses except the complainant because of the reason of death. PW4, PW5 and PW6 were public servants whose attendance or tracing was not difficult. The insistence by the Appellant to have the case start *de novo* was quite in order and within his right to *demand that any witness be re-summoned and reheard.* The words "may demand" in section 200 of the CPC refers to the discretion of the accused to make the decision that *any witness be re-summoned and reheard* and not that of the court. The discretion of the court comes in after the demand has been made by the accused as a matter of right, which then requires the trial court to consider all the facts of the case. In the circumstances, as the prosecution did not offer any reason why the other witnesses, other than the complainant, would not be found, invariably, there was no basis for the exercise of discretion by the trial court to deny the demand by the Appellant to have witnesses, save the complainant, re-summoned. Not much time had passed since the last witness testified as to command an inescapable inference that the witnesses cannot be found. Such deduction is not even possible in the circumstances of this case. It can only be reached upon concrete reasons which must be supplied by the prosecution. In the absence of such information, the trial court cannot be

said to have exercised discretion judicially; on the contrary, it exercised discretion wrongly and as a result committed an error of principle. See **IBRAHIM MUNGAI WAITHERA v REPUBLIC [2007] eKLR** and **KIKUMI & ANOTHER v REPUBLIC [2004] eKLR**. Accordingly, this court should interfere with that kind of exercise of discretion. I do not, therefore, agree with the submissions by M/S Mwangi for the State that: Section 200 of the CPC was complied with; and that since the complainant was deceased at the time M/S Khadambi took over the trial, it would have been prejudicial to fair trial if the court insisted on starting the case *de novo*.

[17] In light of what I have held above, what is the best remedy in a case such as this; Where the Appellant was convicted upon evidence that was not wholly recorded by the convicting magistrate? And, much time has passed by? The yardstick should be; whether the High Court is of the opinion that the accused person was materially prejudiced. In the event the answer is in the positive, the court may set aside the conviction and sentence; order a new trial or take any other appropriate action on the matter. The Appellant clearly stated to the trial court that, after reading the proceedings, he noted that some questions which he had asked were not noted. This court is not in a position to determine that issue. But it was a matter that the succeeding trial magistrate ought to have considered in deciding whether refusal of the demand by the Appellant to resummons witnesses would cause material prejudice to the Appellant. A specific finding was necessary on the matter. I have found that the trial magistrate erred in refusing a re-call of witnesses other than the deceased complainant, which by itself denied the Appellant a right, thereby causing material prejudice to the Appellant. Accordingly, I hereby set aside the conviction and sentence. I should determine whether a re-trial is feasible in this case, and given that decision, it is not necessary for me to determine the other grounds of appeal.

### **Unreasonable Conduct**

[18] Before I close and make final orders, I have noted that the Appellant exhibited a very difficult and unreasonable conduct in the entire proceeding. For clarity, however, that should never be a reason for denying him a right guaranteed in law except as provided in the Constitution. Further, there are also other more convenient ways of dealing with unreasonable conduct of the accused person without taking away his rights in a trial or attacking his person.

### **Do I Order a Re-trial?**

[19] A re-trial is not tenable in the face of the inordinate passage of time; from 2007 to now be about six years. The Appellant on the other hand has suffered incarceration since 25.9.2008 when he was convicted. It is worth noting also that the Appellant was arrested and tried for the offence of robbery with violence which was not bailable at the time. He has been in custody since the arrest, that is, 8.7.2007. I decline to order a re-trial. Instead, I order that the Appellant shall be set to liberty forthwith unless he is lawfully held in custody.

**Dated, signed and delivered at Meru this 28<sup>th</sup> November, 2013.**

**F. GIKONYO**

**JUDGE**