



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CRIMINAL APPEAL 481 OF 2009**

**DENGA JOHN LENGA.....1<sup>ST</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**AS CONSOLIDATED WITH**

**CRIMINAL APPEAL 480 OF 2009**

**MOSES KIMANI KAMAU.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**AND**

**CRIMINAL APPEAL 482 OF 2009**

**JOHN NGANGA KARANGO.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal arising out of the conviction and sentence of D. Mulekyo PM in Criminal Case No. 25 of 2005 delivered on 28<sup>th</sup> October 2009 in the Principal Magistrate's Court at Kikuyu )**

**JUDGMENT**

The Appellants were charged with 5 offences. Three of the offences were of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the first offences were that on the 29<sup>th</sup> day of July, 2005 at Kidfarmaco village in Kiambu District within Central Province, while armed with dangerous weapons namely a pistol, robbed Kenneth Ndungu Nduati of his motor vehicle registration number KAJ 958 C Toyota AE 100, one mobile phone make Bird Slim, one gold wedding ring, all valued at Kshs.616,000/=, and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Kenneth Ndungu Nduati.

The particulars of the second offence were that on the 29<sup>th</sup> day of July, 2005 at Kidfarmaco Village in Kiambu District within the Central Province, while armed with dangerous weapons namely a pistol, robbed Leah Wamaitha Nduati of one mobile phone make Sagem, one wedding ring, one pair of earrings all valued at Kshs.9,300/= , and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Leah Wamaitha Nduati.

The third offence's particulars were that on the 29<sup>th</sup> day of July, 2005 at Kidfarmaco village in Kiambu District, within Central Province, while armed with dangerous weapons namely a pistol, robbed Josephine Gathei Reuben, one mobile phone make Nokia 3310, two pairs of ear rings, one wedding ring all valued at Kshs.10,500/=, and at or immediately before or immediately after the time of such Robbery threatened to use actual violence to the said Josephine Gathei Reuben.

The fourth offence was that of being in possession of a pistol without a firearm certificate contrary to section 4(1) as read with section 4(3) of the Firearms Act. The particulars of the offence were that on the 29<sup>th</sup> day of July, 2005 along Kingeero-Lower Kabete road in Kiambu District within Central Province, they were found in possession of one U.S. Army Revolver Serial Number 50309 without a Firearm Certificate.

The fifth offence was being in possession of ammunition without a firearm certificate contrary to section 4(1) as read with section 4(3) of the Firearms Act. The particulars of the offence were that on the 29<sup>th</sup> day of July, 2005 along Kingeero Lower Kabete Road in Kiambu District within Central Province, they were found in possession of two rounds of ammunition without a Firearms certificate.

The Appellants were also charged with an alternative offence of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars of the offence were that on the 29<sup>th</sup> day of July, 2005 at Lower Kabete Village in Kiambu District within Central Province, otherwise than in the course of stealing, dishonestly received or retained three wedding rings and five pieces of earrings knowing or having reasons to believe them to be stolen goods.

The Appellants were arraigned in court on 16<sup>th</sup> August 2005 and they all pleaded not guilty to the charges against them. They were tried, convicted of the five main offences and sentenced to death for the offence of robbery with violence, and imprisonment of 7 years each for the offences of being in possession of a pistol without a firearm certificate and being in possession of ammunition without a firearm certificate, which imprisonment sentences were concurrent and suspended pending the execution of the sentence of death. The Appellants being aggrieved by the judgment of the trial magistrate have appealed both their conviction and sentence.

The Appellants had four common grounds of appeal, namely that there was no positive identification that was made of them; that the trial magistrate erred in finding that the doctrine of recent possession applied to them; in relying on inconsistent and contradictory evidence; and in not considering their defences contrary to section 169 of the Criminal Procedure Code. The 3<sup>rd</sup> Appellant had an additional ground of appeal that he was denied the right to cross-examine PW1 in contravention of sections 208 and 302 of the Criminal Procedure Code. They highlighted and relied on written submissions availed to the court.

Mr. Karuri for the State conceded the appeal and submitted that section 200(3) of the Criminal Procedure Code was not complied with by the succeeding magistrate at page 28 of the proceedings. Further, that the trial magistrate did not give the 3<sup>rd</sup> Appellant the opportunity to cross-examine PW1. He asked the court to exercise its discretion and order a new trial of the Appellants, given the fact that a firearm was used in the commission of the offences and the complainants are still alive.

We therefore need to consider the preliminary issue as to whether there was non-compliance with sections 200, 208 and 302 of the Criminal Procedure Code, before we can consider the substantive issues raised in the Appellants' grounds of appeal. Section 200 of the Procedure Code provides as follows:

**“(1) Subject to subsection (3), where a magistrate, after having heard and recorded the**

**whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -**

**(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or**

**( b ) where judgment has not been written and signed by his predecessor or, act on the evidence recorded by that predecessor or, resummon the witnesses and recommence the trial.**

**(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.**

**( 3 ) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witnesses be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.**

**(4) 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 thereby, set aside the conviction and may order a new trial.”**

The Court of Appeal in **Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga v Republic, Criminal Appeal No. 106 of 2009**, stated that the right under section 200 of the Criminal Procedure Code was owed to the accused and not his/her advocate, and that the duty to explain to the accused the right to opt to have witnesses recalled or trial start afresh was mandatory. Msagha Mbogholi J. in **Rebecca Mwikali Nabutola v Republic (2012) eKLR** after reviewing various Court of Appeal decisions also came to the conclusion that the requirement to comply with section 200(3) of the Criminal Procedure Code is mandatory, and that the succeeding magistrate must record that the Magistrate has informed the accused of the accused person’s rights and options under the section and that the record should also capture the reply of the accused.

We have perused the record in the present appeals. The trial proceedings commenced on 16/8/2005 before Mrs Murage, Principal Magistrate, who heard and recorded the evidence of PW1. On 29/8/2007 the hearing and recording of evidence of PW2 proceeded before Hon. Ominde, Ag PM. And there is no record of compliance with section 200 of the Criminal Procedure Code. On 9/4/2008 the trial proceeded before Hon. S.N Karani and the court record shows that section 200 of the Criminal Procedure Code was complied with and that the Appellants wished the case to proceed. Hon. S.N Karani heard and recorded further evidence from PW2 and the evidence of PW3.

When the hearing commenced before Hon. Mulekyo on 19/11/2008 the 3<sup>rd</sup> Appellant applied for the handwritten proceedings to enable him make an informed decision on section 200. The trial court ordered that the handwritten proceedings be issued to the accused person. On 26/11/2008 the court record shows that section 200 of the Criminal Procedure Code was explained to the accused persons by Hon. Mulekyo in Kiswahili language, and the accused replied that they wanted to proceed from where her predecessor left. Hon. Mulekyo proceeded to hear and record the evidence of PW4, PW5, PW6, PW7, PW8 and the evidence given by the accused persons before delivering judgment.

It is also evident at page 15 of the court record that on 17/05/2006 after PW1 gave her evidence-in-chief, she was cross-examined by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> accused persons, but not by the 3<sup>rd</sup> accused person who is the 3<sup>rd</sup> Appellant herein. It is our finding that the non-compliance of section 200 by one of the succeeding magistrates, namely Hon. Ominde, and the failure to give the 3<sup>rd</sup> Appellant the opportunity to cross-examine PW1 contrary to the requirements of section 208 and 302 of the Criminal Procedure Code were

material lapses of procedure that caused prejudice to the Appellants.

Considering the foregoing, it is our considered view that the appeals herein be allowed and the conviction and sentence of the Appellant be reversed. We have considered whether to order a retrial or not, bearing in mind the circumstances in which the present appeals are being allowed does not determine the Appellants' guilt or otherwise. It has been held by the Court of Appeal that a retrial should only be ordered when it will not cause prejudice to the Appellant and in the interests of justice, and various factors should guide the court in determining whether or not to order a retrial such as: the illegalities or defects in the original trial; the length of time that has elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecutions making or not – see **Muiruri v Republic [2003] KLR 552** and **Mwangi v Republic [1983] KLR 522**.

In the present appeal we are concerned that the Appellants have been in lawful custody for a period of 8 years, and that it will take longer to decide whether or not they committed the alleged offences. We have been assured by the state that the complainants are still alive, but we have not been assured that the other witnesses will be available or of the integrity of their evidence after such a considerable lapse of time.

We therefore find that a retrial in the circumstances will prejudice the Appellants. We accordingly order that the Appellants be and are hereby set at liberty forthwith unless they are otherwise lawfully held.

Orders accordingly.

**DATED AT NAIROBI THIS 12<sup>TH</sup> DAY OF NOVEMBER 2013.**

**L. KIMARU**

**JUDGE**

**P. NYAMWEYA**

**JUDGE**