REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CR. APPEAL NO. 128 OF 2012

DICKSON KAMAU MULWA……..…..APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(An Appeal from the conviction and sentence in Criminal Case No. 321/2011 in the Principal Magistrate's Court at Kitui (Hon. S.K. Mutai, SRM))

Judgment

1. The Appellant, Dickson Kamau Mulwa ("Appellant") has appealed from the conviction and sentence by the Learned S.K. Mutai, who by then was a Senior Resident Magistrate at Mutomo. In that case, the Appellant was charged with one count of robbery with violence contrary to section 296(2) of the Penal Code.
2. After a fully-fledged trial in which the prosecution called ten witnesses and the Appellant testified in his own behalf and called one witness, the Learned Magistrate convicted the Appellant of the of the charged count of robbery with violence. That set the stage for the present appeal.
3. Dissatisfied with the conviction and sentence, the Appellant filed this appeal and listed down four grounds of appeal. When the appeal was called for hearing before us on 06/06/2013, the Appellant indicated that he wished to argue his appeal through written submissions. We allowed him to do so. The bulk of his appeal is based on the argument that the trial record reveals a plethora of contradictions in the testimonies of Prosecution Witnesses that conviction is quite unsafe in the circumstances. He also faults the Learned Trial Magistrate for failing to take into account his defence, which, he says was strong and worthy of belief.
4. When the Learned State Counsel, Mrs. Abuga rose to address us, she conceded the appeal. Her concession was based on Aection 200(3) of the Criminal Procedure Code. She informed us that the section was not complied with when the case was transferred from Kitui Law Courts to Mutomo Law Courts. This, she conceded, made the conviction of the Appellant a nullity because his trial had been conducted by two different magistrates and the latter one did not comply with the terms of Section 200(3) of the Criminal Procedure Code.
5. We think it was the appropriate thing for her to do. Section 200(3) of the Criminal Procedure Code provides as follows:

> *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 witness be re-summoned and reheard and the succeeding magistrate shall informed of that right.*

6. Under this provision, it is the duty of a magistrate who takes over a criminal trial commenced by another magistrate to explain to the accused person the import of the section and to give the

accused person an election whether to recall the witnesses who have already testified to come testify again or to be cross-examined. Our jurisprudence has established that failure to do so is fatal to a conviction.

7. We have examined the record of the trial in the Court below. It shows that trial commenced before Learned Magistrate Mr. A.G. Kibiru, Principal Magistrate, on 3rd August, 2011. He heard three witnesses. After a number of mentions and adjournments, the matter came before the Learned Magistrate Kibiru on 26th March, 2012. The Learned Magistrate made the following order:

> **I note that the matter arose in Ikutha in Mutomo District. There is now a competent court in Mutomo. Matter is transferred to Mutomo Law Courts. Mention in Mutomo Law Courts on 10/04/12**

8. It was pursuant to this order that the case was transferred to Mutomo Law Courts. It was first mentioned there before the Learned S.K. Mutai on 17th April, 2012. It was set for hearing on 24th April, 2012. On that day, the Learned Magistrate recorded the following:

> **Court Prosecutor: I have 4 witnesses and ready to proceed.**
>
> **Accused: I am ready to proceed [from] where the case has reached.**
>
> **Court: Provisions of section 200 CPC complied with.**

9. The State counsel believes that this record does not demonstrate sufficient adherence to Section 200(3) of the Criminal Procedure Code. Our jurisprudence is quite clear that failure to adhere to the mandatory provisions of section 200(3) of the Criminal Procedure Code renders a trial a nullity. See, for example, **O v Republic (Kisumu C.A. Crim. App. No. 200 of 2006)**. The question here, though, is whether the Learned Magistrate failed to inform the Appellant of his right to re-summon the witnesses previously heard by the Learned A. Kibiru. Precisely, the question is whether simply intoning "provisions of Section 200(3) CPC complied with" is sufficient to comply with the mandatory terms of section 200(3) of the CPC.
10. The jurisprudence from the Court of Appeal suggests that there has to be a recording in the proceedings that clearly shows that the right to recall witnesses was explained to the accused person. This jurisprudence says that it is inadequate to simply record *"section 200 CPC complied with"* as the Learned Trial Magistrate did in this case. The reason behind this robust demand that succeeding magistrates literally comply with the terms of section 200(3) and record their compliance is to ensure that accused persons are not prejudiced. When it comes to the protection of rights of accused persons, our jurisprudence demands that the law be read in a way that reasonably expands rather than restricts any liberties or rights meant for the protection of the accused.
11. In this context, we are inclined to agree with the Learned State Counsel that the recordation done by the Learned Succeeding Magistrate is insufficient to meet the high threshold of section 200(3) set by the Court of Appeal. Consequently, we find the contravention of section 200(3) to have rendered the trial as a whole fatally defective.
12. We note that in conceding the appeal the Learned State Counsel, prayed for a re-trial. We are duty-bound to determine if the interests of justice would require us to order one or not. In answering the question whether there should be a retrial or not, we are guided by the principles which have emerged in our jurisprudence on when it is appropriate to order a re-trial. Overall, the following four principles govern the exercise of an appellate Court's discretion in granting or refusing a retrial:
    a. First, a retrial may be ordered only when the original trial was illegal or defective. See **Merali v Republic (1071) EA 221**. This means that a retrial should not be ordered where the appeal succeeds due to lack of sufficient evidence. A re-trial should never be used by the prosecution to fill gaps in its case.
    b. Second, a retrial should be ordered where the interests of justice require it and refused where it is likely to cause injustice or prejudice to the appellant. See **Ahmed Suman v**

Republic (1964) EA 481.

c. Third, a retrial should be ordered only when it is likely that it will result in a conviction. As the Court of Appeal remarked in **Mwangi v Republic (1983) KLR 522**:

> **[A] retrial should not be ordered unless the appellate Court is of the opinion that on a proper consideration of the admissible evidence or potentially admissible evidence, a conviction might result.**

d. At the end of the day, each case must be decided on its unique facts and circumstances of each case must be considered.

m. Applying these principles to the instant case, we are unable to acquiesce to the State's request for a re-trial. As the Appellant argued before us, the conviction of the Appellant turned only on circumstantial evidence. The victims of the robbery never saw their assailants; they ran through the back door when they heard the assailants breaking into the front door. The main connection between the Appellant and the crime is the car which was found near the crime scene and from which the assailants were seen running away from as they engaged the Police in a gun fight. However, the Police Officers involved did not identify any of the assailants. The connection between the Appellant and the vehicle was that he had earlier hired it. The Appellant did not deny hiring the vehicle. However, his defence was that he had been car-jacked in the vehicle on his way to Mombasa and the vehicle stolen from him as he changed a tyre puncture. He produced a witness who claimed he found him with his hands and legs tied.

n. The Learned Magistrate disbelieved the Defence Witness. This is what he said in analysis of the testimony of DW2:

> ***I do also disagree with DW2 because he should have escorted the accused to the nearest AP Camp to report the incident of carjacking since he said that they were only half a kilometer from Masimba and one and a half Kilometres from Kanyangi AP Post. As a result the defence put forward by the accused is untenable and incredible.***

15. With respect to the Learned Magistrate, we do not think that the witness was obliged to accompany the Appellant to the AP Post. His testimony was that he acted as a good Samaritan and untied the Appellant; went with him to his house and gave him matatu fare. If the State did not believe that story, they should have tested its credibility on cross examination. We have looked at the testimony of the defence witness and although the Learned Magistrate disbelieved it, we note that the testimony remained unshaken on cross-examination. We fear that ordering a re-trial will be tantamount to giving the State another chance to prove its theory. It would be unfair to the Appellant.

16. We also note that the Learned Magistrate in disbelieving the Appellant's version of the events made remarks that are tantamount to shifting the burden of proof to the Appellant. The Learned Magistrate, in his analysis, concluded thus:

> ***Likewise, I find the defence adduced by the [Appellant] is wanting and unconvincing because if he had hired a car to use in attending a wedding in Mombasa as shown by the wedding invitation card, then the accused ought to [have] called and/or adduced evidence to show that the wedding actually took place on the material date. As it stands, the accused's assertion that he was carjacked on his way to attend a wedding are just mere allegations with no proof.***

17. We do not think that it would have been necessary for the Appellant to prove that the wedding took place in order for his version of the story to hold water. Indeed, once he had placed on the table plausible evidence that he was on his way to Mombasa and was carjacked on the way, it would have been for the State to demonstrate that the story was implausible and incredible. A re-evaluation of the evidence does not indicate that the State was successful in doing so. The obligation of the Appellant to adduce evidence in his defence did not, in our view, require him to prove that the wedding he had been invited to actually took place.

18. In our view, therefore, the Appeal succeeds on both the ground that section 200(3) of the Criminal

Procedure Code was not complied with as well as the fact that we do not believe that the evidence on record was strong enough to safely sustain a conviction.

19. For these reasons, we allow the appeal, sets aside the conviction and sentence imposed and order that the Appellant be set at liberty forthwith unless he otherwise lawfully held.

DATED, SIGNED AND DELIVERED this 3rd day of December 2013.

JOEL NGUGI, Judge

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B. T. JADEN, Judge

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