THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NUMBER 24 OF 2008

FRANCIS KIMEU MATILU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against original judgment of the Hon. Senior Resident Magistrate, in Makindu Mr. B. Ochieng delivered on 6th May, 2010 in Criminal case No.1166 of 2004)

JUDGMENT

The State conceded to this appeal on the ground that the trial of the appellant was conducted by two magistrates. The first magistrate heard the whole of the prosecution case. The second magistrate presided over the defence case, crafted and delivered the judgment. However, the succeeding magistrate failed to comply with the mandatory provision of section 200 of the Criminal Procedure Code when he took over the case. That omission vitiated the entire trial, conviction and sentence.

Having conceded the appeal, **Mrs. Gakobo** learned Senior State Counsel however pleaded for a retrial on the grounds that the appellant had been sentenced to 20 years imprisonment. He had so far served only 4 years of the prison term. In the premises, it could not be said that he had served a substantial portion of the sentence and would therefore be prejudiced if a retrial was ordered. The evidence on record was strong. Identification was by recognition. This evidence if tendered at the retrial, a conviction is likely to result. She further submitted that witnesses were readily available for the retrial. In the interest of justice, a retrial ought to be ordered so that justice can be done to the complainant as well as the appellant.

In response, the appellant welcomed the state's gesture of conceding the appeal. However, he was opposed to a retrial.

I have carefully read and considered the record of the trial court. It is quite apparent that section 200 of

the Criminal Procedure Code was not complied with. As a result, the appellant was prejudiced. The case was presided over by 3 and not 2 magistrates as stated by Mrs. Gakobo. The evidence of PW.1, 2, 3, 4 and 5 was taken by **Hon. Munguti** Senior Resident Magistrate. The ruling on no case to answer was delivered by **Hon. Ndubi** Resident Magistrate in unclear circumstances. Thereafter and again in unclear circumstances, the case was taken over by **Ochieng P.M.** who heard the defence case, crafted and delivered the judgment. However, the two succeeding magistrates failed to observe and comply with the mandatory requirements of section 200(3) of the Criminal Procedure Code. Failure to so comply denied the appellant a fundamental right. The two magistrates were required and or obligated to inform the appellant of the right to re-summon and examine witnesses who had previously testified. There is wisdom in that provision of the law as the succeeding magistrate neither heard nor saw the witnesses as they testified. This provision of the law was enacted or designed to safeguard the right of the accused to a fair hearing. Failure to comply with the said mandatory provisions of the law vitiated the appellant's trial in the subordinate court. On that basis, the learned state counsel was right in conceding the appeal. Accordingly, I allow the appeal, quash the conviction and set aside the sentence imposed on the appellant.

Should I order a retrial.

I have anxiously considered whether or not to order a retrial. The relevant principles to consider when faced with such a matter were set out in the case of **Muiruri Vs. Republic (2003) KLR 552** thus:

"3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case.

4. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of appellant, whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or the court's."

In this case I think that the interest of justice will be best served by an order of retrial. I have looked at the evidence tendered during the retrial and I am satisfied that if the self-same evidence was tendered at the retrial a conviction may result. The State has assured me of the availability of witnesses. The appellant too was sentenced to 20 years imprisonment. This was on 1st February, 2007. To date he has so far served 4 years or so of the term. A retrial in the circumstances will not prejudice him. In any event the mistake leading to the quashing of the conviction was not the prosecutor's. Rather it was entirely the court's.

In the upshot, the appeal is allowed. The conviction and sentence imposed upon the appellant is set aside. However, the appellant shall be retried on the self-same charges before the same court. However, the retrial shall not be presided over by either **Mr. Munguti, Senior Resident Magistrate, Ndubi Resident Magistrate** or **Ochieng, Principal Magistrate**. For purposes of retrial the appellant shall appear before the said court on 8th March, 2012. Until then he will remain in custody.

Ruling dated, signed and delivered at **Machakos** this **29th** day of **February**, 20**12**.

ASIKE-MAKHANDIA

JUDGE