REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 85 OF 2004

LESIIT J.

CHRISTOPHER KINYUA MATERE .....1ST APPELLENT

DAVID MICHUBU…….....…..……..2ND APPELLANT

VERSUS

REPUBLIC …….....…….……REPONDENT

JUDGMENT

The Appellants **CHRISTOPHER KINYUA MATERE** 1ST Appellant and **DAVID MICHUBU** 2nd Appellant were jointly tried and convicted of one count of Assault contrary to section 252 of the Penal Code. Both were sentenced to twenty four months imprisonment. They were aggrieved by the conviction and sentence and therefore filed these appeals. The appeals have been consolidated having arised out of the same trial.

The Appellants engaged Kiogora Arithi & Associates who filed Petitions of Appeal in each appeal seven grounds of appeal were raised as follows:

1. The learned trial magistrate erred in law and fact by convicting the Appellant without complying with the express provisions of section 200(2) and (3) of the Criminal Procedure Act (Cap 75).

2.The learned trial magistrate erred by failing to consider that to proceed with the case I the manner that he followed or adopted was prejudicial to the Appellant.

3.The judgment of the learned trial magistrate is bad in law and unlawful as the particulars on the charge sheet does not support the evidence on record and the court's judgment as the same are fundamentally and materially at variance.

4.The learned trial magistrate erred in law and fact by also convicting the Appellant whereas the evidence on record clearly shows that he did not commit the offence for which he was charged with by the prosecution.

5.The learned trial magistrate erred in law by convicting the Appellant on uncorroborated and contradictory evidence of the prosecution witnesses.

6.The judgment of the learned trial magistrate is against the weight of evidence and is bad in law.

7.The learned trial magistrate erred in law by imposing a harsh and excessive sentence against the Appellant under the circumstances of this case.

The appeals are opposed.

Mr. Kiogoa advocate urged the appeals on behalf of the Appellants. Counsel urged that the Appellant were tried by a magistrate who was transferred. That the succeeding magistrate did not comply with the provisions of S.200 (2) and (3) of the Penal Code. Mr. Kiogora urged that as a result of the said omission, the Appellants, who were not represented by counsel suffered prejudice.

Mr. Kiogora submitted that the evidence of PW1 contradicted that of PW2 and 3. That above that the evidence adduced before the court clearly established that the complainant was armed with a panga and engaged in a fight against the Appellant.

In regard to the sentence Mr. Kiogora urged that the same was excessive.

Mr. Mungai, learned Counsel for the State opposed the appeal on behalf of the State. Counsel urged that the evidence before court was clear that the Appellants were both armed and that the complainant was unarmed and did not provoke anyone. Counsel urged that the Appellants were fighting over miraa they claimed belonged to their father and took the law in their hands.

I have carefully considered this appeal and have analyzed and evaluated afresh all the evidence adduced before the lower court. While bearing in mind that I neither saw nor heard any of the witnesses and giving due allowance.

In the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic** Criminal Appeal No. 272 of 2005 it was stated as follows:-

"In the same way, a court hearing a first appeal (i.e. a first appellate court) also has a duty imposed on it by law to carefully examine and analyze afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same. There are now a myriad of case law on this but the well-known case of Okeno vs . Republic [1972] EA 32 will suffice. In this case, the predecessor of this court stated:-

"The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala vs. R. [1975] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its won conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for ht fact that the trial court has had the advantage of hearing and seeing the witnesses."

Mr. Kiogora raised a pertinent that section 200(2) and (3) of the Criminal Procedure Code were not complied with. The subsections provide:

"**S200(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 witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."

I see from the record of the proceedings that one N. Kimani heard the entire case for the prosecution to finalization. He concluded the case on 30th January, 2004. It appears he was transferred as on the date set for defence hearing, he did not sit on 1st March, 2004 the case was taken over by Mr. G. Oyugi. The case was heard next on 8th June, 2004 when the learned Magistrate Oyugi noted.

"**Court: Charge read out to the accused persons and s.211 of the Criminal Procedure read out to the accused persons in Kimeru**. **1st Accused person sworn states in Kimeru**"

It is clear from the proceedings that the magistrate who succeeded the hearing of the case made no reference to s.200 of the Criminal Procedure Code. No attempt was made to comply with the said provisions. S. 200(3) of the Criminal Procedure Code makes it mandatory for the succeeding magistrate to inform the accused person of his right under that sub-section. Failure to comply with the provisions means the Appellants were denied a statutory right which they ought to have enjoyed. In the circumstances the proceedings were rendered defective, null and void. I accordingly set aside the conviction and sentence.

The issue for determination is whether a retrial should be held.

There are various decisions of the Court of Appeal relating to the principles the court should apply when ordering for a retrial which the Court of Appeal made mention of in **Richard Omollo Ajuoga Vs. Republic H.C. Criminal Appeal No. 223 of 2003**. They are as follows:-

"**In the case of Ahmend Sumar Vs. Republic (1964) E.A. 481, at page 483, the predecessor to this court stated as follows:-**

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.

The Court continued at the same page at paragraph II and stated further:-

"We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.

Taking the queue from that decision, this Court in the case of Bernard Lolimo Ekimat Vs. Republic Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-

"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

I have considered the charge both accused faced before the lower court. It was an assault causing actual bodily harm contrary to section 251 of the Penal Code. It is a misdemeanor with a maximum sentence of five years.

I have considered that the offence is alleged to have been committed in 2003. We have no information whether the witnesses in the case would still be available to come and testify. I considered that the Appellants were sentenced to 2 years imprisonment on 6th July, 2004. They served less than a month of the sentence as they were released on cash bail of 15000/- each pending the hearing and determination of this appeal.

I considered the case itself and found that there was controversy in evidence by both sides creating a doubt as to who was the aggressor and whether it was not a fight between the complainant and Appellants. The learned trial magistrate did not evaluate or analyze the evidence nor consider the controversy in order to determine or resolve it. In the circumstances I am not satisfied that a conviction

will result if the self same evidence were adduced in a retrial.

I decline to order a retrial.The Appellants are now free. They should have a refund of their cash bail deposited as part of the terms of bail pending appeal.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF DECEMBER, 2011

J. LESIIT
JUDGE