REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 47 of 2005

JAMES GITONGA M'MULUU ……..APPELLANT
VERSUS
REPUBLIC……RESPONDENT

J U D G M E N T

The Appellant was on 26th August 2003 charged in court with the offence of Robbery with Violence contrary to Section 296(2) of Penal Code.
Upon the trial of the case, he was convicted by the Senior Resident Magistrate on 20.12.04 and sentenced to death on 11.2.2005. Being aggrieved of the said judgment, he appealed against conviction and sentence on 22nd February 2005. At the hearing he presented his Amended Grounds of Appeal by way of written submissions.

The Attorney General through Mr. Monda conceded to the appeal on the ground that upon perusal of the proceedings he found that five witnesses had testified before the Honourable Senior Resident Magistrate Mr. H. Njiru. However when the matter came up for hearing on 11th August 2004 it was placed before the Honourable C.A. Opulu who directed that the case proceed before him. He took over the case under Section 200 of the Criminal Procedure Code. The hearing then proceeded when the Prosecution closed its case by calling one last witness. The Appellant was placed on his defence and gave an unsworn statement on 8.10.2004.

Mr. Monda submitted that the Accused was not afforded the opportunity to be explained his rights under Section 200(3). Under the said provision he was entitled to be informed and notified that he had a right to recall any of the 5 witnesses for purposes of cross-examination once more before the second Magistrate. That the appellant was prejudiced in the circumstance.

However, Mr. Monda applied that there be a re-trial of the case. He said that the evidence was intact which placed him at the scene of crime. He submitted that he was properly convicted. He added that all witnesses are in Mombasa and the pistol used in the robbery was still available. He assured that the prosecution will mount a speedy trial.
The Appellant opposed the application for re-trial. He submitted that he was arrested on 11.08.2003 and the trial took place up to the time of conviction on 11.02.2005. He added that he waited for his appeal to be heard for over 5 years and he would suffer prejudice. That he has been in custody for $6^1/_2$ years.

We have considered the grounds for concession and the submissions on the question of re-trial. Section 200(3) of the Criminal Procedure Code provides that:-

"200……..

(1)

(2)

(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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right..."

This is a mandatory provision. An accused must be informed of his right that is conferred by law under Section 200(3). Section 200(4) provides that:-

"4. Where an accused person is convicted upon evidence not wholly recorded by the convicting magistrate, the High Court if it is of the opinion that the accused was materially prejudiced thereby, set aside the conviction and may order a new trial."

Upon consideration, we agree with the learned counsel for the Attorney General that the right of the Accused/Appellant herein was infringed upon by the failure to inform him of his right. The trial court was under duty to do so. For the High Court to set aside the conviction, however, it must satisfy itself that the accused person was materially prejudiced as a result.

It is our view that considering the sentence in respect of the offence, that of death, then certainly the Appellant's was materially prejudiced. Had he been given a chance to recall the 5 witnesses or any of them, it cannot be ruled out that the new Magistrate hearing the

case may have reached a different decision upon analyzing the evidence. We therefore accept the concession by the Attorney General and we hereby quash the conviction and set aside the sentence.

We have considered the application for retrial. The Appellant was arrested and was charged in court on 26.08.2003. His trial took place for a period of about $1^1/_2$ years. This is a speedy trial by Kenyan standards. However, the appeal took a period of $5^1/_2$ years before it was heard. This is a very long period. His conviction and sentence was against the law in view of the disregard of S.200 (3). It follows that he was wrongly convicted and his incarceration, totally unnecessary and wasteful. His rights were violated as a result. His appeal arose due to this faulty conviction. This means that one cannot de-link the period he was incarcerated while waiting for his appeal to be heard and the first trial. The appeal took $5^1/_2$ years to be concluded. Taken together with the trial period of 1½ years, the Appellant has been incarcerated and denied his liberty for six (6) years in total. In the premises for this court to order a retrial it will be a further serious prejudice to the accused. All things being equal it will take at least 2 year or more for the trial to start afresh and be concluded. It could take longer, we do not know. This means that the Accused would have spent not less than 8 years before knowing his fate with respect to charge.

This would be unfair, unreasonable and unjust. To grant an order for re-trial would violate the Appellant's right to a fair hearing within a reasonable time as prescribed by the Constitution.

Having quashed the conviction and set aside the sentence, we hereby order that the Appellant be set at[p liberty and released forthwith unless otherwise lawfully held.

DATED and DELIVERED at Mombasa on this 20th day of July 2010.

M.K. IBRAHIM **PROF. J.B. OJWANG**
J U D G E **J U D G E**