

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 286 of 2007

LUCY SALVA NKIROTE APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Nanyuki in Criminal Case No. 1200 of 2005 dated 26th September 2007 by Ndungu H. N. (Miss) – Ag. S.P.M.)

J U D G M E N T

Mr. Orinda, the learned Senior Principal State Counsel who represented the Republic in this appeal, readily conceded the appeal. I think Mr. Orinda was right in doing so. The ground on which the concession was made was that the trial of the appellant was conducted before two separate magistrates. **Mr. E. G. Mbaya**, Ag. Senior Resident Magistrate heard the evidence of all the prosecution witnesses and before he could rule on whether the appellant had a prima facie case to answer he ceased to have jurisdiction in respect of the said court as he had been transferred. **Miss Ndungu**, Ag. Senior Principal Magistrate thereafter took over the trial. She ruled that the appellant had a case to answer, heard the defence, wrote and delivered the judgment. The record is, however, wholly silent with regard to the compliance with the provisions of section 200 of the criminal procedure code. **Miss Ndungu** was by law bound to explain to the appellant his rights under section 200. Those provisions are for the protection of the rights of an accused person and section 200 (3) of the Code specifically provides that the succeeding magistrate, which **Miss Ndungu** was.

“.. shall inform the accused person of that right”,

i.e. the right of an accused person to demand the resummoning and rehearing of all or any of the witnesses

who had testified before the departing magistrate. **Miss Ndungu** totally failed to comply with that section or at any rate there is no way of telling from the record whether she did or did not comply with the section. The charge of wounding with intent to main contrary to section 231 (a) of the Penal code which the appellant faced is an extremely serious one, carrying with it life imprisonment as the punishment. Such serious lapses on the part of a trial court are normally resolved in favour of an accused person. I must do so in the present appeal with the result that the conviction recorded against the appellant cannot be allowed to stand.

Mr. Orinda, however, tried to persuade me that I should order a retrial and the basis of that contention was that when one looks at the recorded evidence, a conviction could well be had on the evidence as the evidence was overwhelming. The appellant and complainant were persons

known to each other as they were lovers. Medical evidence was clear and uncontroverted. The presence of the appellant at the scene of crime is not denied. In those circumstances, a retrial will serve the interest of justice.

Mr. Chweya, learned counsel for the appellant opposed the request for a retrial arguing that a retrial will accord the prosecution opportunity to fill the gaps in their case, that the charge was defective, that the prosecution did not prove intention to main and finally that a retrial would be prejudicial to the appellant.

I find no quarrel with respective submissions by counsel on the issue. However it should be noted that following the incident, the complainant sustained serious injuries. He will be required to undergo upto 3 operations and skin grafting to remedy the situation. The offence charged against the appellant was alleged to have been committed on 18th August 2004 and it was not until 24th May 2005 that the appellant was arrested and subsequently charged. By 26th September 2007 her trial was over. In those circumstances, it cannot be claimed that the appellant will be prejudiced if a retrial is ordered. There was therefore no inordinate delay in the trial of the appellant as would strongly militate against ordering a retrial. To my mind it would be indeed in the interest of justice to make such an order.

In the event, I allow the appeal, quash the conviction and set aside the sentence of 36 months imposed on the appellant. The appellant shall however undergo a retrial on the self same charge before any other magistrate of competent jurisdiction other than **E.G. Mbaya** and **Ndungu H. N. (Miss)** who presided over the initial trial. For that purpose the appellant shall be presented before the Senior Resident Magistrate's Court at Nanyuki on 12th February 2009 for her retrial to commence. Pending such appearance, the appellant remain in prison custody.

Dated and delivered at Nyeri this 29th day of January 2009

M. S. A. MAKHANDIA

JUDGE