



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL APPEAL 202B OF 2008 & 44 OF 2009
(From original conviction and sentence in the Senior Resident
Magistrate's Criminal Case No.1178 of 2006 at Nyamira
– J. Macharia Esq., R.M)
GEOFFREY MAKORI TINEGA APPELLANT
VERSUS
REPUBLIC RESPONDENT
JUDGMENT

The Appellant was on 22/10/08 convicted by the Resident Magistrate, Nyamira of the charge of cheating contrary to **section 315 of the Penal Code** and sentenced to 5 years imprisonment. He appealed against the conviction and sentence. The appeal is based on the following grounds:

1. THAT the learned Resident Magistrate erred in law by not ruling hat the Appellant's constitution rights had been violated by being detained in Police Custody for a period exceeding 24 hours before being arraigned in court.
2. THAT the learned trial Resident Magistrate erred in law and in fact by not observing that the ingredients of the offence had not been established by the prosecution beyond reasonable doubt as required by law.
3. THAT the learned trial Resident Magistrate erred in law and in fact by not indicating the language of the Court in most part of the proceedings.
4. THAT the trial Magistrate erred in law by failing to comply with section 203 of the Criminal Procedure Code by failing to recall the prosecution witness as applied by the accused.
5. THAT the learned Magistrate erred in law and in fact by awarding a sentence which was manifestly excessive in the circumstances occasioning failure of justice.
6. THAT the learned Magistrate erred in law and in fact by relying on the evidence which was full of contradictions and inconsistencies.
7. THAT trial Magistrate erred in law by convicting the Appellant on wrong provisions of the law.

8. THAT the trial learned Magistrate grossly erred in law by meting a sentence not provided for by the law and in particular the charge facing the Appellant.

Mr. Kemo, for the Republic, did not support the appeal. **Mr. Nyamweya** and **Mr. Kerosi Ondieki** appeared for the Appellant.

I agree that, even if the conviction were to be held to have been properly entered, the sentence meted out to the appellant was illegal. The Appellant was charged with cheating under **section 315** of the **Penal Code**. The offence is a misdemeanour with a maximum penalty of 3 years imprisonment. The Appellant faced two counts of cheating but was convicted on only one. The maximum sentence the trial magistrate was entitled to impose was three years. It follows that in sentencing the Appellant to five years the court acted unlawfully. That sentence is hereby set aside.

There was complaint that the trial magistrate erred in law by failing to comply with **section 203 (Mr. Nyamweya corrected it to section 200)** of the **Criminal Procedure Code** by failing to recall the prosecution witness as applied by the appellant. The record shows that the Appellant was tried by the learned **Mr. S. K. Gacheru**, Resident Magistrate, up to the conclusion of the prosecution case. He was put on his defence. The magistrate was transferred from the station and the case taken over by the learned **Mr. J. Macharia**, Resident Magistrate under **section 200 of C.P.C.** It is indicated that the new magistrate explained to the Appellant the provisions of **section 200(3)** of the **Criminal Procedure Code**. The Appellant informed the Court he wanted the case to proceed from where it had reached but asked that one prosecution witness be recalled. After that, the Appellant was asked to make his defence which he did while not sworn or affirmed. The case was adjourned for judgment. He was found guilty and sentenced.

The court did not ask the Appellant which witness (the prosecution had called four witnesses) he wished to be recalled. By the time he was asked to make his defence and close his case, the witness had not been recalled. In the cases of **NJENGA v REPUBLIC [1984] KLR 605, KARIUKI VS. REPUBLIC [1985] KLR 505** and **NDEGWA v REPUBLIC [1985] KLR 534**, it was emphasized that **section 200 (3)** of the **Criminal Procedure Code** entitles an accused person to demand that any witness be resummoned and reheard and a duty is imposed on a succeeding magistrate to inform the accused person of that right. In this case the succeeding magistrate informed the Appellant of his right and the Appellant sought the recall of one witness. The court did not recall the witness. It did not even ask who the witness the Appellant sought to recall was. The non-recall of the witness made the trial by the succeeding magistrate a nullity. In **NDEGWA V. REPUBLIC** (supra) at Page 537 the Court Appeal observed as follows:

“It could be also argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully “observed” the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion.

The succeeding magistrate was as helpful as he could possible make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation.”

After this finding, it would be a futile exercise to deal with the other grounds in the Petition of Appeal. The conviction is quashed and the sentence set aside. I note that the Appellant has been in jail since 22nd October 2008 and, like was observed by **Mr. Kemo**, the evidence did not even support the charge. I will not order a retrial. The Appellant is ordered to be set at liberty forthwith unless he is otherwise lawfully detained.

Dated and Delivered at Kisii this 12th Day of **June, 2009**

A. O. MUCHELULE

JUDGE

12/6/09

A. O. Muchelule, J

cc. Mongare

Mr. Kerosi for Appellant

Mr. Kemo for State

Appellant present.

Court: Judgment in open court.

A. O. MUCHELULE

JUDGE