REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 224 of 2008

PETER NDERI MBUTHIA ……..……..…APPELLANT

VERSUS

REPUBLIC ……..…….…….. RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO.242 OF 2008

PETER MURIGI KIMANI……...…….....……...APPELLANT

VERSUS

REPUBLIC ……....……..RESPONDENT

(Appeal from original Conviction and Sentence of the Senior Resident Magistrate's

Court at Barichu in Criminal Case No.3056 of 2007 by J.N. MWANIKI – R.M.)

J U D G M E N T

These two appeals have been consolidated for ease of hearing and as they arose from the same trial in the subordinate court. In the said court the appellants were tried, convicted and sentenced to 6 years imprisonment for the offence of Engine room braking and committing a felony contrary to *section 306 (a)* as read with *section 306 (b)* of the Penal code. The appellants were aggrieved by the conviction and sentence aforesaid, hence they preferred these appeals.

When the appeals came up for hearing, **Mr. Mukura**, learned Senior State Counsel conceded to the same on the ground that there was failure to comply with the mandatory provisions of *section 200* of the Criminal Procedure Code. Counsel submitted that the trial of the appellants in the subordinate court commenced before **B.A. Ojoo Ag RM** before being taken over by **J.N. Mwaniki**, **RM.** However in so taking over the case, **J.N. Mwaniki** failed to comply with the provisions of *section 200* of the Criminal Procedure Code. Accordingly the trial was a nullity. The learned Senior State Counsel therefore urged me to so find.

Mr. Mukura, however pleaded with me to order a retrial as the evidence against the appellants was overwhelming and if the self-same evidence was tendered at the retrial, a conviction was likely to result. That witnesses will be made readily available, no prejudice will be occasioned to the appellants as they had hardly served a substantial portion of the sentence. Finally counsel submitted that it would be in the interest of justice if a retrial was ordered.

The 1st appellant opposed a retrial claiming that he was never arrested with the stolen mortar. The 2nd appellant on his part was not averse to the idea.

I have carefully perused the record of the trial court and I am satisfied that **Mr. Makura** was right in conceding to the appeal on the grounds of failure by the incoming magistrate to comply with *section 200* of the Criminal Procedure Code particularly *subsections (3) and (4)* thereof. The trial of the appellants commenced before **B.A. OJoo** Acting

Resident Magistrate on 14th February, 2005 when **Samuel Munene Kamau**, (PW1) and **Mwathi Kiriru** (PW2) respectively testified, were cross-examined and re-examined. The prosecution thereafter applied for adjournment which application was readily granted as it was not opposed.

After the evidence of these witnesses, the matter was adjourned severally until 24th May, 2009 when the it came up for further hearing.

On that day, a new Magistrate, **J.N. Mwaniki** took over the case and proceeded with the remaining witnesses without any reference at all to the provisions of *section 200* of the Criminal Procedure Code. It is not clear from the proceedings the circumstances under which the new magistrate took over the case. It is not indicated whether it was as a result of the transfer of the previous magistrate from the station or the said magistrate somehow ceasing to have jurisdiction over the case for one reason or another. I think it is desirable that whenever a new magistrate takes over a case previously handled by another magistrate, the record should show the circumstances under which the incoming magistrate has taken over the case.

Be that as it may, it is clear that **J.N. Mwaniki** did not comply with the requirements of *section 200 (3)* of the Criminal Procedure code. That section provides:-

"**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." – Emphasis added.**

The section is clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms. Pronouncing itself on that section, the court of appeal in the case of **Ndegwa v/s Republic (1985) KLR 534** had this to say:-

"**No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration."**

The language used may appear flamboyant and generous but with respect, captures well the purport of *section 200 (3)* of the Criminal Procedure Code. There is no evidence that the learned Magistrate explained to the appellants the purpose of the section and the appellants' election thereof. There is no evidence that the appellants waived their rights under *section 200 (3)* of the code and that the succeeding magistrate was relieved of his duty to inform the appellants of those rights. The evidence taken by **B.A. Ojoo** of the two witnesses was crucial to the conviction of the appellants. In my view, the failure by **Mr. J.N. Mwaniki** to inform the appellants of their rights under *section 200 (3)* of the Code, was in the circumstances of the case, fatal and on that ground alone I must allow the appeal.

What order should I make in the circumstances? A retrial? The law as to when a retrial should be ordered is already settled and I need not cite any authorities for that proposition.

There was overwhelming evidence led by the prosecution in support of the charges that the appellants were convicted of. The evidence showed that the appellants broke in the Engine room and stole therefrom a mortar. The state counsel has also given an assurance that the witnesses will be made readily available in the event that I order a retrial. The appellants were convicted on 19th August, 2008 to serve 6 years imprisonment. As of now they have not served a substantial portion of the sentence. It cannot therefore be said that prejudice will be occasioned to them in the event of a retrial. Indeed it will serve the interest of justice if a retrial is ordered. Accordingly I would allow the appeal and set aside both conviction and sentence. The appellants shall however undergo a retrial over the self-same charge. For that purpose they will be presented before the senior resident magistrate's court, Baricho on 10th August, 2009 for the retrial to commence before any other magistrate of competent jurisdiction other than **B.A. Ojoo** and **J.N. Mwaniki** who presided over the initial trial. Until then the appellants shall remain in prison custody.

Dated and delivered at Nyeri this 31st day of July, 2009.

M.S.A. MAKHANDIA

JUDGE