REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 7 of 2007

SHADRACK KIETI KAMBA ………………..……………………. APPELLANT

VERSUS

REPUBLIC …………………...…………………………………. RESPONDENT

(Being an appeal from the Judgment of Honourable Mr. B.Ochieng dated 18th April 2007 in Makindu Ag. PM'S CR.C. No.157 of 2005)

JUDGMENT

1. Shadrack Kieti Kamba, the Appellant herein was one of the accused persons in Makindu PM'S Court Criminal Case Number 157/2007. In that case he jointly with others faced five counts of the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He was with 2 others convicted and sentenced to death hence this appeal.

2. In the course of reading the record in the matter after the appeal was heard we realized that two magistrates conducted the trial. Hon. Munguti, Ag. SRM recorded the evidence of PW1, Fanice Mahendi Mchania, PW2, Margaret Wanjiru Kahihu, PW3, Pamela Makungu Imbunza, PW4, Henry Kevogho Baraza, while Hon. Ochieng, SRM recorded the cross-examination of PW4 and thereafter continued with the trial until conclusion. We note that on 3/10/2006 when he took up the conduct of the matter Hon. Ochieng failed to comply with the provisions of Section 200 of the Criminal Procedure Code. That section provides as follows:-

"S. 200. (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may-

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

(b) Where a judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

(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.

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

3. In interpreting that section, the Court of Appeal in **Eric Omondi** *alias* **Gor vs R Cr. Appeal No. 15/2007** had this to say;

"**While we agree that the succeeding magistrate in the case before us was aware and did to some degree comply with the provisions of section 200, above, the wording of sub-section (3) thereof demands of the succeeding magistrate that he scrupulously observe and comply with its requirements. The highlighted part of that sub-section is couched in mandatory terms. It states** "*shall inform the accused person of that right*"**. Which right? The right to resummon and examine witnesses who had previously testified. There is wisdom in that provision as the succeeding magistrate neither heard nor saw those witnesses testify. If the accused person is informed of this right, he might wish to succeeding magistrate to form his won impression about their demeanor. Subsection (4) of that section is instructive. It provides that on first appeal, if the High Court is of the opinion that the accused person was materially prejudiced by the non-compliance with the section it may set aside, the conviction** "*and may order a retrial*". **Prejudice may be discerned from the nature and circumstances of the case.**

Our perusal of the lower court record shows that the trial magistrate did not specifically inform the appellant of his right to demand the recall of witnesses who had already testified.

In Raphael – vs – Republic (1969) E.A. 544, a Tanzania case, Bramble J, held that it is the compliance by the succeeding magistrate, of the requirement of a section equivalent to section 200, above, which gives him the jurisdiction to commence the hearing of the matter from where his predecessor left. In his view, proceedings not conducted in compliance with that section are a nullity.

The reasoning in the above case is quite persuasive and we are of the considered view that as the record does not show that the appellant was explained of his right to demand the recall of witness who had already testified we cannot say there was full compliance with the requirements of section 200 Criminal Procedure Code. That provision was enacted to safeguard the right of an accused person to a fair hearing. The section, in our view, sets out the conditions which a succeeding magistrate has to comply with as a prerequisite to taking over the conduct of the case. He has to demonstratively show he has done so and a failure to comply denied him the jurisdiction to handle the case, and whatever he does in breach, renders those proceedings a nullity. Section 382 Criminal Procedure Code cannot be properly involved to cure that irregularity, which in our view is of a fundamental nature."

4. We cannot help but be bound by that holding which similarly applies in this case. The proceedings before us are clearly a nullity and we allow the Appeal, quash the conviction and set aside the sentence imposed. Having so done, we must consider whether it is necessary to order a retrial.

5. We note that the witnesses were all based in Mombasa and were travelling back to Vihiga where they had gone to bury a relative. They were attacked when their vehicle had a puncture at a place called Masimba on the Nairobi-Mombasa highway. Of the six witnesses who testified, four were passengers in that vehicle and two were police officers. Our considered view is that noting that the offence was allegedly committed more than four years ago, to round up all the witnesses within reasonable time may be an uphill task for the prosecution and therefore an unnecessary undertaking. As was stated in **Elirema vs Republic Cr. Appeal No. 67/2002,** where there is difficulty or impossibility of tracing prosecution witnesses, then a retrial should not be ordered. In the event, and while allowing the Appeal we shall reluctantly not order a retrial in the wider interests of justice.

6. The Appeal having been allowed, then the Appellant shall be ordered to be released unless he is otherwise lawfully held.

7. Orders accordingly.

Dated and delivered at Machakos this **20th** day of **July** 200**9**.

ISAAC LENAOLA

JUDGE

M. WARSAME

JUDGE