REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 17 of 2008

WILSON NGUNJE…….....……..... APPELLANT

Versus

REPUBLIC…..... RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO.19 OF 2003

DAVID MARSALE……...……APPELLANT

Versus

REPUBLIC……..RESPONDENT

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

at Nanyuki in Criminal Case No.667 of 2006 by H.N. NDUNGU – SRM)

J U D G M E N T

WILSON NGUNJE and **DAVID MARSALE** hereinafter referred to as *"the 1st and 2nd appellants"* respectively were jointly charged with one count of robbery with violence contrary to *Section 296 (2)* of the Penal code. The 2nd appellant alone faced an alternative count of handling stolen goods contrary to *section 322 (2)* of the Penal Code. Particulars of each count were set out in the charge sheet and we need not repeat them here. Suffice to state that the appellants were after a full trial in which the prosecution lined up 9 witnesses found guilty on the capital charge, convicted and sentenced to death as required under the law. However in respect of the alternative count, the learned magistrate correctly made no finding on the same.

Be that as it may, the appellants were aggrieved by the convictions and sentences imposed. Accordingly, they each separately lodged appeals to this court. When the appeals came up for hearing, we ordered that they be consolidated with the consent of the parties involved.

In support of their appeals, the appellants tendered written submissions which we have carefully read and considered. The state through **Mr. Makura** learned state counsel however conceded to the appeals on the grounds that the trial in the lower court was a nullity as a result of being presided over by two different magistrates at different times and failure by the succeeding and or the last magistrate to comply

with the mandatory provisions of *section 200 (3)* of the Criminal Procedure code. The learned state counsel however went further and sought from us an order for retrial on the grounds:-

(i) That the evidence on record was strong and capable of returning a conviction should a retrial be ordered.

(ii) That the trial of the case was concluded on 14th January, 2006. Accordingly the appellants had been in prison for only 3 years which is a short period compared to the death penalty that was imposed on them. In the premises the appellants would not be prejudiced if a retrial was to be ordered.

(iii) That the state would readily avail the witnesses.

(iv) That it would be in the interest of justice if a retrial was to be ordered.

None of the appellants would hear of a retrial. They all submitted that they had been in custody for a long time and have continued to suffer.

We have perused the record of the proceedings of the lower court and have confirmed that indeed **Ndungu H.N. Ag SPM** took over the case from **E. G. Mbaya, SRM** after the latter had presided over the evidence of 6 witnesses. **Ndungu H.N** (Miss) took over the case and heard the remaining 3 witnesses, placed the appellants on their defence and wrote the judgment. At the time that **Ndungu H.N. (Miss)** took over the case, the record does not show that she complied with the mandatory provisions of *section 200 (3)* of the Criminal Procedure code. The 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……"**

In the case of **Ndegwa Vs Republic (1985) KLR 534** the court of appeal stated:-

"……**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……."**

This case emphasizes the importance of complying with statutory provisions that offer protection to a citizen, more so an accused person.

The trial court was clearly required to inform the appellants of their right to have the previous witnesses re-summoned and reheard. It is not sufficient for the trial court to merely remark "**caution under *section 200 CPC* given"** as **Ndungu** did on 14th June, 2009 when she took over the case. Those remarks mean nothing. The record of the trial court must show that the trial court explained to the accused his rights as provided for under *section 200* of the Criminal Procedure Code and thereafter his

election thereof. The trial court failed to so act in the circumstances of this case. Failure to inform an accused person of his rights given to him by law is not a procedural irregularity which can be cured under the provisions of *Section 382* of the Criminal Procedure Code. It is a procedural irregularity that is fatal as it renders the entire proceedings a nullity. It indeed amounts to a mistrial.

In the case of **Kariuki Vs Republic (1985) KLR 504**, faced with a similar scenario as in the instant case, the court commented:-

"…….**In the circumstances, the appellant having a right to re-summon and rehear the witnesses, of which right he was not informed, though a duty was imposed on the succeeding magistrate to inform the appellant of such right, we think that the assumption of jurisdiction by the said succeeding magistrate without informing him of his right, was clearly wrong and the trial by the succeeding magistrate was a nullity……"**

Need we say more!

For comparative purposes however, we would also refer to the Tanzanian case of **Raphael Vs Republic (1969) EA 544** which dealt with similar provisions as our own *section 200 (3)* of the Criminal Procedure Code. In that case the court stated:-

"**..…(1) it is prerequisite to the second magistrate exercising jurisdiction that he should appraise the accused of his right to demand that the witnesses or any of them be re-summoned and re-heard……."**

(2) If the second magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction and the trial is a nullity……"

We reiterate here that the provisions of *Section 200 (3)* of the Criminal Procedure Code are mandatory and should be observed at all times by the trial courts as they are for the protection of an accused person. It is the duty of the trial court to inform an accused person of his rights to recall witnesses or to start the case *de novo.* Failure to do so renders the proceedings a nullity as was held in the aforesaid authorities. Accordingly and in line with the aforesaid authorities, we declare the proceedings to have been a nullity and accordingly set aside the conviction and sentences imposed against each appellant. **Mr. Makura** was thus right in conceding to the appeal on that ground.

The state has urged us to order a retrial in this appeal and advanced various grounds set out in the earlier part of this judgment. The appellants have opposed an order for retrial and given their reasons as well. The principles applicable in determining whether a retrial should be ordered are now well settled. A retrial should only be ordered:-

(i) If the original trial was illegal or defective.

(ii) If it is in the interest of justice.

(iii) If it will not occasion injustice or prejudice to the appellant.

(iv) If it will not accord the prosecution opportunity to fill up gaps in its evidence at the first trial.

(v) If upon consideration of the admissible or potentially admissible evidence a conviction may result and finally,

(vi) Each case must depend on its particular facts and circumstances.

See generally **Ahmedali Ali Dharamshi Sumar VS Republic (1964) EA 481, Fatehali Manji VS Republic (1966) EA 343, M'kanake VS Republic (1973) EA 67 and Mwangi VS Republic (1983) KLR 522.**

The above conditions that must be satisfied are conjunctive and not disjunctive and one of them which must be present is that the trial in the subordinate court must have been defective or a nullity. We have already so held.

No doubt the offence committed was serious as it carries with it a death penality. The public will take umbrage, and justly so in our view, if people who have been convicted for such heinous offence were to be released merely because of procedural irregularity on the part of the presiding Magistrate. Indeed in the circumstances of this case PW1 was even rendered comatose for 2 days in a forest. The interest of justice will be best served in our view by an order of retrial. The appellants though charged in court on 24th March, 2006 it was not until 14th January, 2008 that their case was concluded. The appellants have thus been behind bars for approximately 3 years. However, considering that the appellants had been sentenced to death we do not think that the period for which the appellants have been in custody is such that they would be prejudiced or suffer injustice if a retrial is ordered. We have also considered the evidence, and without saying much lest we prejudice the mind of the magistrate who will eventually preside over the retrial, we are convinced that if the self-same evidence was to be tendered, a conviction is most likely to result.

Having taken into account all the foregoing, we order and direct that there be a re-trial in this case. Towards this end the appellants shall be produced before the Senior Principal Magistrate's Court at Nanyuki on 2nd December, 2009 for the retrial to commence before any other Magistrate of competent jurisdiction apart from **Mr. E.G. Mbaya SRM** and **Ndungu H.N. (Miss) SPM** who presided over the earlier trial.

Until then the appellants shall remain in prison custody.

Dated and delivered at Nyeri this 19th day of November, 2009.

J.K SERGON

JUDGE

M.S.A. MAKHANDIA

JUDGE