REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 158 of 2008

JOHN NJOROGE MBIRA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in Senior Resident Magistrate's Court at Karatina in Criminal Case No. 506 of 2006 dated 1st July 2008 by L. Mbugua – Ag. P.M.)

J U D G M E N T

John Njoroge Mbira hereinafter referred to as "*the appellant*" was arraigned before the Senior Resident Magistrate's Court at Karatina on two counts of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the 1st count were that on 24th August 2005 at Ragati village in Mathira within Nyeri District of the central Province, he with others not before court while armed with dangerous and offensive weapons namely pistol robbed **Lucy Wangui Wachuka** of a mobile phone make Motorola T190 and Kshs.3,000/= all valued at Kshs.9,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Lucy Wangui Wachuka**. The particulars of the second count were that on the same day and place he jointly with others not before court while armed with dangerous weapons namely pistol robbed **Margaret Wambui Kinyoro** of a mobile phone make Samsung valued at Kshs.10,000/= and cash Kshs.30,000/= all valued at Kshs.40,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said **Margaret Wambui Kinyoro**. The appellant pleaded not guilty to the charges and he was tried.

The prosecution case was that on the night of 24th June 2005 at about 10.00 p.m. **Lucy Wangui Wachuka,** the complainant in count one (PW1) was in her house. In same compound as PW1 liked her sister **Margaret Wambui Kinyoro** who could have been the complainant in count two but never lived to tell her story, her brother **John Kamuru Wacuka** (PW2), and **David Muriithi Njoroge** (PW3), a cousin to the complainant. PW1 heard her door being hit and shortly thereafter thugs wearing masks armed with pangas and a gun entered and demanded money. They took Kshs.3,000/= from her, a Motorola and Samsung cellphones. They then ordered her to take them to her late sister's house (would be complainant in count 2) and forced her to open the door.

They forced the late **Margaret** into her bedroom and took her Kshs.20,000/= from her. Among the thugs, PW1 recognised the voice of the appellant as he had been her boyfriend and had in fact stayed

together for a year or so. The thugs then shot the two sisters seriously injuring them. Indeed Margaret was fatally injured. The brother of the two, PW2 heard the gunshots and also a person *saying 'pitia hii'* a Kiswahili term for "pass this way". He recognised that voice too as belonging to the appellant. He was familiar with it since the appellant had been a boyfriend of his sister (PW1).

PW3, the cousin to the two sisters also heard the gunshot and went to the scene only to find the two sisters seriously injured. They were rushed to hospital where PW1 was admitted for a month, while Margaret subsequently succumbed to the gunshot wounds on 7th July 2005 and passed on. PW1 later on gave the name of the appellant to **P.C. Joseph Omwenga** (PW6) on 26th June 2005 and he started looking for him. However it was not until 3rd June 2008 that the appellant was arrested having been pointed out to the witness by PW1.

Put on his defence the appellant elected to give a sworn statement of defence and called no witnesses. He stated that he and PW1 were lovers but had separated. However he denied having perpetrated the crime.

In her judgment the trial magistrate carefully evaluated the evidence, found the appellant guilty as charged on count one, convicted and sentenced him to the mandatory sentence of death. As the complainant in count II hadn't testified as she passed on as aforesaid, the trial magistrate had acquitted the appellant at the stage of the count at no case to answer stage.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal. He faulted the learned magistrate for convicting and sentencing him on doubtful evidence of identification/recognition, had not considered that he had been arrested a year after the event and failed to consider adequately the defence advanced by him.

When the appeal came up for hearing, the appellant argued it by way of written submissions which we have carefully read and considered.

On the part of the state, **Ms Ngalyuka**, learned Senior State Counsel opposed the appeal. She submitted that though the robbers were disguised with masks PW1, PW2 and PW3 were however able to identify the appellant by his voice. They were all familiar with the appellant's voice since as a boyfriend to PW1 he had stayed with them in the same compound for well over one year. That the appellant did not deny the fact that the three witnesses were familiar with his voice. There was therefore no possibility of mistaking his voice. The witnesses could not have framed the appellant as they had no reason to do so. Finally she submitted that the evidence tendered by the prosecution was consistent and cogent.

As we perused both the typed as well as original record of he trial magistrate in preparation of crafting this judgment, it became apparent to us that this appeal was bound to succeed purely on the basis of procedural impropriety and or flaws committed by the trial magistrate. The magistrate who concluded the trial failed to comply with the mandatory provisions of section 200(3) of the criminal procedure code. We appreciate that this issue was not raised nor canvassed before us during the hearing of the appeal. However since it is a matter of law and goes to the jurisdiction, we cannot ignore it. In any event the law on the same is pretty settled and we do not think that if we had been addressed on the subject by both the appellant and the state counsel, we would have re-written the script.

The trial court record shows as follows: firstly, the trial had begun on 31st October 2006 before **Ag. Principal Magistrate**, **P. C. Tororey** and on that occasion PW1, **Lucy Wangui Wachuka**, PW2 **John Kamuru Wacuka** and PW3 **David Muriithi Njoroge** were heard.

Secondly, the record shows that after the first occasion of hearing, the same learned magistrate mentioned the matter several times, though no further hearing took place before her. The record shows thereafter that on 6th March 2007 the learned magistrate took the evidence of PW4, **Maina Ndirangu** and PW5 **John Nduru Njogu**.

Thirdly, the case was thereafter adjourned to 5th June when the same magistrate presided over the evidence of PW6.

Fourthly with effect from 19th June 2007 and 29th January 2008, the case was alternately mentioned before her and other magistrates namely, **B. M. Kimemia** (R.M) and **L. Mbugua** (SRM).

On 29th January 2008 the proceedings of the court are recorded as follows:-

"**29/1/08**

Coram: Before L. Mbugua SRM

I.P. Kasongo for prosecution

C/C Kariuki

Accused present

Inter; Eng/Kisw/Kik

Accused: I pray case to proceed from where it had stopped.

Order: Under section 200 of CPC case to proceed from where it had stopped. Proceedings to be typed ....." Subsequent thereto the learned magistrate proceeded to hear the evidence of PW6 who had been recalled solely to produce the post mortem report dated 14th July 2005. Thereafter the prosecution closed their case. The learned magistrate found that the prosecution had established a prima facie case against the appellant, put him on his defence and thereafter crafted and delivered the judgment.

The foregoing chronology touches on one legal point importing nullity in the trial process. The relevant provision of law is section 200(3) of the Criminal Procedure Code which stipulates thus:-

"***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*".**

As already seen Senior Resident Magistrate **P.C. Tororey** had already heard a large amount of the prosecution evidence by the time that she ceased to preside over the proceedings in circumstances which are not clear from the record. Indeed she heard the entire prosecution case. Was that evidence going to be re-taken, before a succeeding magistrate? This is not clear because, up to the last mention before hearing proceeded before **L. Mbugua** there was no mention of section 200(3) of the Criminal Procedure Code; and the record does not show that the succeeding Magistrate gave any formal information to the appellant herein with regard to the same. But on 7th August 2006 the succeeding Magistrate went on with the hearing of the testimony of the recalled witness. It is insufficient that the record shows that the appellant elected to proceed from where the previous proceedings had stopped. It is clear that the first phase of the trial presided over by one magistrate, continued into the second part, presided over by a different magistrate, but without the care to inform the appellant that he had right to recall the earlier testimony. The incoming magistrate has the obligation to spell out to the appellant that requirement. The fact that the incoming magistrate had communicated that requirement to the appellant must be apparent in the record of the trial magistrate. We cannot say for certain looking at the instant record that the learned magistrate appraised the appellant of the aforesaid requirements and gave the appellant an opportunity to elect.

It is clear to us that the succeeding learned magistrate when she entered the case did not have in

contemplation the significance of Section 200(3) of the Criminal Procedure Code; and, as she gave no notice to the appellant herein at the time, it is quite possible that the appellant would have elected to have the case heard de novo or even recall some of the witnesses. Considering that the previous magistrate heard the entire prosecution case it cannot be said that the appellant was not prejudiced by the incoming magistrate's failure to inform him of his rights under the law. Since the information to be given out by a succeeding magistrate under Section 200(3) of the Criminal Procedure Code is mandatory, are be inclined to state that there was a significant flaw in the trial proceedings. We find accordingly that there was fatal error in the trial and on this account we must declare the proceedings a nullity.

Should we order a retrial?

It is clear from the record that the appellant has been in custody since 3rd June 2006. It is also true that the offences allegedly committed by the appellant were grave ones, in terms of other persons' rights to life and security, and in terms of pacific communal living, and of civilization for all people. Indeed in the process an innocent life was lost. It is true also that, if the appellant were to be successfully prosecuted, he would be subject to severe penalties that far outweigh the duration he has been in custody.

The foregoing considerations dictate, as a matter of law and judicial discretion, that we should order a retrial.

Accordingly, we hereby order as follows:

(1) The appeal is allowed, conviction quashed and sentence imposed set aside.

(2) There shall however be a retrial of the appellant based on the 1st count in the original charge sheet as the complainant in the 2nd count has passed on.

(3) The said retrial shall take place before a magistrate with competent jurisdiction, other than P.C. Tororey and L. Mbugua who presided over the initial trial.

(4) This matter shall be mentioned before the Principal Magistrate's court at Karatina on 18th December 2009, for the retrial to commence.

(5) Retrial shall be conduced, throughout, on the basis of priority.

Dated and delivered at Nyeri this 4th December 2009

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE