**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL 43,44 & 45 OF 2006**

1. **FRANCIS MBITHI KATETE**
2. **PATRICK NZIOKI MUASA**
3. **KIVUVA MUTUA ……..……. APPELLANTS**

**VERSUS**

**REPUBLIC …….. RESPONDENT**

***(Being an appeal from the judgment of the Chief Magistrate Mrs H.A. Omondi delivered on 26/04/2006 in Machakos Criminal Case No. 3200 of 2004)***

**JUDGMENT**

1. The Appellants herein were all arraigned before the Chief Magistrate's Court at Machakos on 7/7/2004 and charged with two (2) counts of the offence of robbery with violence. The particulars of offence were as follows:

On Count I that:

"**On the nights of 13th and 14th June 2004 at Kaonyweni village in Machakos District within Eastern Province, jointly with others not before court while armed with offensive weapons namely Rungus, Bow and arrows, Axes, Grill cutter and pangas robbed MUTINDA NDOO of cash kshs. 384,000/=, mobile phone make Nokia 3310 valued at 7,000/=, sweater valued at 2,300/=, jacket valued at 1,100/=, half jacket valued at 700/=, two shirts valued at 700/=, bow and arrows valued at 170/=, panga valued at 100/=, Somali Sword & knife valued at 500/=, two w/watches Omax and Disco valued at 950/=, Safari Boots valued at 1,600/=, North Star shoes valued at 1,000/=, two headscarves valued at 400/= and Somali cap valued at 100/= all valued at Kshs. 400,620/= and at or immediately before or immediately after the time of such robbery used actual violence to the said MUTINDA NDOO."**

On Count II that:

"**On the nights of 13th and 14th June, 2004 at Kaewa Market in Machakos District within Eastern Province, jointly with others not before court while armed with offensive weapons namely Rungus, Bows and arrows, Axes, Grill cutter and pangas robbed JEREMIAH MUASA of cash Kshs.44,300/=, Video Deck make National valued at 10,000/= all valued at Kshs. 54,300/= and at or**

**immediately before or immediately after the time of such robbery injured JEREMIAH MUASA."**

2. After a lengthy trial, Mrs H.A. Omondi, Chief Magistrate, convicted all the Appellants and sentenced them to death on both counts. They lodged this Appeal and at the hearing, Mr Wang'ondu, learned State Counsel conceded it on the ground that although Ms D.W. Nyambu, Senior Resident Magistrate commenced the trial and Mr T.O Okello, Senior Resident Magistrate later took it up before handing it over to Mrs H.A. Omondi, Chief Magistrate, there was no compliance with section 200 of the Criminal Procedure Code and that being the case, the whole trial was rendered a nullity. He however sought a retrial because to his mind, there was overwhelming evidence leading to the conviction and sentence. Further, that the offence was serious and that explosives were used to force the victims of the alleged robbery to open their doors and that all the witnesses would be available to testify when required. Lastly, that since the mistake in not complying with section 200 of the Criminal Procedure Code was made by the court and not the prosecution, the interests of justice would necessitate that a retrial be ordered.

3. Mr Ondieki who appeared for the Appellants while agreeing that there was non-compliance with section 200 aforesaid nonetheless went on to argue at length that the Appeal otherwise had merit and that a retrial was not warranted. Of relevance to the issue however, was his submission that the Appellants had been in custody for over 5 years and to subject them to a retrial would be prejudicial to them.

4. We have looked at the record of the trial court and we note that Ms D.W. Nyambu, Senior Resident Magistrate commenced the hearing of the case on 6/1/2005 and on that day, PW1, Jeremiah Muasya testified. On 10/6/2005, Mr T.O Okello, Senior Resident Magistrate took the evidence of PW2, Mutinda Ndoa and there is no record at all that section 200 of the Criminal Procedure Code was complied with. That section provides as follows:-

"**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 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 commenced 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."**

5. Mr T.O Okello aforesaid took the evidence of PW2 as well as that of PW3, Naomi Ndumi and Scholastica Nduku, PW4 after Ms Nyambu, and he failed to comply with section 200 aforesaid. Further on 18/10/2005, when Mrs H.A. Omondi took up the matter and recorded the evidence of PW5 P.C. David Waiharo, PW6, P.C. Ibrahim Karanja PW7, P.C. David Payen, PW8, George Bosire and PW9, Erick Musyoki Kinyili, again there was no compliance with section 200 aforesaid which is in mandatory terms.

6. As we understand it, where there is no compliance as was the case here, the whole trial is rendered a nullity. This is what led the Court of Appeal in **Erick Omondi alias Gor vs R, Cr. App. NO. 15/2007**

(unreported) to state as follows:-

"**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 the succeeding magistrate to form his own 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 witnesses 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 invoked to cure that irregularity, which in our view is of a fundamental nature."**

7. The holding above must hold true in this case because whereas three learned magistrates conducted the trial at different times, the succeeding last two failed to abide by the mandatory expectations of section 200 of the Code and all we can do is agree with both Mr Wang'ondu and Mr Ondieki and declare the Appellants' trial a nullity and their convictions are quashed and the sentences of death set aside. But having done so, we are also obligated to consider whether a retrial is necessary in the circumstances of this case because in **Paul Mutungu vs R Cr. Appeal No. 127/2006** (unreported), the Court of Appeal stated that in so doing, "**every case must depend on its own facts…"** Whereas Mr Ondieki went to extraordinary lengths to convince us that the Appeal as the whole was merited, he singularly failed to address his mind to the circumstances which a court should look at while addressing the question of a retrial. They include:-

a. length of the prior trial and time the Appellant has spent in custody (**see Paul Matungu** (Supra));

**b.** availability of witnesses – see for example **Elirema vs R (2003) KLR 537;**

c. whether the prosecution would have an opportunity to fill up gaps in the evidence already tendered;

d. whether on the whole the Appellant would be prejudiced if a retrial were to be ordered.

8. In this case, the Appellants were first arraigned in court on 7/7/2004 and convicted on 26/4/2006. The mistake that has occasioned their appeal being allowed was wholly attributable to the court and not the prosecution or the Appellants. It would be wholly unfair to subject them to another trial. Throughout

the two year trial they consistently complained that the case was taking too long and we deem it prejudicial to send them back for another protracted trial.

9. Regarding the availability of witnesses, it may well be that they may be available but our analysis of the evidence tendered would show that there were too many gaps in evidence which the prosecution may well get a chance to fill up. One such glaring gap relates to the evidence of identification of all the Appellants and on that point we would agree with Mr Ondieki only to the extent that the evidence of PW1, Jeremiah Muasya, PW2 Mutinda Ndoa and PW3 Naomi Ndumi Mutua was wholly unreliable and created doubts about how they were able to identify all or any of the Appellants in the circumstances of the incident.

10. For these reasons, we decline to order a retrial but will instead allow the Appeals, quash the convictions and set aside the sentences imposed.

11. The Appellants may be released unless they are otherwise lawfully held.

12. Orders accordingly.

Dated and delivered at Machakos this 21st day of April 2008.

**J.B OJWANG'**

**JUDGE**

**ISAAC LENAOLA**

**JUDGE**