REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL APPEAL 67 OF 2007

ALI ODONGO OJUMBO.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G E M E N T

The appellant was convicted for the offence of rape contrary to section 140 of the Penal Code. He was then sentenced to 20 years imprisonment.

In his appeal to the High Court, the appellant challenged both his conviction and sentence.

When the appeal came up for hearing before me on 2nd July 2008, the learned state counsel, Mr. Daniel Karuri, conceded the appeal, albeit reluctantly. The reason why he conceded the appeal was that although the trial of the appellant was conducted by three different magistrates, none of them ever complied with the provisions of section 200 of the Criminal Procedure Code.

A perusal of the record reveals that on 30th November 2004, when the plea was taken, the trial magistrate was Hon. P. K. Sultani SRM. Thereafter, that magistrate did not receive any evidence in the case.

When the case started, on 23rd March 2005, the trial magistrate was Hon. Mshimba Ag. R.M.

By the time PW2 testified, on 29th September 2005, the trial magistrate was Hon. S. N. abuya R.M.

Pursuant to the provisions of section 200 (3) of the Criminal Procedure Code,

"*when 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.*"

Regrettably, although Hon. S. N. Abuya R.M. was a succeeding magistrate, he did not discharge his obligation of informing the appellant herein of his right to demand, if he was so minded, that PW1 be resummoned and reheard.

Notwithstanding the failure by the succeeding magistrate to comply with section 200 of the Criminal Procedure Code, he proceeded to receive the evidence of PW2, PW3, PW4 and PW5.

Thereafter, the prosecution closed its case and the appellant was put on his defence, after the court had held that he had a case to answer.

Hon. S. N. Abuya R.M. also received the sworn evidence of the appellant.

After giving due consideration to the evidence tendered by both the prosecution and the defence, as well as to the submissions by the prosecutor and the appellant herein, Hon. S. N. Abuya delivered his judgement, in which he found the appellant guilty.

The learned trial magistrate then heard the mitigation of the appellant, as well as the submissions of the prosecutor, on the issue of sentence.

However, as the court held the view that the offence was serious, whereas the said court had a limited jurisdiction, the case was referred to the Senior Resident Magistrate, for purposes of sentencing.

There is no doubt that the learned trial magistrate had legal authority to refer the appellant herein to a court with a wider jurisdiction, for purposes of sentencing, once the trial court had formed the considered opinion that the appellant was deserving of such greater punishment than the learned trial magistrate had power to inflict.

In my view, at the stage of sentencing, the accused person would not be entitled to exercise the right conferred upon him by virtue of section 200 of the Criminal Procedure Code. I say so, because both the prosecutor and the defence would have already closed their respective cases. Indeed, the accused would no longer be an accused, but a convict. He would thus not be at liberty to demand that the trial be re-visited, through having the witnesses, or any of them, resummoned and reheard.

In the event, I hold the considered view that Hon. E. K. Makori SRM, who handed down the sentence to the appellant herein, was not under any legal obligation to comply with section 200 of the Criminal Procedure Code.

To my mind, Hon. E. K. Makori SRM did discharge his legal duty, by explaining to the accused that the case had only been taken before him for the sole purpose of sentencing, because the learned trial magistrate felt that it did not have the requisite legal power to hand down an appropriate sentence.

As already held hereinbefore, Hon. S. N. Abuya R.M. had failed to comply with the mandatory provisions of section 200 of the Criminal Procedure Code. That failure was fatal to the prosecution case. And therefore, the learned state counsel was right to have conceded the appeal on that ground.

Having given consideration to the evidence on record, I have formed the view that the same may be sufficient to sustain a conviction.

Furthermore, the case herein was only determined in July 2007. The learned state counsel assured this court that the witnesses would be readily available.

He therefore sought an order for a retrial.

In response, the appellant was agreeable to a retrial. In those circumstances, I find and hold that an order for retrial would be in the interest of justice.

It is ordered that the appeal herein be and is allowed. The conviction is quashed and the sentence set aside. However, the appellant shall not be set free for now. Instead, it is ordered that he be produced before the Senior Resident Magistrate's Court, Mumias, at the earliest opportunity, so that he can be charged afresh with the charge which he faced previously.

In the event that he should plead "Not Guilty" to the said charge, the retrial of the appellant herein shall be conducted by any competent magistrate, other than Hon. S. N. Abuya.

Dated, Signed and Delivered at Kakamega, this 3rd day of July, 2008

FRED A. OCHIENG

J U D G E