



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 377 of 2004**

**NICHOLAS OTIENO OWINO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 2562 of 2002 of the Chief Magistrate's**

**Court at Makadara (Mr. Nyakundi – CM)**

**J U D G M E N T**

NICHOLAS OTIENO OWINO was convicted for one charge of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code by the Makadara Chief Magistrate's Court and was sentenced to death as prescribed in the law. He lodged this appeal having been dissatisfied with the court's findings.

The appeal came up for hearing before us on the 23<sup>rd</sup> November 2006. Miss Gateru, learned Counsel for the State conceded to the appeal on grounds that the trial was conducted by more than one magistrate. Counsel submitted that when Mr. Kanyangi took over the trial from the preceding trial magistrate, it was not clear from the record whether he explained the provisions of Section 200 of the Criminal Procedure Code to the Appellant.

We have perused the record of the proceedings and do confirm the submissions by the learned State Counsel. In fact, the record of the proceedings discloses that the Appellant was tried by three different magistrates. The trial begun before Mrs. Juma, Principal Magistrate on the 7<sup>th</sup> October 2002. Mrs. Juma heard the evidence of PW1 the Complainant in the case, PW2 a key witness who was working with the Complainant at the time of the said robbery and part of the evidence of PW3 who was the arresting officer. The case came up again for hearing on 30<sup>th</sup> June 2003, when Mr. Kanyangi, SPM, took over the trial of the accused. The Coram and opening remarks of the proceedings of that day are as follows: -

*“30/6/03*

*Before Mr. Kanyangi – SPM*

*Prosecutor – IP Mwangi*

*Court clerk – Kakai*

*Accused in custody*

*Order – By consent of the accused case to proceed under Section 200 of the Criminal Procedure Code...*

*MR. C. O. KANYANGI*

*PW111 ....”*

The succeeding trial magistrate heard PW3, who was re-called only for purposes of producing the OB of Buru Buru Police Station. The learned trial magistrate, Mr. Kanyangi, then adjourned the case until 29<sup>th</sup> January 2004 when prosecution closed its case. The case came up on 12/2/04 when he made a ruling in compliance to Section 211, putting the accused person to his defence. There is no order adjoining the case but it was adjourned severally until 15<sup>th</sup> April 2004 when Mr. Nyakundi, SPM, took over the trial of the Appellant. The record of that day reflects the following: -

*“15.4.2004*

*Before Mr. Nyakundi SPM*

*Prosecutor: IP Kariuki*

*Court Clerk: Esther*

*Accused: in custody present*

*Court:*

*29.4.2004 Court No. 1. Remanded in custody.*

*Mr. Nyakundi*

*SPM.*

*Section 200 CPC read and complied with.*

*Accused:*

*I elect my case to proceed from where the other magistrate stopped.*

*Court:*

*The ruling delivered on 15.4.2004 before me in presence of the accused in open court.”*

It is difficult to follow what was happening in Mr. Nyakundi’s court and on which date the cited proceedings took place. It is however clear that the Appellant made an election to have the case continued from where “the other magistrate stopped”. Section 200(3) of the Criminal Procedure Code.

*“Section 200 (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 where judgment has not been written and signed by his predecessor, act on the evidence recorded by that*

*predecessor, or re-summon the witnesses and recommence the trial.*

*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 exercise jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered the judgment*

*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.”*

Having perused the record of the proceedings, we find that Mr. Kanyangi, SPM, did not comply with the provisions of Section (3) of the Criminal Procedure Code. The record only shows that the Appellant consented to the case proceeding under Section 200 of the Criminal Procedure Code. That statement was vague because the provisions of Section 200 are very wide. Section 200(1) (a) gives a succeeding magistrate power to read a judgment written and signed by the trial magistrate whom he has succeeded in the matter. Section 200(1) (b) gives the succeeding magistrate power to either (i) act on evidence recorded by the predecessor or (ii) re-summon the witnesses and recommence the trial.

Under Section 200 (3) gives a succeeding magistrate power to inform an accused person of his right to re-summon witnesses in the case and power to the succeeding court to re-hear.

We have shown the provisions under Section 200 of Criminal Procedure Code to demonstrate that Mr. Kanyangi’s statement that the case proceeded under Section 200 of the Criminal Procedure Code was not only ambiguous but in flagrant violation of the accused/Appellant’s right to be informed of his rights under that section.

We find that due to the violation of the Appellant’s right during the trial before Mr. Kanyangi, we find that the case was a mistrial. That is however only part of the problem.

Section 200(4) of the Criminal Procedure Code provides: -

*“200(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.”*

It is our duty as a first appellate court to determine whether the Appellant suffered any prejudice in his trial before the lower court.

In NDEGWA vs. REPUBLIC [1985] KLR 534 Madan, Kneller and Nyarangi JJA at page 537 held: -

*“It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully “observed” the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion. The succeeding magistrate was as helpful as he could possible make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation.*

*For the reasons we have stated, in our view the trial was unsatisfactory.”*

In NJENGA VS. REPUBLIC [1984] KLR 605 Hancox JA, Cheseoni & Nyarangi Ag. JJA held: -

*“1. In a case depending on visual recognition, where the principal witness is heard by one magistrate*

and the second identifying witness by another, it is essential that the accused is informed of his right to resummon the witness.

2. *The Criminal Procedure Code (Cap 75) Section 200(3) entitles an accused person to demand that any witness be resummoned and enjoins the trial magistrate to inform the accused person of that right.*

3. *Since it could not be said that if the succeeding magistrate had seen and heard both identifying witnesses he would necessarily have convicted, it could not be said that the failure caused no prejudice to the appellant.”*

Mr. Nyakundi, who heard the Appellant’s defence and wrote the judgment convicting the Appellant did not see, hear, assess and gauge the demeanour and credibility of witnesses. Considering that the incident took place at night and the Appellant was arrested after a chase, it was very important that the trial magistrate who saw and heard the witnesses was the one who wrote the judgment as the demeanour and credibility of the witnesses was of utmost importance. We do find that given the circumstances of the case, the Appellant’s trial before the lower court was a mistrial and further that the Appellant suffered prejudice for having been convicted by a magistrate who did not truly try him. We set aside both the conviction and sentence.

The next issue we have to determine is whether we should order a retrial as suggested under Section 200(4) of the Criminal Procedure Code. The principles applicable in determining whether to order a retrial where the original trial was found to be defective or a nullity still apply to this case.

We do not wish to restate all these principles. We believe that the Principle in the case of MWANGI vs. REPUBLIC [1983] KLR 522 is sufficient to help us dispose of this issue and the appeal.

In the Mwangi case, it was held: -

*“A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result.”*

We have perused the record of the proceedings afresh and have analyzed the evidence that was adduced before the lower court. We find that the evidence of the three prosecution witnesses had material contradictions which were material to the prosecution case. While the Complainant said that the last passenger of his matatu refused to alight where he had indicated his destination, PW2 who was the conductor stated that the last passenger in fact alighted. PW1 said that at the point where this last passenger was meant to alight, three passengers entered the Matatu PW2 contradicts him by saying only two passengers entered at that point and that two others joined in at a further stage and it was then that all four committed the robbery. PW1 described the Appellant as one of the three people who first boarded the matatu while PW2 described him as one of the two to board the matatu before the last two. These contradictions are material since apart from the order in which the Appellant is described as having boarded the Matatu, none of the witnesses described his features or the manner in which he was dressed.

There was an important omission made by the trial magistrate Mrs. Juma. While in his evidence PW3 said that he recovered the Complainant’s identity card and wallet from the Appellant the identity card produced in court was a copy. Secondly and equally important the Complainant, PW1 the alleged owner of the two items did not identify them in court. That was a material discrepancy. Thirdly and equally important the photocopy of the identity card adduced in court as exhibit 3, bore the names “JULIUS LOBIKI OLE SANDEO’ as per page 14 of the proceedings. PW1’s gave his names as “JULIUS LOBIEK LENDEO”. Both names were taken down by the same magistrate and so it cannot be argued to be a mistake. The two sets of names are materially different and cannot be said to belong to one and the same person. Since the Complainant failed to identify the said identity card, exhibit 3, to the court as his, given the discrepancy, we find that the evidence adduced did not support the evidence that the Appellant was found with the Complainant’s identity card.

We were also concerned with the Appellant’s mode of arrest. The Appellant was chased. According to

PW1, he was chased by PW3 for 5 minutes and according to PW2 “for 10 minutes”. However, from the evidence of these two witnesses the Appellant was not chased immediately. PW3 first approached PW1 and PW2 in the matatu before following the direction the “thugs” ran to. PW3 did not follow the Appellant from the time he left the vehicle to the point of arrest. There was therefore a broken link between the time the robbers escaped from the Complainant’s vehicle and the time the police started running after them. Given the lack of proven identity by the Complainant and PW2 and due to weakness of the evidence of recovery, we find that no conviction would result from this case if a retrial were ordered. Besides, the Appellant has been in continuous prison custody since 5<sup>th</sup> October 2002, a period of 5 years. We find that the interest of justice does not require for an order of retrial being made.

For the reasons we have enumerated in this judgment we decline to order a retrial. We order that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 1<sup>st</sup> day of February 2007.

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant present

Miss Gateru for the Respondent

CC: Tabitha/Eric

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**LESIIT, J.**

**JUDGE**

.....

**MAKHANDIA**

**JUDGE**