REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Appeal 36 of 2005

(Appeal arising from Original Kimilili R. M. Cr. C. No.28 of 2004)

MARTIN SIMIYU JUMA ..... APPELLANT

VS

REPUBLIC ..... RESPONDENT

JUDGMENT

The appellant was charged jointly with Elizabeth Nekesa Maalamba of the offence of theft of Ksh.30,000/= the property of William Malaamba Toili.

The particulars are that on the 5th day of January 2004 at Kuywa Village in Bungoma district within the Western Province jointly stole Ksh.30,000/= the property of William Maalamba Toili.

The appellant was convicted and sentenced to serve two (2) years imprisonment. He appealed on three grounds:

i) That the learned trial magistrate erred in fact and in Law in that his conviction was based on uncorroborated accomplice evidence.

ii) That the appellant's conviction was made on evidence partially recorded by a different magistrate and that the appellant has thereby been prejudiced.

iii) That the trial magistrate had no justifications in disbelieving the appellant's defence.

When the appellant's case was at the defence stage the trial magistrate, Mr. J. N. Mwaniki's was transferred to another station, his successor, F. K. Gitonga, took over. However, he did not record in his judgment that he had complied with the provisions of Section 200 of the Criminal procedure Code (Cap 15) Laws of Kenya.

The prosecution's case against the appellant was that DW1, William Malaamba Toili, discovered that money had been stolen from his metal box at his house. The sum of Ksh.30,000/= was missing. On inquiry among his family members, her daughter, Elizabeth Nekesa, charged jointly with the appellant as first accused and duly convicted, told him (PW1) that she had taken the money to appellant to buy her (Nekesa) clothes from Uganda and the rest for his up-keep as a student in Uganda. P.W1 confronted accused who denied knowledge of the money. Accused, according to PW1, then went underground.

The learned Resident Magistrate in his judgment made a finding that going underground when confronted

with confession of Nekesa (co-accused) was incriminating and hence afforded evidence of corroboration. Accordingly, he placed the accused on his defence who in his brief unsworn statement testified that he did not steal any money.

Section 200 of the Criminal Procedure Code provides:

(1) 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 that 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.

(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 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.

(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.

In NDEGWA –VS- REPUBLIC (1985) K.L.R. 534 at 538 (para.40) the Court of Appeal had this to say:

"*Section 200 is a provision of the law which is to be used very sparingly indeed, and only in case where the exigencies of the circumstances, not only are likely but will defeat the ends of justice, if a succeeding Magistrate does not, or is not allowed to adopt and continue a criminal trail started by a predecessor owing to the latter becoming unavailable to complete the trial.*

In the circumstances of this case the exigencies of the circumstances would have defected the ends of justice if the succeeding magistrate did not adopt and continue the criminal trial started by the predecessor as it was at the defence stage.

However, it was incumbent upon the succeeding magistrate to explain to the appellant the provisions of Section 200 of the Criminal procedure Code (cap 75)".

There is no evidence on record that Section 200 of the Criminal procedure Code (Cap 75) was explained to the appellant. In this respect the original trial was defective in my view.

In general, a re-trial will be ordered only when the original trial was illegal or defective (see FATEHALL MANJI -vs- REPUBLIC (1966) E.A. 345.

Accordingly, I quash the conviction, set aside the sentence and order that the matter do proceed for a retrial before a Resident Magistrate in Bungoma (other than F.K. Gitonga) with competent jurisdiction.

A certified copy of this order to be served upon the Resident Magistrate in Kimilili as well as the DCIO, Bungoma for compliance.

Dated and delivered at Bungoma this 6th day of February 2006.

N.R.O. OMBIJA

JUDGE

MISS MUOMA for Khakula

NA for state