REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 1245, 1246, 1247, 1248 & 1249 of 2002

GEORGE IRUNGU WANYOIKE…..…….....…….…..APPELLANT

VERSUS

REPUBLIC…….....……..…...RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1246 OF 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 2648 of 2001 of the Chief Magistrate's Court at Thika (Betty Rashid – PM.)

JULIUS IRUNGU MUHUNI…….…….....…..…..…..APPELLANT

VERSUS

REPUBLIC…… …….…...RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1247 OF 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 2648 of 2001 of the Chief Magistrate's Court at Thika (Betty Rashid – PM.)

FRANCIS NYAMESIO PAUL..…….……...…..……..…..APPELLANT

VERSUS

REPUBLIC…… …….…...RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1248 OF 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 2648 of 2001 of the Chief Magistrate's Court at Thika (Betty Rashid – PM.)

STEPHEN MUNYAO NDUTA…….…….....…….…..…..APPELLANT

VERSUS

REPUBLIC…….....…….…....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 1249 OF 2002

(From original conviction (s) and Sentence(s) in Criminal case No. 2648 of 2001 of the Chief Magistrate's Court at Thika (Betty Rashid – PM.)

JOSEPH GACHERU GATHUNJI..…….....……..…….…..APPELLANT

VERSUS

REPUBLIC…….....…….…….…....RESPONDENT

J U D G M E N T

GEORGE IRUNGU WANYOIKE, JULIUS IRUNGU MUHUNI, FRANCIS NYAMESIO PAUL, STEPHEN MUNYAO NDUGA and **JOSEPH GACHERU GATHUNJI** were convicted by Thika Senior Resident Magistrate Mrs. B. Rashid in four out of the five counts of **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the **Penal Code** each of the Appellants faced. The learned trial magistrate proceeded to sentence each Appellant to death in each of the four counts and ordered that the sentences should run concurrently. The Appellants were dissatisfied with their convictions and sentences and therefore lodged their individual appeals. These appeals have been consolidated for purposes of the appeal.

When this appeal came up for the hearing on 7th March 2006 **MISS GATERU** learned council for the State conceded to the appeal. Learned counsel submitted that **MRS. B. RASHID** who finalized the hearing of the case before the lower court and also wrote the judgment was not the one who had initially started the hearing of the case. That at the point that Mrs. Rashid took over the matter, she did not comply with **Section 200** of the **Criminal Procedure Code** and neither did she give the Appellants their rights under the said section.

We have perused the record of the proceedings of the trial court and have confirmed that the trial of this case was conducted by two different magistrates. **MRS. OMONDI** commenced the hearing of the case on 9th January 2002. In total she heard the evidence of PW1 up to PW9. It appears that the trial magistrate, Mrs. Omondi was transferred out of the station and at the same time the accused persons had another case. It became difficult for the case to be set down for hearing when the prosecution witnesses, the accused persons and the trial magistrate Mrs. Omondi were both available and present in court. Eventually on 12th June 2002, all the accused persons consented to the production of P3 forms and ballistic reports by a police officer under **Section 77** of the **Evidence Act**, the Appellants requested Mrs. Omondi to finalize the case. Upon that consent Mrs. Omondi set down the case for hearing on 26th June 2002. On 26th June 2002, the Appellants were not produced in court. Eventually it appears that the Appellants lost hope of being heard by Mrs. Omondi and therefore sought for the case to be taken over by another court. On 25th July 2002, Mrs. Omondi directed that the case should continue from the stage it had reached before her and not start *de novo* as per the Appellants' requests. Mrs. Omondi then proceeded to disqualify herself form handling the matter. The case was thereafter taken over by Mrs. B. Rashid who heard only one prosecution witness and the entire of the defence case. Mrs. Rashid did not raise the issue of taking over the case from Mrs. Omondi with the Appellants and neither did she explain to them their rights under **Section 200** of the **Criminal Procedure Code**.

Section 200(3) of Criminal Procedure Code provides as follows:-

"***Section 200(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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right."***

We have included in this judgment a short summary of what transpired in the trial before the subordinate court in order to demonstrate something. **Section 200(3)** of the **Criminal Procedure Code** places a mandatory duty upon the succeeding Magistrate of a case partly heard by another to inform the accused persons in that case of their right to demand that any witnesses be re-summoned and re-heard by the succeeding magistrate. That duty cannot be delegated or assumed by any other person except the succeeding magistrate. In the instant case, the succeeding magistrate did not inform the Appellants of their rights under **Section 200** of **Criminal Procedure Code**. Instead the learned trial magistrate merely exercised assumption of jurisdiction in the matter and proceeded to hear the remaining witnesses in the case. That failure to inform the Appellants of their right under **Section 200** of the **Criminal Procedure Code** was wrong and rendered the proceedings by the succeeding magistrate a nullity. See **KARIUKI vs. REPUBLIC 1985 KLR 504**. Mrs. Omondi could not comply with **Section 200** of the **Criminal Procedure Code** on behalf of the succeeding magistrate even if the Appellants stated their wishes to her as to the future conduct of the proceedings as neither Appellants nor Mrs. Omondi had such powers to do so. That action by Mrs. Omondi to direct how the trial should proceed before the succeeding magistrate was *ultra vires* and Mrs. Rashid ought not to have acted on the directions given. Mrs. Rashid seems to have acted on those directions and by so doing violated the mandatory provisions of **Section 200(3)** of the **Criminal Procedure Code** therefore rendering the trial a nullity.

We are fully aware that **Section 200** of the **Criminal Procedure Code** should be used very sparingly indeed. The Court of Appeal in **Ndegwa vs. Republic 1985 KLR 534** at 537 observed as follows: -

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

Whereas the Appellants in this case chose before Mrs. Omondi to have her cease exercising jurisdiction over the matter due to her 'transfer' from the station and to 'proceed' with the matter before another court, we are not satisfied that mere transfer was a good reason for Mrs. Omondi to cease exercising jurisdiction in the case. The delay caused in the case was not solely due to her transfer but also because the Appellants had other cases before the magistrate's law courts. The case was heard quite speedily by Mrs. Omondi between January and June 2002, Mrs. Omondi indicated that she was to be available next in September 2002 for a serious case and a capital charge. We do not think that it was expedient for Mrs. Omondi to disqualify herself from handling the case when she had initially heard all except one prosecution witness. This is an action that needs to be discouraged and in our view, Mrs. Omondi had initially finalized the matter and was the best placed to conclude it. As it turned out no time was saved in having Mrs. Rashid take over the proceedings. In **NDEGWA vs. REPUBLIC** (Supra) the Court of Appeal stated, and we reiterate the same in this case, as follows: -

"***No rule of natural justice, no rule of statutory protection, no rule of evidence and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration. In this case however, the second magistrate did not himself see and hear all the prosecution witnesses and even though he said 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…"***

Section 200 of the **Criminal Procedure Code** may be invoked but we wish to emphasize that the occasion to exercise it should not be liberalized by trial magistrate disqualifying themselves from a matter they have heard almost to finality just because they have been transferred. For a case of a serious charge as capital robbery where several counts were involved like in the instant case, it is desirable that the

succeeding magistrate exercises discretion circumspectively and even where the accused persons may want to proceed from the point the case had reached it would be desirable to re-summon some important witnesses especially the chief witnesses in the case. In **NJENGA vs. REPUBLIC 1985 KLR 605** the Court of Appeal held: -

*"**In a case depending on visual recognition, where the principal witnesses is heard by one magistrate and the second identifying witness by another, we think it essential that the requirements of subsection(3) should be observed, as it is for the protection of an accused person."***

In the instant case, the entire evidence relied upon by the prosecution except that of the investigating officer, was taken by Mrs. Omondi. We cannot say that no prejudice was occasioned to the Appellants in this case. As we have stated even though this is not the law, in a capital charge such as the instant one, it is desirable that the key witness in the case are re-summoned by the succeeding magistrate for hearing even where the accused persons in the case do not require or demand so. Having said this we declare the trial before the lower court a nullity, quash the conviction and set aside the sentences.

On whether or not to order a retrial, **Miss Gateru** submitted that the case being a serious one and there being sufficient evidence, a retrial should be ordered. All Appellants opposed to an order for retrial.

An order for retrial cannot be ordered where the appellate court is of the view that upon consideration of admissible or potentially admissible evidence a conviction may not result. See **MWANGI vs. REPUBLIC 1983 KLR 522**. We have carefully analyzed and evaluated the evidence adduced before the lower court. The Complainants in this case were passengers in a public service vehicle KAN 248 A driven by PW2. They were robbed on the material day (17.2.01) by persons who were traveling together with them at between 7.30 and 8.00 p.m. Only two Complainants identified the Appellants as the assailants. PW1, a police officer who at the time was traveling home identified all five Appellants as the assailants. PW6, another passenger Complainant identified the 1st and 2nd Appellants only. The circumstances of identification are not clearly stated since part of the robbery took place in the vehicle and due to a struggle which ensued between PW1 and the robbers outside the vehicle. The circumstances of identification are unclear but due to the lateness of the hour and being a rural setting, those circumstances must be considered to have been difficult. Whereas PW1 and PW2 were able to identify the Appellant in subsequent identification parades their evidence on the role played by those they identified was inconsistent. PW1 identified the 4th Appellant as the one who struggled with him before throwing him out of the vehicle and robbing him. PW6 said that it was in fact the 5th Appellant who struggled with and threw out. PW1 also identified the 1st Appellant as the robber who had the gun while PW6 identified the 2nd Appellant as the gun man. These were the only identifying witnesses and since their evidence was contradictory and inconsistent, we are satisfied that no conviction would result if we ordered a retrial in this case. The Appellants have been in prison custody since May 2001, a period of five years. In the circumstances of this case and the facts, we do not think that the interests of justice would require an order for a retrial being made. The Appellants will suffer prejudice. Consequently we decline to order a retrial. We order that the Appellants be set at liberty unless they are otherwise lawfully held.

Dated at Nairobi this 2nd day of May 2006.

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LESIIT, J.

JUDGE

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MAKHANDIA, M.

JUDGE

Read, signed and delivered in the presence of;

Appellants

Miss Gateru for the State

Wambui – Court clerk

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LESIIT, J.

JUDGE

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MAKHANDIA, M.

JUDGE