REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 578 of 2005

(From Original Conviction and Sentence in Criminal Case No. Tr. 3876 of 2003 of the Chief Magistrate's Court at Kibera – Ms. Muchira, S. R. M.)

ERICK NJOROGE KIHARA ……..…….....……...……..APPELLANT

VERSUS

REPUBLIC…….....……..…..…….….RESPONDENT

JUDGMENT

ERICK NJOROGE KIHARA was charged with three counts in the Chief Magistrates Court at Kibera. On the first count he was charged with causing death by dangerous driving contrary to Section 46 of the Traffic Act. On second count he was charged with driving un-licenced motor vehicle contrary to Section 15 of the Traffic Act and finally in count three he was charged with driving un-road worthy motor vehicle contrary to Section 58 (1) of the Traffic Act. All the offences were alleged to have been committed on 10th November, 2003 along Ewaso Kedong – Ngong Road in Kajiado District. After a full trial of the case by two Magistrates, the Appellant was found guilty and convicted and sentenced to a fine of Kshs.100, 000/= in default two (2) years imprisonment in respect of count one, and Kshs.20, 000/= in default 9 months imprisonment in respect of count three. The sentences were ordered to run consecutively. The Appellant was however acquitted of count two. The Appellant was aggrieved by the conviction and sentence. He therefore lodged the instant Appeal through Messrs Wandugi & Company Advocates.

I need not set out the grounds of Appeal as the Appeal was conceded to by the State when it came up for hearing before me on 27th September, 2006. The State conceded to the Appeal on the grounds that the case was presided over by two Magistrates at different times without due observance of the mandatory provisions of Section 200 (3) of the Criminal Procedure Code. Upon conceding the Appeal on that ground, Mr. Ong'ondo, Learned State Counsel nonetheless urged me to consider ordering a retrial on the grounds that the evidence against the Appellant was overwhelming, that the offences committed by the Appellant were serious and finally that it would be in the public interest if a retrial was ordered.

Mr. Wandugi, Learned Counsel for the Appellant welcomed the decisions by the State to concede to the Appeal. However he was opposed to an order for a retrial. He advanced the following grounds in support of his position, that such an order will not meet the ends of justice, that the Appellant would be prejudiced as he had already served 4 months in prison before he was released on bond pending Appeal, that the evidence on record shows that the deceased was a victim of his own mischief and finally that if the self same evidence was to be re-tendered at the retrial, a conviction is unlikely to result.

I have perused the record of proceedings. It is true that the Appellant was tried by two Magistrates to

wit: Ms. Siganga and Ms. Muchira, both Senior Resident Magistrates. Ms. Siganga heard the evidence of PW1, PW2 and PW3. Thereafter Ms. Muchira took over the case in unexplained circumstances and handled it until the end. It is clear that in taking over the case from Ms. Siganga, Ms. Muchira was oblivious to the mandatory provisions of Section 200 (3) of the Criminal Procedure Code. It would appear that the in coming Magistrate simply walked into the proceedings and without informing the Appellant of his rights under Section 200 (3) of the Criminal Procedure Code proceeded to preside over the proceedings. As a result, the Appellant's rights to determine how the trial should proceed before the incoming Magistrate were breached. In the case of ***KARIUKI VS REPUBLIC (1985) KLR 504,*** the Court held inter alia:-

"…… ***Unclear Section 200 (3) of the Criminal Procedure Code (Cap 75) an accused person is entitled to demand that any witness be re-summoned and reheard and a duty is imposed on a succeeding Magistrate to inform the accused person of that right……. The assumption of jurisdiction by the succeeding Magistrate without informing the Appellant of his right was wrong and the trial by the succeeding Magistrate was a nullity……"***

In the case of ***RAPHAEL VS REPUBLIC (1969) EA 544,*** a Tanzanian case in which the court was deliberating on the same provisions of the law stated:-

"….***It is a prerequisite to the second Magistrate's exercising jurisdiction that he should appraise the accused of his right to demand that the witness or any of them be re-summoned and reheard under Section 196 of the Criminal Procedure Code….. If the second Magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction and the trial is a nullity….."***

These two cases are on all fours with the circumstances of this case. Accordingly I find that the lack of compliance with Section 200 (3) of the Criminal Procedure Code by Ms Muchira rendered the proceedings fatally defective and a nullity therefor.

As urged by the Learned State Counsel, I do therefore hereby declare the trial a nullity, and set aside the conviction entered and sentence imposed.

I have been asked to order a retrial. The Appellant would hear none of that. An order for retrial should not be made if it will cause injustice, hardship or prejudice to the Appellant. Such an order should only be made in the interest of justice. It should not be made if it will accord the Prosecution an opportunity to fill in gaps in their evidence and finally a retrial should not ordered unless the Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence a conviction might result. See generally ***FATEHALI MANJI VS REPUBLIC (1966) EA 343, AHMEDALI ALI DHARAMSHI SUMAR VS REPUBLIC (1964) EA 481, M'KANAKE VS REPUBLIC (1973) EA 67*** and ***MWANGI VS REPUBLIC (1983) KLR 522.***

No doubt the offences with which the Appellant was charged are serious. An innocent life was lost. The mistake that has occassioned the nullification of the proceedings cannot be blamed or visited upon the Complainant. I am of the view therefore that the ends of justice will best be served by an order of retrial. The Appellant had been sentenced on the 1st count to a fine of Kshs.100,000 in default 2 years imprisonment and on the third count a fine of Kshs.20,000/= in default 9 months. The Appellant was unable to raise the fine and was consequently doing jail term before he was released on bond pending Appeal. Although default sentences on both counts would appear to be illegal, he had nonetheless served only four months of the jail term. In those circumstances it cannot be said that should the Appellant undergo retrial on injustice or prejudice will be occassioned to him. The evidence on record, as correctly submitted by Learned Counsel is overwhelming. Although, Learned Counsel for the appellant submitted that the deceased was the author of his own misfortune and or mischief, this is not borne out by the evidence on record. It cannot be true that the Appellant was unaware of the presence of the deceased on the lorry. After all he offered to give him and his brother (PW2) a ride from their house to Ngong. I am satisfied that if the self same evidence was tendered at the retrial, a conviction is likely to result.

For these reasons, I order that the Appellant do stand a retrial on the self same charge. Towards this

end the Appellant shall present himself before the Senior Principal Magistrate's Court at Kibera on 10th November, 2006 at 9 a.m. for his retrial to commence. In the meantime his bond is cancelled and he is remanded in prison custody pending appearance in court as aforesaid.

Dated at Nairobi this 30th day of October, 2006.

……

MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Mrs. Ong'ondu for State

Erick: Court clerk

…….

MAKHANDIA

JUDGE