



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

Criminal Appeal 1089 of 2001

(From Original Conviction and Sentence in Criminal Case No.17200 of 2000 of the Chief Magistrate’s Court at Nairobi).

FRANKLINE KABUGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.1090 OF 2001

(From Original Conviction and Sentence in Criminal Case No.17200 of 2000 of the Chief Magistrate’s Court at Nairobi).

EPHANTUS MBOYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO.1091 OF 2001

(From Original Conviction and Sentence in Criminal Case No.17200 of 2000 of the Chief Magistrate’s Court at Nairobi).

MICHAEL WAITHAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The three appeals have been consolidated.

The appellants were charged with robbery with violence contrary to Section 292(2) of Penal Code. After trial they were convicted and sentenced each to death. Their appeal to this court is against both convictions and sentences. Each appellant had filed 6 grounds of appeal which are more or less similar. But the 3rd appellant in his additional ground of appeal has raised the issue of legality or otherwise of the proceedings. He submitted that the proceedings were first commenced by G. Ombongi (Senior Resident Magistrate and was later taken over by I. Indech who did not comply with the provisions of Section 200 of the Criminal Procedure Code.

He went further to submit that by so doing his constitutional rights were violated. He was denied a fair hearing.

We feel that we should deal with this ground first because if the same succeeds and we declare the trial before the magistrate a nullity then there will be no need to go into the rest of the grounds of appeal.

Section 200(3) of the Criminal procedure Code provides:

‘3’ Where a succeeding magistrate commences the hearing 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 persons of that right’.

The lower court record shows that the hearing commenced on 25th August 2000 by G. Ombongi who recorded the evidence of PW1 and PW2.

Then the trial was taken over by I. Indeche Senior Principal Magistrate who recorded the rest of the evidence. At the close of the prosecution case the record shows as follows:

Court Accused have a case to answer. Section 211 Criminal procedure Code explained.

Then each accused informed the court the manner in which they were going to give their evidence.

Section 200(3) of the Criminal Procedure Code sets out the role of the succeeding magistrate. It requires him to inform the accused of his right to demand that any witness be resummoned and reheard. That requirement is spelt out in mandatory terms. In effect, it is not a discretionary matter. The succeeding magistrate is required to comply with it. But in this case the succeeding magistrate failed to comply with the said mandatory requirement.

It is not possible for us to say what actions, if any, the appellants or any of them could have taken, had the succeeding magistrate drew their attention to the provisions of Section 200(3) of the Criminal Procedure Code. Whether or not the appellant could have PW1 and PW2 recalled, we cannot say. Also if the appellants, or any of them could then have raised questions which might have had an impact on the course of their trial is a matter of conjecture. But the only certain conclusion we can arrive at is that the learned succeeding trial magistrate failed to comply with a mandatory stipulation.

By doing so, the said succeeding magistrate acted irregularly. The question that we must now ask ourselves is how we are to deal with the said irregularity.

To our minds, it behoves us to set aside the judgment herein. Accordingly, the convictions against the appellants are quashed and sentence set aside. The offences with which the appellants were charged are serious and it is our considered opinion that justice could only be done if the appellants were retried. We therefore order that the appellant be retried before a court of competent jurisdiction by a magistrate other than M. Injene Indeche or G. Ombongi.

We further order that the trial of the appellants be accorded priority as the appellants have been in custody since June 2000.

Dated and delivered at Nairobi this 3rd day of February 2005.

J.L.A. OSIEMO

JUDGE

F.A. OCHIENG

JUDGE