



**Republic v Kariuki & another (Criminal Appeal 86 & 87 of 2019
(Consolidated)) [2023] KEHC 2498 (KLR) (Crim) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2498 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL 86 & 87 OF 2019 (CONSOLIDATED)
JM BWONWONG'A, J
MARCH 21, 2023**

BETWEEN

REPUBLIC APPELLANT

AND

GEORGE NJOROGI KARIUKI 1ST RESPONDENT

JOSHUA KIPROP KISORIO 2ND RESPONDENT

*(Being an appeal against the judgement of acquittal delivered on 2nd April 2019
by the Hon. Ojoo, SPM, in Kibera Chief Magistrate's Court Criminal Case No.
87 of 2019, Republic vs George Njoroge Kariuki and Joshua Kiprop Kisorio)*

JUDGMENT

1. This is an appeal by the Republic (state) against the acquittal of the respondents by the trial court, filed pursuant to section 348A of the *Criminal Procedure Code* (Cap 75) Laws of Kenya.
2. The two cross appellants also filed their appeals against their convictions and sentences.
3. Directions were given to the effect that the main appeal be heard first, before proceeding to the appeals of the cross appellants.
4. It is for that reason that the court determined the appeal by the Republic first.
5. The appellants were convicted of the following offences.
Count 1 forgery contrary to section 350 (1) of the *Penal Code* (Cap 63) Laws of Kenya.
Forgery 3 forgery contrary to section 350 (1) of the Penal Code (Cap 63) Laws of Kenya.
Count 4 forgery contrary to section 350 (1) of the Penal Code (Cap 63) Laws of Kenya.



Count 5 forgery contrary to section 350 (1) of the Penal Code (Cap 63) Laws of Kenya.

Count 6 obtaining money by false pretences contrary to section 313 of the Penal Code.

Count 7 uttering a false document contrary to section 353 of the Penal Code

6. The appellants were acquitted on counts 2 and 8.
7. In the course of preparing the judgement, it came to light that the appellants were tried in the lower court by five magistrates.
8. The record of the proceedings shows that the five magistrates took evidence of the witnesses as follows.
 1. Hon. G L Nzioka, SPM, (as she then was).
She took the evidence of Pw 1 and Pw 2.
 2. Hon. Matheka, SPM, (as she then was)
She took the evidence of Pw 1(recalled) , Pw 2 (recalled), Pw 3 and Pw 4.
 3. Hon. L. Wachira, PM
He took the evidence of Pw 3 (recalled), Pw 5, Pw 6, Pw 7 and Pw 8
 4. Hon. Onyina (Mr.) Ag. SPM
He took the evidence of Pw 11, Pw 12, Pw 13 and Pw 14
 5. Hon. Ojoo, SPM
9. He took the evidence of Pw 14 (recalled) and that of the appellants in their defence. He also took the evidence of one defence witness.
10. He then proceeded to deliver the judgement that is now appealed the subject of this appeal.
11. The law in this regard is that a case should not be tried by a succession of magistrates. This is clear from the provisions of section 200 (3) of the Criminal Procedure Code (Cap 75) laws of Kenya, which provides as follows:
 - (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 has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit 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 resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right.” Underlining mine.



12. The foregoing provisions must be read together with section 201 (2) of the Criminal Procedure Code, which provide as follows:

‘2) The provisions of section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.’

These provisions are for the benefit of the accused person. The provisions are intended to assist the trial court to assess the demeanour of the witnesses, in the course of testifying before the court.
13. The importance of demeanour is very important and it is for that reason that remarks should always be made in the notes of the trial court for its own guidance in preparing a judgement or ruling and for the guidance of an appeal court should the case be appealed against. This is clear from the provisions of section 199 of the Criminal Procedure Code, which reads as follows:

“When a magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of the witness whilst under examination.”
14. Where a case is tried by a succession of magistrates, the last of the five-trial magistrate is unlikely to have the full impact of the demeanour of witnesses, which influences the outcome of the judgement.
15. Furthermore, a trial that is conducted by a succession magistrate might also lead to delay in finalising the trial. The reason appears to be that every succeeding magistrate must familiarize himself with the proceedings on record before taking over the trial.
16. I find that in this case the accused did not have a fair trial; since the trial was conducted by a succession of magistrates.
17. It therefore follows that this was a mistrial.
18. The appellant’s appeal succeeds with the result that the order of acquittal is hereby quashed.
19. In view of the foregoing, I find that it is moot to consider the grounds of appeal of the Republic, which I hereby decline to do so.
20. The only remaining issue to be determined is whether I should order a re-trial.
21. The principles that guide a court on whether a re-trial should be ordered include the following. First whether the evidence on record might result in a conviction, if it is believed. In this regard, I find as persuasive the decision of the court in *Braganza v Regina* [1957] EA 152, in which the court held that a re-trial may be ordered if the evidence on record might result in a conviction.
22. Second, whether the witnesses are likely to be traced if there has been a long lapse of time.
23. Third, if there has been a long lapse of time, a re-trial may not be ordered, because witnesses might have lost memory of the evidence in respect of the case.
24. Fourth, a re-trial may not be ordered where the appellant has substantially served his sentence by the time the appeal is being determined.
25. I have considered the foregoing matters and the circumstances of the case. As a result, I find that the foregoing matters are in favour of ordering a re-trial. I therefore order the appellants to be tried before another magistrate of competent jurisdiction.



26. The appellants are to appear in the chief magistrate's court at Kibera for re-trial purposes as soon as practicable.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21ST DAY OF MARCH 2023

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua: Court Assistant

Ms Joy Adhiambo for the Republic/appellant

Mr. Muthaura for the accused/1st respondent

Accused/2nd respondent present in person

