



IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 43 OF 2018

CONSOLIDATED WITH

CRIMINAL APPEALS NOS. 44, 45, 46 & 47

CORAM: D.S. MAJANJA J.

BETWEEN

JOHN MUTIGA M'IKIAO.....1ST APPELLANT

JOSEPH MBAYA RAMARE.....2ND APPELLANT

GEORGE RIUNGU MBIJIWE.....3RD APPELLANT

BERNARD KAMENJU MUTUNGA.....4TH APPELLANT

JOHN KAILIKIA KUBANIA.....5TH APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. G. Sogomo, SRM

dated 16th March 2018 at the Magistrate's Court at Tigania

in Criminal Case No. 1570 of 2012)

JUDGMENT

1. The appellants, **JOHN MUTIGA M'IKIAO (A1)**, **JOSEPH MBAYA RAMARE (A2)**, **GEORGE RIUNGU MBIJIWE (A3)**, **BERNARD KAMENJU MUTUNGA (A5)** and **JOHN KAILIKIA KUBANIA (A4)** were charged, convicted and sentenced to death for the offence of robbery with violence contrary to **section 296 (2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge were that 26th October 2012 at Mumui Location, Tigania West District of Meru County, jointly with others not before the court, the appellants robbed **DANIEL NJUGUNA JOHN** of his shirt, trouser, cap, leather shoes, Nokia mobile phone all valued at Kshs. 13,000/- and Kshs. 10,000/- cash and during the time of such robbery used actual violence on the said **DANIEL NGUNJA JOHN**.

2. Although all the appellants were charged with causing grievous harm contrary to **section 234** of the *Penal Code* only the 4th appellant was convicted and sentenced to 7 years' imprisonment. It was alleged that on the same day and at the same time, he did unlawfully cause grievous harm to **DOROTHY MUKIRI**.

3. The appellants have now appealed against conviction and sentence based on their respective petitions of appeal and written submissions. Although they have raised several points, I think the only issue that is decisive in this appeal is whether the trial magistrate complied with **section 200** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* ("the Code") which states as follows:

200(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.

(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 exercised 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 re-heard and the succeeding magistrate shall inform the accused person of that right.

(4) Where an accused person is convicted upon the 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. [Emphasis mine]

4. The case against the appellants was commenced before Hon. J. W. Gichimu who heard 7 prosecution witnesses and after the prosecution closed its case, he put the appellants on their defence. On 6th May 2015, the matter came up before Hon. Mararo, PM. He explained to the appellants the purpose and effect of **section 200** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** and each of the appellants stated that they were ready to proceed with the matter from where it left.

5. After several adjournments, the matter came up for hearing before Hon. Sogomo, SRM when counsel representing the appellants requested the court to commence the matter de novo since she had just been instructed to take over and conduct the matter. The application was opposed by the prosecution. In a considered ruling, the trial magistrate held that that appellants had been placed on their defence and that since the matter started, the appellants had elected to proceed without representation and that it was not in the interests of justice to start the case afresh. The magistrate also noted that the appellants had made an election to proceed with the matter without recalling witnesses.

6. From the proceedings I have summarized, the question for consideration is whether Hon. Sogomo was the “*succeeding magistrate*” within the meaning of **section 200(3)** of the **Code**. The duty to inform an accused of his right is thrust upon the succeeding magistrate and the succeeding magistrate is the one who “*commences hearing of the proceedings.*” Although Hon. Mararo complied with the **Code**, he did not commence the hearing of the proceedings. It is Hon. Sogomo who commenced the hearing of the proceedings and took the defence testimony. By stating in the ruling that the appellants had already exercised their right to have the matter proceed without recalling witnesses, the trial magistrate failed to comply with **section 200(3)** of the **Code**.

7. In **Andrew Momanyi Nyauma and Another v Republic KSM CA Criminal Appeal No. 215 & 216 of 2016 [2013]eKLR**, the Court of Appeal, speaking on the application of **section 200(1)(b)** aforesaid, stated that:

*In our view, it is only when the Magistrate is acting pursuant to **Section 200 (1) (b)** that he needs to explain to the accused his rights for in that case the Magistrate is enjoined to inform the accused that he can resubmit the witnesses or can seek that the hearing recommences de novo.*

8. Under **section 200(1)(b)** of the **Criminal Procedure Code**, the trial magistrate has a duty to explain to the accused that he is entitled to recall witnesses or start the hearing *de novo*. It is clear that the succeeding magistrate, in this case, did not comply with the mandatory provision of the law as he failed to explain or inform the appellants of their right to recall witnesses or have the case commence *de novo*. It is only after the succeeding magistrate has explained to the accused their rights, that he can properly decide whether or not to recall the witnesses in light of the circumstances. This appeal must succeed on this ground.

9. I now turn to consider whether a retrial is appropriate. In **Muiruri v Republic [2003] KLR 552**, the Court of Appeal held that whether a retrial should be ordered or not must depend on the circumstances of the case. It observed that a retrial will only be ordered when it is in the interests of justice and if it is unlikely to cause injustice to the appellant. Amongst the factors the court ought to consider include the nature of illegalities or defects in the original trial, length of time that has elapsed since the arrest and arraignment of the appellant and whether the mistakes leading to the quashing of the conviction were entirely the prosecution’s making or not.

10. On this score, I find that the evidence against the appellants overwhelming and the offence for which the appellants are charged serious. The complainants and appellants are neighbours and the witnesses are either relatives or neighbours hence it would not be difficult to get them to testify. Moreover, the failure to comply with **section 200(3)** of the **Code** was purely a mistake of the trial court that has now been remedied by this appeal.

11. I therefore allow the appeal, quash the conviction and sentence. I direct that the appellants shall be retried on the same charges before a Magistrate of competent jurisdiction other than Hon.Sogomo, PM. The appellants shall remain in custody and shall be taken to the Magistrates Court at Tigania on a date fixed at the delivery of this judgment.

12. In view of the nature of the matter, I direct that the appellants shall remain in custody pending the hearing of the testimony of the complainants which shall be heard within 6 months from the date this judgment and the trial shall be completed within 18 months from the date of this judgment.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 21st day of MAY 2020.

A. MABEYA

JUDGE

Appellants in person.

Ms Nandwa, Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.