



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

CRIMINAL APPEAL NO. 59 OF 2018

MORRIS OCHIENG ODOUR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(an appeal against judgment, conviction and sentence delivered on 19th September 2018 in

Siaya Principal Magistrate's Court Criminal Case No. 773 of 2015 by Hon. J. Ong'ondo (PM)

JUDGMENT VIA SKYPE

1. The appellant herein **MORRIS OCHIENG ODOUR** was jointly charged with Samuel Ochieng Okoth (the 1st accused person in the trial court) with the offense of robbery with violence contrary to section 296(2) of the Penal Code and the particulars of the offence being that on the night of 17th and 18th October 2015, at Magungu Primary School in Siaya Sub county within Siaya County, jointly with others not before the court, robbed Gabriel Odero Rabango a watchman at Magungu Primary School of text books valued at Kshs. 25,000/- and at immediately before or immediately after the time of such robbery struck the said Gabriel Odero Rabango and killed him.

2. The two appellants were arraigned before Hon. H. Wandere PM and they denied the charge and a plea of not guilty was entered. They were subsequently tried and *vide* the judgment delivered 19th September 2018 the first accused was acquitted. The judgment for the 2nd accused now appellant herein was delivered on 24.10.2018 where he was convicted of the offence of robbery with violence and sentenced to life imprisonment.

3. Aggrieved by the conviction and sentence, the Appellant herein lodged this appeal vide the petition dated 29.10.2018. The petition was later amended vide the amended grounds of appeal which were filed together with the appellant's written submissions and which were both admitted on record vide the orders of 15.10.2019. The grounds of appeal in the amended grounds of appeal are:

1. That the learned trial judge (magistrate) succeeding and convicting grossly erred in law and facts by failing to comply with the mandatory provisions of the law under section 200(3) of the Criminal Procedure Code (C.P.C) Cap 75 Laws of Kenya thus rendering the entire trial to be a nullity hence prejudice.

2. That the Hon. learned trial magistrate erred in law and fact by basing the conviction on the basis of circumstantial evidence without proper evaluation of its material factors and that he failed to realize that it did not meet the legal standards thus rendering to the serious miscarriage of justice

3. That the learned trial magistrate further erred in law and fact by failing to observe that the prosecution case was riddled with poor investigations, where the police failed to put their mind into the natty gritty aspects of investigations thus rendering a fatal blow to their case against the appellant.

4. That the learned trial magistrate gravely erred in the matters of law and facts and relied on the evidence of clothes to base the appellant's conviction and failed to consider that the prosecution failed to:-

a. Prove that the clothes were recovered from the appellant and belonged to him (appellant) and not the deceased.

b. Prove to court on how the exhibits were handled and preserved hence making the forensic result questionable.

5. That the Hon. trial magistrate gravely erred in law and fact by failing to consider or to consider adequately the fatal contradictions which created doubts contrary to section 163(1)(c) of the Evidence Act Cap 80 Laws of Kenya hence rendering a prejudice against the appellant.

6. *That the learned trial magistrate erred in law and fact when he was much impressed with the appellant's mode of arrest and failed to consider that it did not at all point to the appellant's guilt thus rendering a prejudice.*

7. *That the learned trial magistrate grossly faulted in points of law and facts in failing to observe that most of the crucial witnesses were not all availed in court and be cross examined by the appellant as prescribed by law under section 144 as read together with section 150 of the Criminal Procedure Code Cap 75 of the Laws of Kenya thus rendering a prejudice to the Appellant.*

8. *That the leaned trial magistrate faulted in points of law and fact in failing to observe that the prosecution case was not affirmatively established beyond reasonable doubt as prescribed by law under section 111(1) of the Evidence Act Cap 80 Laws of Kenya and by failing to resolve that section 107(1) of the Evidence Act was violated.*

9. *That the learned trial magistrate erred in law and in fact when he misapprehended the fact and misdirected himself to the issue for determination and drew wrong inferences to the detriment of the defense thus rendering to serious miscarriage of justice.*

10. *That the learned trial magistrate erred in law and in fact in failing to consider the appellant's defense which was not at all displaced by the prosecution side as provided by law under section 212 as read together with section 309 of the Criminal Procedure Code Cap 75 of the Laws of Kenya thus a prejudice.*

11. *That the learned trial magistrate gravel erred in law and in fact in failing to accord the appellant with a right to a fair trial as provided by law under article 25(c) as read together with article 50(2) of the new constitution of Kenya which is the supreme law of the land which rendered to serious miscarriage of justice.*

4. The appellant prayed that the appeal be allowed, conviction quashed and the sentence set aside and that he be set at liberty. He also prayed for other orders that the court may deem fit, fair and just for the interest of justice.

SUBMISSIONS

5. the appellant relied on the above amended grounds of appeal and on his submissions and r submitted that what the witnesses testified before the trial court was not what they had told the police and further that when the exhibits were taken to the government analyst, there was a gap as the exhibits were not marked. Further, that the deceased's clothes were not taken for examination, the pangas were never produced and that the deceased clothes were never produced.

6. He further submitted that the allegations that he was fleeing the village were not true. That he asked for the investigations diary but was not given and further that the investigating officer did not write everything in his statement. He further submitted that the manner in which the evidence was taken prejudiced his rights to a fair trial as he asked for witnesses to be brought back to court but the trial court refused.

7. Opposing the appeal, Mr. Okachi (Senior Principal Prosecution Counsel for the state opposed the appeal and submitted (orally) that there was more than enough evidence linking the appellant to the offence and further that recall of witnesses was in the discretion of the court which was satisfied that the process was fair and that fair trial was accorded to the appellant and that no violation of the appellant's rights was proved.

8. He further submitted that the matter was heard expeditiously for justice to be done. Further, that exhibits recovered from the residence and blood samples taken from the clothes matched the deceased' blood. He submitted that the conviction was sound and based on sufficient evidence and that the defense was considered but was a sham and the sentence was lawful.

9. In a rejoinder, the appellant submitted that witnesses were people with the same interest and that there was no independent witness. Further that the exhibits were not marked.

10. The appellant submitted that there was violation of section 200(3) of the CPC Cap 75 of the Laws of Kenya as the prosecution case was heard by two magistrates whereby Hon. H. Wandere PM he took evidence from PW1-PW7 and when Hon. J Ong'ondo, PM took over the hearing, he took evidence for PW8 and PW9. The appellant submitted that the bulk of the prosecution evidence was heard by Hon. Wandere and that efforts to have PW1 and PW2 recalled to testify were thwarted by the Magistrate who took over the conduct of the case from Hon Wandere. The appellant relied on the cases of **Ndegwa –vs- Republic (1985) eKLR 534** and **Richard Charo Mule –vs- Republic Nairobi Court of Appeal Criminal No. 135 of 2004**, where it was held that failure to comply with the provisions of section 200(3) of the Criminal Procedure Code Cap 75 of the Laws of Kenya ought to render a trial a nullity.

11. On the issue of circumstantial evidence, the appellant submitted that the trial court based its findings on the circumstantial evidence without carefully considering the nitty gritty aspects of the same before drawing its conclusion. The court was referred to the case of **Abanya alias Onyango –vs-Republic Cr. Appeal No. 32 of 1990 (UR)** among other authorities on the tests which evidence must satisfy for it to be applied as circumstantial evidence. He submitted that the evidence presented before the trial court did not pass the said test.

12. The appellant submitted further that the prosecution did not call crucial witnesses, which action, he complained, was contrary to the law. He relied on section 143 of the Evidence Act Cap 80 of the Laws of Kenya and further the cases of **Buknya & Another –vs- Republic Uganda 1982 E.A 549** and **Juma Ngodia –vs- Republic (1982-1988) KAR 454** and submitted that failure to call his father, the Assistant Chief and the Scene of Crimes Officer was fatal to the prosecution's case as there was no proof that the exhibit blood stained clothes were his.

13. The appellant further submitted that the evidence regarding what the deceased was wearing at the material time was contradictory and that the said clothes were never produced in court as exhibits for the witness (PW 9) to identify and that this evidence was crucial in his conviction.

14. The respondent opposed the appeal maintaining that there was sufficient evidence to warrant conviction of the appellant and urged this court to dismiss the appeal.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

15. From my analysis of the grounds of appeal, the following issues flow for determination:

1. *Whether the learned trial magistrate did comply with the requirement of section 200(3) of the Criminal Procedure Code Cap 75 Laws of Kenya upon taking up the matter from the previous magistrate?*
2. *What was the effect of failure to comply with the said provisions (if there was any)?*
3. *Whether the evidence tendered before the trial court met the legal test of circumstantial evidence?*
4. *Whether the evidence by the prosecution was contradictory and created doubts contrary to section 163(1)(c) of the Evidence Act Cap 80 Laws of Kenya hence rendering a prejudice against the appellant.*
5. *Whether all crucial witnesses were availed to court by the prosecution and whether there was any prejudice suffered by the appellant due to failure by the prosecution to avail the said crucial witnesses?*
6. *Whether the prosecution did establish its case beyond reasonable doubts.*
7. *Whether the appellant's defense was considered?*
8. *Whether the appellant's rights to a fair trial (as provided by law under article 25(c) as read together with article 50(2) of the new constitution of Kenya) were infringed?*

16. However, before the court can determine the above issues, on a first appeal the court must abide by the obligation espoused in **Okeno v. Republic [1972] E.A. 32** as re-stated in **Kiilu and another vs. R (2005) 1 KLR 174** that:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. (see Peters v. Sunday Post, [1958] E.A. 424.)”

17. Therefore, it is the duty of this court in deciding on this appeal and in answering the above issues for determination to submit the evidence which was tendered before the trial court to fresh and exhaustive examination and to come up with its own independent decision after weighing the conflicting evidence if any, as to whether the prosecution proved the offence of robbery with violence beyond reasonable doubt. In doing so, this court must remember that the burden of proof always rest with the prosecution and the same must be proved beyond any reasonable doubt. This is what was held in **Woolmington –vs- DPP (1935)A.C 462** and further in **Miller Versus Minister of Pensions 1942 A C.**

18. Before delving into the other grounds of appeal and whether they are meritorious, I first observe that the appellant raised a ground of appeal which in my view is so fundamental in the justice system that it forms part of the constitutionally guaranteed right to fair trial. This was the appellant's main ground of appeal in his amended petition and when the appeal came up for oral hearing, the appellant adopted his amended grounds and his written submissions. In the said submissions, the appellant submitted that the trial magistrate breached section 200(3) of the Criminal procedure Code Cap 75 of the Laws of Kenya in that the prosecution case was heard by two magistrates whereby Hon. H. Wandere, Principal Magistrate then, took evidence for PW1 to PW7 and that when Hon. J. Ong'ondo took over the case, he took evidence for PW8 and PW9 and the defence evidence. The appellant therefore submitted that the bulk of the prosecution evidence was heard by Hon. Wandere and that efforts to have PW1 and PW2 recalled to testify were thwarted. The appellant relied on the cases of **Ndegwa –vs- Republic (1985) eKLR 534** and **Richard Charo Mule –vs- Republic Nairobi Court of Appeal Criminal No. 135 of 2004** where it was held that failure to comply with the provisions of section 200(3) of the Criminal Procedure Code Cap 75 of the Laws of Kenya ought to render a trial a nullity.

19. In rebuttal, the state through Mr. David Okachi Senior Principal prosecution Counsel submitted that recall of witnesses was in the discretion of the court which was satisfied that the process was fair and that fair trial was accorded to the appellant. Further, that no violation of the appellant's rights was proved. Counsel further submitted that the matter was heard expeditiously for justice to be done.

20. In my humble view, this is a serious issue of law as opposed to fact and which ought to be determined at the preliminary stage or rather before the other issues can be determined. This is because, if found that the learned trial magistrate was in violation of section 200(3) of the Criminal Procedure Code, the trial ought to be declared a nullity.

21. Therefore the question and issue that I must determine *in limine* is whether **the learned trial magistrate did comply with the requirement of section 200(3) of the Criminal Procedure Code Cap 75 Laws of Kenya upon taking over the case from the previous magistrate?** and further **“What would be the effect of failure to comply with the said provisions (if there was any)?”**

22. **Section 200** of the **Criminal Procedure Code** deals with instances where a criminal trial is handled by more than one magistrate. The said provision stipulates:

‘(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 exercise 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 reheard and the succeeding magistrate shall inform the appellant person of that right.[emphasis added]

(4) Where an accused person is convicted upon 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.

23. The Court of Appeal quite recently in the case of **Abdi Adan Mohamed v Republic [2017] e KLR**, appreciating the importance of a trial magistrate to hear a particular case to conclusion held:

“As much as it is practically possible it is highly desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses. This was succinctly explained by this Court in Ndegwa v. R (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-

“It could also be argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that 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.for these reasons we have stated, in our view the trial was unsatisfactory.”

24. In other words, **Section 200**, as was emphasized in the **Ndegwa** (supra) will be resorted sparingly and only in cases where the exigencies of the case dictates. **Even where the trial magistrate has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified. In such a case the succeeding magistrate may continue with the trial from the stage it had reached. The provision can also be used where the evidence already recorded is more or less formal or largely uncontroverted.[emphasis added].**

25. The Court of Appeal proceeded to hold (on application of section 200 of the CPC) that :

“The learned Judges in Ndegwa (supra) emphasized that the court in applying the provisions of section 200 must ensure the accused person is not prejudiced. They stated:

“...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....”

26. Owing to the significance attached to having a trial conducted from commencement to conclusion by the same magistrate or judge, **Section 200(4)** provides that;

“Where an accused person is convicted upon 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.”

27. **Section 200** therefore entrenches the appellant person’s rights to a fair trial as provided for today under **Article 50(1)** of the Constitution.

28. The importance of this section 200 of the Criminal Procedure Code protecting the rights of an accused person was further recognized by J.A. Makau J in **Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others [2015] eKLR** where the learned judge held that

“21. In my view Section 200 (3) of the Criminal Procedure Code protects the rights of the accused to a fair trial as guaranteed by the constitution under Article 50. (2) of the constitution which states every accused person has the right to a fair trial, which includes other rights as set out thereunder. Section 200 (3) of CPC as couched or framed do not have any provision to protect the rights of the complainant. It is silent on the rights of the complainant.”

29. A careful perusal of the trial court record clearly shows, and as was submitted by the appellant that indeed Hon. H. Wandere Principal Magistrate took evidence of PW1 up to PW7. Thereafter, the matter was taken over by Hon. J. Ong’ondo Principal Magistrate. The said trial court further shows that on 23.01.2018, the appellant together with his co-accused appeared before Hon. J. Ong’ondo and the prosecutor prayed that the file be placed aside so as to allow him get the police file. The matter was allocated time for 10.30 a.m and when the file was called at that time, the prosecutor prayed for the file to be placed aside further. The 1st accused indicated that he was ready to proceed. However the 2nd accused (appellant herein) made an application in the following words ***“I pray that PW1 and PW2 re-testify. I was given Government Chemist report same day and told to proceed”***. This application was opposed by the prosecution on the basis that the appellant cross examined the witness. The court proceeded and made a ruling that the application was declined and that the appellant agreed with the prosecution that the witnesses would not refer to the government analyst’s report. The trial magistrate further pronounced himself that indeed PW1 and PW2 only dealt with the physical exhibits and did not touch on the government analyst report.

30. A further perusal of the trial court record does not show anywhere where the trial court might have indicated to the appellant and his co-accused on their rights as stipulated under section 200(3) of the Criminal Procedure Code.

31. It is obvious therefore that the right to recall witnesses and or the trial starting *denovo* was not explained to the appellant and his co-accused. In **Abdi Adan Mohamed v Republic (supra)**, the court gave some of the reasons why the court can decline the request for recall of witnesses. The court held:

“Where, in the language of Section 200(3) the appellant demands that any witness be “re-summoned and re-heard,” the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re- summoned is deceased, to insist on calling such a witness. Similarly if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the appellant person must do so in good faith.” The court proceeded to hold that ***“It ought to be remembered always that where an appellant person demands for the recalling of a witness or witnesses who are said to be unavailable due to death, or cannot be found, or is incapable of giving evidence, or whose presence cannot be obtained without unreasonable or expense, the burden of proving these things is on the prosecution. At no stage did the prosecution avail evidence of which witnesses they were unable to avail and why.”***

32. Applying the above principles set by the Court of Appeal to the instant appeal, I find that the learned trial magistrate did not at all explain to the appellant herein the requirements of section 200. The appellant, nonetheless, on his own accord and initiative requested for the recall of PW1 and PW2, which request was opposed by the prosecution and the trial court rejected the application. This is so, despite the fact that the prosecution did not prove that any of the conditions which might have made the recall impossible existed. For instance, there was no submission or allegation made by the prosecution that the witnesses could not be found or that the witnesses were dead or any other difficult situation that would have made it impossible to recall the witnesses for the prosecution to re testify before the succeeding Magistrate.

33. The provision of section 200(3) makes it mandatory for the succeeding magistrate to comply with it and to explain to the accused person his right of recalling witnesses. This position was appreciated by Makau J in **Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others [supra]**, where the learned Judge held:

“31. Section 200 (3) of Criminal Procedure Code provides where a succeeding Magistrate commences the hearing of proceedings where part of the evidence has been recorded by his predecessor, the accused person may demand that witnesses be re-summoned and reheard and the succeeding Magistrate shall inform the accused of his right.

32. In the instant case the succeeding Magistrate Hon. M.S. Kimani, has since been transferred and unfortunately this matter will have to be taken over by another Magistrate. It is a mandatory requirement for a succeeding Magistrate to comply with Section 200 (3) of the Criminal Procedure Code...”

34. This court is alive to the fact that section 200(3) of the Criminal Procedure Code can be abused especially where the application is made with a view to defeat the ends of justice and especially where the accused person knows very well that the witnesses cannot be traced or are dead or the complainant cannot be traced or cannot get the witnesses without enormous expense or the application is made to cause witnesses have no faith in the court system and fail to turn up or where the case has been pending for a long period without being determined. In such instances, such applications for witnesses to be recalled ought not to be granted specially where the accused has had the opportunity to cross-examine witnesses and specifically where the matter had been pending for a long time. However, the prosecution always has a duty to prove these facts so as to deny the appellant that right of recall. Otherwise, the succeeding magistrate must comply with the provisions of section 200(3) which is couched in mandatory terms.

35. The only question is whether **this right can be said to be against the rights of the victim (complainant) to have justice delivered without undue delay?** In his oral submissions, Mr. Okachi for the Respondent State submitted that the matter was heard expeditiously for justice to be done. In **Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others [supra]** the learned judge (at paragraph 27) addressed the issue of the effects of invoking section 200(3) of the Criminal procedure Code on ordering for recall of the

witnesses and held that:

“Where the accused abuses the same or where the accused has had the opportunity to cross-examine witnesses and specifically where the matter had been pending for a long time, then granting of the application for recall of witnesses under section 200(3), court may be acting contrary to Article 47, 50 (2) (e) and 159 (2) (d) of the Constitution which demands that justice shall not be delayed, and the trial should be concluded without unreasonable delay and lastly everyone has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

36. In my humble view, therefore, the right of recall of witnesses is not *per se* in breach of the victim’s rights to have justice not delayed, and trial be concluded without unreasonable delay and the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. However, these rights can be said to be violated in some instances as indicated above. For that reason, such an argument ought to be decided on a case by case basis.

37. In the proceedings before the trial court, PW1 testified on 22.03.2016 and PW2 testified on 18.07.2016. The application to recall the said witnesses was made on 23.01.2018 and it was when the succeeding learned magistrate took over the trial. Based on the time difference, it cannot be said that recall of the witness would have amounted to the infringement of the rights of the complainant.

38. Accordingly, I find and hold that the learned trial magistrate erred in law when he failed to comply with the provisions of section 200 (3) of the Criminal Procedure Code.

39. On the **effect of failure to comply with the said as stated above**, Section 200(4) of the Criminal Procedure Code provides that:

“Where an accused person is convicted upon 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.”

40. Thus, section 200(4) of the Criminal Procedure Code gives the High Court discretionary power to set aside a conviction where the convicting magistrate convicted an accused person upon evidence not wholly recorded by him/ or her. The court is further bestowed with discretion (upon setting aside the conviction) to order a retrial. This was acknowledged by the High Court sitting at Meru in **Mercy Mugure v Republic [2018] eKLR**, where A.C Mrima J in appreciating the effects of failure to comply with section 200(3) held that :

“16. The appellant’s right to a fair hearing under Article 50 of the Constitution was therefore infringed by the failure by the succeeding magistrate to fully comply with Section 200(3) of the Criminal Procedure Code. In essence all the subsequent proceedings were veiled with that unconstitutionality and cannot stand in law. That is why this Court will not deem it necessary to deal with the rest of the appeal on its merit. I will however consider the possible way forward; that is If the appellant is to be set at liberty or be re-tried.

41. Accordingly, I find and hold that failure by the trial magistrate to comply with section 200(3) of the Criminal Procedure Code makes the trial court’s conviction of the appellant herein invalid and all the subsequent proceedings veiled with unconstitutionality and cannot stand. In the end, I find the conviction of the appellant for the offence of Robbery with violence to be a nullity and I proceed to quash it and set it aside the sentence imposed on the appellant.

42. Having quashed the appellant’s conviction and set aside the sentence imposed on him on account of failure of the trial magistrate to comply with the provisions of section 200 of the Criminal procedure Code, the next question is whether the appellant should be set at liberty of a retrial should be ordered.

43. This question was discussed by the Court of Appeal in **Samuel Wahini Ngugi v Republic [2012] eKLR**, where the Court held:

“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person’

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:

“...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.”[emphasis added].

44. In the instance case, the appellant was convicted and sentenced on 24.10.2018. The appellant took plea on 23.10.2015. It means that the trial took about three years to be concluded. PW1 testified on 22.03.2016 and PW2 testified on 18.07.2016 and the application for recall of

witnesses made on 23.01.2018.

45. The offence for which the appellant was charged with is a serious offence which attracts death penalty if found guilty. The witnesses who testified in the trial court were the deceased's wife, the teacher at the School, the Chairman of the School's Board of Management, a neighbor at the School, the Medical Doctor working at Siaya County Referral Hospital, Police Officers who worked with in Siaya County and the Government Analyst. It is clear that these persons are not difficult to trace.

46. In any event, the appellant only asked for recall of PW1 and PW2 to re-testify therefore not all witnesses *may* be recalled. Furthermore, if a retrial is ordered, what the succeeding trial magistrate would be expected to do is to simply comply with the provisions of section 200 of the Criminal procedure Code. Should there be any challenges in getting or tracing the other witnesses whom the appellant may demand and who may have left the jurisdiction of this court, that they be recalled to testify, it will be upon the prosecution to indicate to the trial court and the court will make a decision based on available evidence and in accordance with the law as analyzed in this judgment.

47. In those circumstances and balancing the rights of the appellant to a fair trial and the rights of the complainant to have administrative action that is expeditious, efficient, lawful, and reasonable and procedurally fair, I find that a retrial would be suitable in this case. I order for a retrial of the appellant before the same Succeeding Magistrate, Hon J, Ongondo Principal Magistrate, who is still in the Court Station at Siaya Principal Magistrate's Court.

48. Having so found and held, I find it unnecessary to determine the other grounds of appeal. Accordingly, and to the extent that I have stated above, this appeal is allowed. The appellant to be retried at Siaya Principal Magistrate's court for the same offence.

49. Orders accordingly.

Dated, Signed and Delivered at Siaya this 5th Day of May, 2020 via skype due to Covid 19 situation.

R.E. ABURILI

JUDGE