REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CORAM: D.S. MAJANJA J.

CRIMINAL APPEAL NO. 43 OF 2016

BETWEEN

CHARLES OGANDA ARAMBI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence of Hon. J. Mwaniki, PM

dated 4th October 2015 at the Magistrate's Court at Keroka

in Criminal Case No. 244 of 2013)

JUDGMENT

1. The appellant, **CHARLES OGANDA ARAMBI**, was convicted on a single count of 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 offence were that on 22nd March 2013, the appellant jointly with others not before the court robbed **JOB BICHANGA NYAMIRA** of his national identity card, mobile phone, padlock and a motor cycle ignition key all valued at Kshs. 8,000/- and immediately after the time of such robbery threatened to use actual violence to the said **JOB BICHANGA NYAMIRA**.

2. The appellant was sentenced to 12 years' imprisonment. He now appeals against the conviction and sentence. The appellant complains that the prosecution did not prove its case beyond reasonable doubt. In his petition of appeal and written submissions, he contends that the he was not properly identified and that the evidence against him was contradictory and could not support a conviction. Counsel for the respondent opposed the appeal on the ground that the prosecution proved that offence as the appellant was identified and that evidence against him was watertight.

3. Despite the contending arguments and upon consideration of the record, I am constrained to allow the appeal for the following reasons. The entire case including the defence was heard by Hon. Sindani, PM. The matter was taken over by Hon. Mwaniki, PM who wrote the judgment and convicted the appellant. The applicable provision for this situation is set out in **section 200(1)(b)** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** 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, ceased to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction the succeeding magistrate may-*
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> *(a)* --------
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> *(b)* *where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.* [Emphasis mine]

4. 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 as follows:

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 resummon the witnesses or can seek that the hearing recommences de novo.

5. Under **section 200(1)(b)** of the ***Criminal Procedure Code***, the trial magistrate has a duty to explain to the accused that he was entitled to recall witnesses or start the hearing *de novo*. It is clear that the succeeding magistrate did not comply with the mandatory provision of the law as he failed to explain or inform the appellant of his right to recall witnesses or have the case commence *de novo*.

6. As to whether a retrial is appropriate in this case, I am guided by the decision in ***Muiruri v Republic*** **[2003] KLR 552** where 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 making or not.

7. In this case, the appellant was charged in 2013, the matter had to start afresh in 2014 when a new magistrate came to hear the case. It is also worth noting that the appellant had been acquitted on 4 other counts due to lack of witnesses. Given the time the appellant has spent at least half of his sentence in custody, I decline to order a re-trial.

8. I therefore allow the appeal, quash the conviction and sentence. The appellant is set free unless otherwise lawfully held on a separate warrant.

DATED and DELIVERED at KISII this 9th day of APRIL 2019

D.S MAJANJA

JUDGE

Appellant in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.