

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CRIMINAL APPEAL NO. 11 OF 2019

ABDALLAH KHALIF NYABWARI.....APPELLANT

=VRS=

THE STATE.....RESPONDENT

[Being an Appeal from the Conviction and Sentence of Hon. B. M. Kimtai (SRM) Keroka Law Courts dated 28th day of May 2018 in Keroka Principal Magistrate's Court Criminal Case No. 1393 of 2016]

JUDGEMENT

The appellant was charged with seven fraud related offences on which he was found guilty, convicted and sentenced to various terms of imprisonment ranging between one year and seven years. The sentences were to run concurrently. Being aggrieved by the conviction and sentences he preferred this appeal. The appeal is rightly conceded by the respondent as the Magistrates who succeeded the trial Magistrate in the matter did not comply with **Section 200 (3) of the Criminal Procedure Code** which states: -

“(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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

The court's duty to inform the accused of his right under **Section 200 (3) of the Criminal Procedure Code** is couched in mandatory terms and failure by the trial court to comply has been held to render the trial a nullity. The appellant was clearly prejudiced by the court's violation of this right. **Section 200 (4) of the CPC** provides: -

“(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.”

Both the appellant and the respondent have asked this court to remit the case back to the lower court for retrial. I am satisfied that the case is one suitable for retrial. Accordingly, I allow the appeal, quash the conviction, set aside the sentences and direct that the appellant shall be tried afresh at the Keroka Principal Magistrates Court before a Magistrate other than B. M. Kimtai. Pending production before that court the appellant shall remain in Prison custody (GK Prison Kisii Main). It is so ordered.

Signed, dated and delivered in Nyamira this 4th day of July 2019.

E. N. MAINA

JUDGE