



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NO. 65 OF 2016

PAUL OCHIENG OMOLLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgment, Conviction and Sentence imposed in Nyando SPM'S Criminal Case Number 597 of 2013 by Hon. P.Olengo PM on 25.10.16).

JUDGMENT

1. On 25th October, 2016; the appellant was convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code and was sentenced to death.

The appeal

2. Being dissatisfied with the conviction and sentence, the appellant lodged the instant appeal. In his amended grounds of appeal filed on 16th January, 2018, appellant raised 4 grounds of appeal **THAT**:

- 1) The trial court failed to comply with the provisions of section 198 of the Criminal Procedure Code**
- 2) The trial court failed to comply with the provisions of Section 200(3) of the Criminal Procedure Code**
- 3) The appellant's conviction was based on recognition which was not rooted on a firm first report**
- 4) The prosecuting failed to avail some essential witnesses**

3. When the appeal came up for hearing on 16th January, 2018, Ms. Wafula, learned counsel for the state conceded to the appeal on the ground that the trial court did not comply with the provisions of Section 200(3) of the Criminal Procedure Code and had instead relied on evidence taken by a preceding magistrate contrary to appellant's request for recall of witnesses.

Analysis

4. This being a court of first appeal, I am guided by the ruling of the Court of Appeal in the case of **OKENO VS .REPUBLIC [1972]E.A.32**, where it held that:-

"It is the duty of a first appellant court to consider the evidence, evaluate itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld"

5. I have carefully considered the written submissions made by the appellant and oral submissions on behalf of the state. This is yet another appeal in which the judgment of the magistrate's court is impugned for failure to comply with the provisions of Section 200(3) of the **Criminal Procedure Code** prescribing the procedure for conviction on evidence partly recorded by one magistrate and partly by another. Both the appellant and the respondent contend that the judgment is a nullity by reason of failure to adhere to the prescribed procedure.

6. Section 200 of the Criminal Procedure Code 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 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.

(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

5. The record shows that the trial began before **Hon. Kimtai** who took the evidence of four prosecution witnesses. The record also shows that when **Hon. Olengo** took over the case on 10th May, 2016, he directed that the case proceeds from where it had reached after the prosecution submitted that witnesses could not be traced. The magistrate heard the evidence on one prosecution witness, the defence case and consequently convicted the appellant.

6. It is evident from the record that appellant requested that the case starts *denovo* but the trial magistrate without informing the appellant of his right under the provisions of Section 200(3) of the Criminal Procedure Code directed that the case proceeds from where it had reached thereby effectively overlooking the mandatory procedural requirements of **subsection (3)** thereof. A plain reading of that provision enjoins the magistrate who takes over the hearing of a case whose evidence has been partly taken by another magistrate to inform the accused person of his right to have any witness who has testified before the previous magistrate recalled and testify afresh.

7. The state counsel conceded that the omission by the learned magistrate to comply with the provisions of **section 200(3)** was fatal to the appellant's trial and on that score alone the appeal ought to be allowed.

8. I agree with both the appellant and the state that failure by the learned magistrate to comply with **section 200(3)** of the Criminal Procedure Code vitiated the appellant's trial and without delving into the other grounds of appeal find that the net effect of this omission was to render the entire trial a nullity.

9. There are a host of cases where it has been consistently held that failure by the court to comply with **section 200(3)** of the Criminal Procedure Code is fatal to an accused person's trial; in **Kariuki versus Republic (1985) KLR 504** the High Court (**Abdullah & Aluoch JJ**) held that under **section 200(3)** of the **Criminal Procedure Code**, an accused person is entitled to demand that any witness be resubmitted and reheard and that a duty is imposed on the succeeding magistrate to inform the accused person of that right. Where the accused person is not so informed, so the court held, the trial is a nullity. The Court of Appeal has similarly held in **Malindi Criminal Appeal No. 57 of 2014, Joseph Kamora Maro versus Republic** and **Nyeri Criminal Appeal No. 21 of 2013 Henry Kailutha Nkaricha & Another versus Republic**. In the latter decision, the Court (R.Nambuye, P.O Kiage and F.Sichale JJA) cited previous decisions in which the Court has been categorical that, according to **section 200(3)** of the Code, the succeeding judge or magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and that a judge or a magistrate must comply with this statutory requirement irrespective of whether the applicant has made the application. Failure to comply, so has the court ruled, renders the trial a nullity. In **Criminal Appeal No. 106 of 2009, Bob Ayub versus Republic, the Court of Appeal** sitting at Kisumu explained further that the court's duty under **section 200(3)** is to the accused person and not to his counsel and thus it does not matter that the accused person is represented; it is incumbent upon the court to inform the accused person of his rights with or without legal representation. It has also been noted that the initiative is upon the court and it is not necessary that any form of application should be made before the court discharges its statutory responsibility.

10. I need not belabour the point that the appellant's trial was a nullity and for this reason there is no need to consider the rest of the grounds of appeal; for the same reason there is no basis upon which this court can consider the evidence adduced at the trial and come to its own conclusions, as it always ought to whenever exercising its appellate jurisdiction. If the trial was a nullity, there is in effect no evidence to reconsider.

11. **Section 200(4)** of the **Criminal Procedure Code** gives this Court the discretion to order for a new trial whenever it quashes a conviction based on the reason that an accused person was materially prejudiced for non-compliance with **section 200(3)** thereof. The record shows that the prosecution had a difficulty tracing witnesses for the fact that this case dragged in court for a period of over 3 years before it was concluded. On that ground, the state conceded that it would on that ground be pointless to order a retrial.

Orders

12. In view of the foregoing analysis, this court makes the following orders:

1. The conviction of the appellant on the basis of a trial that did not comply with section 200(3) of the Criminal Procedure Code was flawed and it is quashed and the sentence set aside

2. Appellant is set at liberty forthwith, unless otherwise lawfully held

DATED AND DELIVERED THIS 8th DAY OF February 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix and Caroline

Appellant - **Present in Person**

For the State - Ms Wafula