



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 21 OF 2017

WYCLIFFE ANGWENYI MOMANYI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment, conviction and sentence of Hon. R. K. Langat,

Senior Resident Magistrate in Rongo Senior Resident Magistrate's Court

Criminal Case No. 227 of 2015 delivered on 28/06/2017)

JUDGMENT

1. The Appellant herein **Wycliffe Angwenyi Momanyi**, was jointly charged with one **Magak Gordon Odhiambo** with two counts of **Stealing by Servant** contrary to **Section 281** of the **Penal Code**, Cap. 63 of the Laws of Kenya and in the alternative **Conspiracy to defraud** contrary to **Section 317** of the **Penal Code** before the Senior Resident Magistrates Court at Rongo in **Criminal Case No. 227 of 2015** (hereinafter referred to as '**the Criminal Case**').

2. A trial followed, and six witnesses testified before **Hon. P. K. Rugut**, Senior Resident Magistrate. The Appellant appeared in person whereas his co-accused was represented by Counsel. The prosecution then closed its case a vide a ruling rendered on 14/12/2016 Magak Gordon Odhiambo was acquitted under **Section 210** of the **Criminal Procedure Code**, Cap. 75 of the Laws of Kenya whereas the Appellant herein was placed on his defence. Before the Appellant tendered his defence, the **Hon. P. K. Rugut**, then the Head of Station, was transferred from Rongo Law Courts. **Hon. R. K. Langat**, Senior Resident Magistrate, took over Rongo Law Courts as the Head of Station.

3. The criminal case came before **Hon. R. K. Langat** on 21/02/2017 for defence hearing but the same did not proceed as the Appellant was yet to be supplied with copies of the proceedings and the ruling as he had so requested. On 05/05/2017 the hearing proceeded, and the Appellant closed his defence without calling any witnesses. A judgment was rendered whereof the Appellant was found guilty of the two principal counts of stealing by servant, convicted and sentenced to 5 years imprisonment on each count with sentences running consecutively.

4. It is that decision which prompted the filing of this appeal. Upon settling directions, the appeal was heard by way of oral submissions where **Mr. Kerario Marwa** appeared for the Appellant and **Miss Monica Owenga** appeared for the State.

5. The role of this Court as the first appellate Court is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

6. In line with the foregoing, this Court in determining this appeal is to satisfy itself that the record is in compliance with the law and that the ingredients of the offences are proved. It is on that footing that I perused the record and came across an issue which although it was not canvassed by the parties, it is so fundamental in the justice system as it forms part of a fair trial. The issue is how the matter was handled by the succeeding Honourable magistrate.

7. **Section 200** of the **Criminal Procedure Code** deals with instances where a criminal trial is handled by more than one magistrate. For ease of reference the said provision states as follows: -

'(1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence n a

trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises 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 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.

8. Sub-section (3) is the most relevant in this case. Since the criminal case had been partly heard and the prosecution's case closed before the preceding magistrate then the succeeding magistrate was under a mandatory duty to comply with that legal provision. The succeeding magistrate was to inform the appellant of his right to request that some witnesses who had testified be resubmitted and recalled. I must however clarify that the duty on the part of the succeeding magistrate is only limited to informing the accused person of that right. The succeeding magistrate is however not bound to oblige the request which may thereupon be made by the accused person. The magistrate must consider the request, if any, in light of the circumstances of the case and upon hearing all parties. The court may or may not accede to the request made by the accused person.

9. On the importance of compliance with the said procedural requirement, my brother *Makau, J.* in the case of Office of Director of Public Prosecutions vs. Peter Onyango Odongo & 2 others High Court at Siaya Constitutional and Judicial Review Division Petition No. 2 of 2015 (2015) eKLR rightly so expressed himself while considering whether Section 200 (3) of the Criminal Procedure Code was unconstitutional. The learned Judge delivered himself thus: -

'16. Section 200 (3) of the Criminal Procedure Code is intended in my view to address the mischief that may arise when a succeeding Magistrate commences hearing of proceedings where part of the evidence had been recorded by his predecessor, without explaining to the accused of his rights to re-summon or recall witnesses who had given evidence before the succeeding magistrate's predecessor, for cross examination if need be. The Section is intended to protect the rights of an accused to a fair trial and give the succeeding Magistrate an opportunity to note the demeanor of the witnesses to enable Court make a just decision.

17. It should be noted Section 200 (3) of C. P. C. gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross – examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross – examination or to give evidence as far as this section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.

18. Section 200 (3) of C. P. C. entrenches the accused rights to a fair trial as constituted under Article 50 (1) of the Constitution of Kenya 2010.

19.

20. In the case of *R V. Wellington Lusiri [2014] eKLR* the Court emphasized the need for succeeding Magistrate to continue with the proceedings under Section 200 by informing the accused of his rights.

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 state 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.

22. The question therefore is do the silence on the rights of the complainant under Section 200 (3) CPC mean the complainant's rights are not protected? The succeeding Magistrate before determining the accused demand for retrial or recalling or re-summoning of any of the witnesses, in my view, as Section 200 (3) is not mandatory for the accused demand to be granted or to be allowed, the succeeding Magistrate is not supposed to deal with Section 200 (3) of CPC in a isolation of several articles of the constitution dealing with the Bill of rights as section 200 (3) of CPC is not exhaustive in itself. The succeeding Magistrate is supposed to be guided by Article 27 (1) of the constitution, which states every person is equal before the law and has rights to equal protection and equal benefit of the law. This means the protection to fair trial is automatically granted to both the complainant and the accused. This means as I understand the said article, before final order is made on the accused demand in terms of Section 200 (3) CPC the complainant should be afforded an opportunity to be heard on the application. A blatant granting of the application without hearing the complainant would

in my view not only be against the rules of natural justice but would amount to a violation of the letter and the spirit of our constitution and would not be in the best interest of achieving a fair trial, If the complaint is completely overlooked on the issue.

23. In considering Section 200 (3) CPC as regards the information given to the accused, the same information should be extended to the complainant in equal measure, Article 159 (2) (a) (b) and (d) of the constitution deals with justice to all irrespective of status, justice not being delayed and being administered without undue regard to procedural technicalities. That the accused and the complainant should get justice without delay and should be administered without undue regard to procedural technicalities. That the accused and the complainant are entitled to justice without procedural technicalities and discrimination.

24. The court in determining an application under Section 200 (3) of CPC should comply with Article 28 of the constitution which provides every person has inherent dignity and the right to have that dignity respected and protected. Further under Article 47 (1) of The Constitution every person has the right to administrative actions that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 53 (d) of the constitution states every child has a right to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and Article 53 (2) provides a child's best interest are of paramount importance in every matter concerning the child.

10. The learned Judge further rightly concluded that '*.....Section 200 (3) of the Criminal Procedure Code was constitutional and valid as it protects the rights of an accused person to a fair trial in terms of Article 50 of the Constitution of Kenya, 2010.....*'

11. 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 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.

12. The upshot is that the following orders do hereby issue: -

a.

b. The appeal is hereby allowed, conviction quashed and sentence set-aside.

c. The proceedings in Rongo Senior Resident Magistrates Court Criminal Case No. 227 of 2015 by Hon. R. K. Langat, Senior Resident Magistrate, as from 21/02/2017 and including the judgment delivered on 28/06/2017 be and are hereby set-aside.

d. The Rongo Senior Resident Magistrates Court Criminal Case No. 227 of 2015 shall be mentioned before another succeeding Magistrate other than Hon. R. K. Langat who shall comply with Section 200(3) of the Criminal Procedure Code. However, on account of the jurisdiction of the other learned magistrate at Rongo Law Courts the matter shall be transferred to the Chief Magistrate's Court at Migori and be placed before the Senior Principal Magistrate for appropriate directions within 5 days of this judgment.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 7th day of June 2018

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Kerario Marwa Counsel for the Appellant.

Miss Atieno, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Miss Nyauke – Court Assistant