



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO.28 OF 2014

(Consolidated with Cr. Appeal No.27 of 2014)

SIMON WESONGA OLUOCH1ST APPELLANT

JULIUS MAKOKHA SHIKUKU.....2ND APPELLANT

VERSUS

REPUBLICRESPONDENT

(An Appeal arising out of the sentence and conviction of D.O. Ogolla delivered on 3rd June 2014 in Busia Criminal case no.1797 of 2013)

J U D G M E N T

1. These are two Appeals that are consolidated for purposes of hearing and determination. Simon Wesonga Oluoch (**the 1st Appellant**) and Julius Makokha Shikuku (**the 2nd Appellant**) are both serving a sentence of three (3) years imprisonment after having been convicted of the offence of Grievous Harm contrary to Section 234 of The Penal Code.
2. The particulars of the offence were that on the 15th day of October 2013 at Cheigo village, Bumala 'B' sub location, Malachi Central location in Busia County, jointly with another not before Court unlawfully did grievous harm to DAVID OCHIENG.
3. In the course of Hearing of the Appeal, it became apparent that the proceedings before the Trial Court were vitiated for non-compliance with the provisions of Section 200 of The Criminal Procedure Code. The Court record of 11th February 2014 shows that, for reasons not clear, Hon. M. Munyekenye SRM who had heard seven (7) Prosecution witnesses ordered that the matter be mentioned before The Chief Magistrate on 25th February 2014 on directions on further hearing.
4. Indeed the matter was mentioned on 25th February 2014 before the Chief Magistrate and the record of that day is reproduced below:-

“25/2/14

Before: T.W. Cherere, CM

C/P: Nyabuti

CC; Opoty

Inter: English/Kiswahili

Accused 1, 2 Present

Mr. Jumba for accused

Section 200 (3) CPC explained to accused in Swahili and counsel Mr. Jumba replied:-

I ask matter proceeds from where it had reached.

We shall not recall any witness.

Further hearing 18/3/14 court 1”

5. Section 200 of The Criminal Procedure Act provides as follows:-

“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 resummons 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 resummoned 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. (my emphasis)

As is clear from the provision of subsection 3, The Succeeding Magistrate is duty bound to inform the Accused person about the right to recall or to rehear any witness. The Succeeding Magistrate is also duty bound to place on record that he/she has informed the Accused person of that right and also the reply made by the Accused. The duty of the Court is to the Accused person and even where the Accused person is represented by Counsel, the Court must directly inform the Accused person of his right and record that fact and the response, if any, of the Accused persons. Where this is not adhered to, then the trial is vitiated (see Generally the Decision in **Rebecca Mwikali Nabutola –vs – Republic 2012** e KLR).

6. In the present case the Record shows that the Accused persons were informed of their Right under Section 200. But the response was by Counsel but not the Accused persons themselves. But it needs to be reiterated the duty of the Court is to the Accused person himself and that duty remains even where the Accused person is represented by Counsel. I have to find that the Succeeding Magistrate did not comply with the provisions of Section 200 of The Criminal Procedure Act as contemplated by the Law and the Trial and resultant conviction were vitiated.
7. So is this a suitable case for retrial as proposed by the State Counsel? A Retrial should not be ordered where it is likely to cause an injustice to the Accused person (see **Muiruri –vs- Republic** [2003] e KLR 552). Upon conviction, the Sentencing Court sentenced each of the Accused persons to serve 3 years imprisonment. This was on 3rd June 2014. That sentence is not said to be

lenient or inappropriate. I shall therefore take it to be the proper sentence in the circumstances of this case. That would mean that at the time of delivering this decision the Appellants will have served about 1/3 of their term. That is not an insubstantial portion of their full term. It would be unfair, in my view, to subject them to a Retrial.

8. The result is that the conviction of The Appellants is hereby set aside, and so too is the sentence. There are hereby released unless held for some other lawful reason.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 11TH DAY OF MARCH 2015.

IN THE PRESENCE OF:

KADENYICOURT ASSISTANT

PRESENT IN PERSON.....FOR APPELLANT

OWITI.....FOR RESPONDENT