REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROBI

CRIMINAL APPEAL NO. 191 OF 2011

RICHARD LOISA SEKENGEI…… APPELLANT

VERSUS

REPUBLIC …….RESPONDENT

(From original conviction and sentence in criminal case number… of ….in the Chief magistrate's court at Nairobi E. Obaga (PM) on 7th March, 2009

JUDGMENT

The appellant Richard Louisa Sekengei was charged with three offences. In count I he was charged with the offence of soliciting for a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the Anti Corruption and Economic Crimes Act No. 3 of 2003. In count II he was charged with the offence of receiving a benefit contrary to Section 39 (3) (a) as read with Section 48 (1) of the same Act. In count three he was charged with the offence of abuse of office contrary to Section 46 as read with Section 48 (1) of the same Act.

The record before me shows that the case was substantially heard by C.W. Githua (Mrs) (as she then was) who recorded evidence from nine witnesses. Thereafter the learned trial magistrate disqualified herself at the instance of the counsel for appellant who had written a letter addressed to the Chief Magistrate, Anti-corruption court complaining that the learned trial magistrate was biased. In recusing herself however, the learned trial magistrate expressly denied any bias against the appellant as she had no reason whatsoever to do so.

She then referred the case to another court for re-location. On 28th February, 2011 the matter was placed before L. Nyambura (Ms) (as she then was and the learned counsel for the appellant indicated that he wanted the matter to start *de novo*. On the same day the file was placed before E.O. Obaga (Mr) (as he then was) for directions and taking hearing dates.

The learned counsel for the appellant reiterated that the case should start afresh as the learned trial magistrate who had partly heard it had disqualified herself and no prejudice will be suffered by the prosecution. The prosecution opposed the application in that it had closed its case and the appellant placed on his defence. It transpired later, however, that the prosecution had not closed its case.

The learned trial magistrate in a ruling delivered on 7th March, 2011 refused to allow the case start *de novo* and ordered that the hearing shall proceed from where the previous magistrate had reached. He also ordered that the appellant reserves his rights to have other witnesses re-called for further cross-examination if need be except the complainant.

In excluding the complainant the learned trial magistrate reviewed the checkered history of the case where the complainant appeared unwilling to testify, and that she had to be compelled to do so after being remanded in accordance with the provisions of Section 152 (1) of the Criminal Procedure Code.

Efforts to summon her for further cross-examination after the charge had been amended proved futile forcing the prosecution to drop the amended charge and reverting to the original one. It was clear therefore to the learned trial magistrate that, she would not be available if the case were to start afresh. Aggrieved by the said ruling the appellant filed this appeal.

In the meantime the appellant filed an application to stay the lower court proceedings and on 21st March, 2012 Achode J made an order to stay the said proceedings. The substratum of this appeal is that the learned trial magistrate erred in law in refusing to grant the appellant the right to have the case start *de novo* thereby breaching the provisions of Section 200 (3) of the Criminal Procedure code.

There is the allegation that the trial magistrate erred in failing to note that there was bias on the part of the magistrate who presided over the matter in the first instance. There was also a complaint that the learned magistrate erred in law and fact in failing to allow the defence to recall the complainant, in that it was a violation of the appellant's constitutional rights as enshrined in Article 50 of the Constitution and also discriminatory and selective, hence a travesty of justice.

It is his prayer therefore that the appeal be allowed, the ruling made on 7th March, 2011 be quashed and the matter commence *de novo* to allow the defence recall any of the prosecution witnesses including the complainant herein.

The appeal is opposed. Both the learned counsel for the appellant and the Republic have filed written submissions which I have on record. My first observation is that this matter should have been preferred by way of a review and not appeal. However, there is no prejudice in the form it has been presented.

After the trial magistrate disqualified herself, the succeeding magistrate was required by law to apply the provisions of Section 200 (3) of the Criminal Procedure Code. It is provided therein

> **"200 (1) ……..**
>
> **(2)……**
>
> **(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 re heard and the succeeding magistrate shall inform the accused person of that right."**

The record before me shows that Section 200 (3) aforesaid was not complied with. The application of that section is initiated by the succeeding magistrate It is irregular for an advocate to inform the court the exercise of the right of an accused person under that Section. This is because it is the accused who is on trial and the duty of the court is to that accused and not his advocate. **See Criminal Appeal No. 106 Of 2009 Bob Ayub "Alias" Edward Gabriel Mbwana "Alias" Robert Mandinga vs. Republic.** I subscribe to that position and this court in **Misc. Criminal Application No. 445 of 2012 Rebecca Mwikali Nabutola and Others vs. Republic** reiterated that position.

The right to demand the resummoning and rehearing of the witnesses under the foregoing provisions is discretionary on the part of the accused person. However, the law demands that the succeeding magistrate **"shall"** inform the accused of that right. My understanding of that requirement on the part of the magistrate is that it is both mandatory and or directive. Many a times the accused persons have complained that since the succeeding magistrates have not complied with the said provision then the proceedings thereafter are a nullity.

Indeed this court has held so on many occasions, and in deserving cases either allowed the appeals and or

ordered a retrial. Whereas all succeeding magistrates are bound to inform the accused persons of that right it does not necessarily follow that where an accused person makes that demand then the court must comply therewith.

The decision to recall witnesses for whatever reason shall indeed depends on the circumstances of each case. In all cases however the interest of both parties must be taken into consideration. That is to say, no prejudice should be allowed to visit the accused person neither should the prosecution case be compromised by taking such a step.

The recalling of the complainant in the instant case was made after the original trial magistrate had accepted the amendment of the charge which added a new count to the three that were contained in the original charge. When it became clear that the complainant could not be found the prosecution reverted to the earlier charge which had been amended and the logical presumption is that the recalling of the complainant had now become unnecessary.

It is therefore surprising that the appellant has raised the complaint that he was denied the right to recall the complainant. As at the time the ruling which is subject of this appeal was delivered, nine witnesses had testified and only one remained before the close of the prosecution case. As at that time, over three years had elapsed from the first time the appellant had been arraigned in court. UnderArticle 50 (2) (e) of the Constitution the accused person has a right to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay. Also Article 159 (2) (b) of the Constitution provides that the courts shall be guided by principles which include that justice shall not be delayed.

By asking the court to start the case *de novo* the appellant is going against the tenor, context and spirit of the Constitutional provisions which are supposed to protect him. It is the duty of the court to uphold those provisions and therefore I am unable to accede the request by the appellant herein. I believe there is no prejudice that shall be occasioned to the appellant by so holding because he was all along represented by counsel.

The allegation of bias against the learned trial magistrate finds no place in the proceedings in that, they were raised after the request to have the tapes replayed in court was rejected. There was no suggestion whatsoever of bias in the ruling of the learned trial magistrate. There was no prayer by the appellant that any witnesses who had testified should be recalled. The order to recall the witnesses other than the complainant appears to be misplaced. I am not persuaded therefore that this appeal has any merit. In the circumstances I order that the appellant shall be presented to another magistrate of competent jurisdiction who shall invoke the provisions of Section 200 (3) of the Criminal Procedure Code bearing in mind the observations I have made in this ruling. The end result is that this appeal is hereby dismissed.

Orders accordingly.

SIGNED DATED and **DELIVERED** in court this **15th** day of May **2014**.

A.MBOGHOLI MSAGHA

JUDGE