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**IN THE HIGH COURT AT EMBU**

**CRIMINAL APPEAL NO. 197 OF 2011**

**BETWEEN**

**ROBERT NJAGI NJUKI.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Chief Magistrate's Court Embu in Criminal Case No. 1284 of 2000 G.C. Mutembei, SPM delivered on 16<sup>th</sup> October 2003)***

**JUDGMENT**

1. In the subordinate court, the appellant **ROBERT NJAGI NJUKI**, was charged with two counts of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. He was convicted and sentenced to death.
2. The appellant was charged on 2<sup>nd</sup> March 2000. The trial continued apace until he was convicted and sentenced. On 7<sup>th</sup> November 2003 he lodged the petition of appeal. Unfortunately the appeal could not be heard as the original file and proceedings could not be located. The matter was mentioned from time to time until March 2014 when the original file was traced and the record of appeal prepared and appeal admitted or hearing on 17<sup>th</sup> March 2014. We regret the loss of the file and the consequent delay in the hearing and determination of this appeal.
3. The prosecution called four witnesses to prove its case. The case against the appellant was based on a repudiated confession that was admitted after a trial within a trial. He was also connected to the robbery by when the police recovered the deceased's jacket from his house. On 18<sup>th</sup> September 2001, after the close of the prosecution case, the appellant was called upon to make his defence after the learned magistrate had complied with **section 211** of the *Criminal Procedure Code (Chapter 75 of the Criminal Procedure Code)*. He elected to make an unsworn defence. He indicated that he would not call any witnesses and that he needed a month to prepare the defence.
4. In the meantime, the trial magistrate who heard the case was replaced by another magistrate. On 14<sup>th</sup> March 2002, when the defence came up for hearing, the succeeding magistrate complied with **section 200** of the *Criminal Procedure Code* by informing the appellant of his right to have any or all witnesses recalled and for the hearing to start de novo. The appellant stated that he did not wish to have any witnesses recalled but applied for the typed proceedings to enable him prepare his defence. The magistrate issued an order that the appellant be issued with proceedings.

5. When the matter came up for hearing on 6<sup>th</sup> May 2002, the appellant applied for the recalling of PW 2, PW 3 and PW 4. The magistrate obliged and issued an order for the witnesses to be recalled. The matter was then fixed for further hearing on 6<sup>th</sup> June 2002. On that day the matter did not proceed but was adjourned from time to time until 5<sup>th</sup> June 2003. On 5<sup>th</sup> June the prosecution applied for adjournment but the application was rejected. An attempt by the prosecution to withdraw the charges under **section 87** of the ***Criminal Procedure Code*** was rejected whereupon the prosecution closed its case. Thereafter, the learned magistrate put the appellant on his defence and directed that the matter proceed for defence hearing. The appellant gave a sworn statement.
6. In our assessment, the learned magistrate fell into grave error when he failed to take into account the fact that he had, on 6<sup>th</sup> May 2002, acceded to the appellant's request to recall PW 2, PW 3 and PW 4 as a consequence of the application of **section 200** of the ***Criminal Procedure Code***. Having regard to the fact that the trial had not taken off for a year, the appellant should have been given the opportunity to elect whether or not he still wished to recall the prosecution witnesses. Mr Wanyonyi, counsel for the State, submitted that the appellant was not prejudiced in any way as he did not insist on calling the witnesses and he proceeded to give sworn evidence when called upon to give his defence.
7. We reject the respondent's assertion that the appellant waived his right and was therefore not prejudiced. It cannot be said that the failure to give him that opportunity occasioned no prejudice to him as such further questioning might have caused the trial magistrate to take a different view of the witness' evidence. Our view is further fortified by the fact that the case against the appellant was based purely on circumstantial evidence and the appellant was entitled to test the evidence afresh. As the court had already given an order that the witnesses be recalled, the court could not proceed to close the prosecution case without affording the appellant the opportunity to once again make the election. The duty on the court to inform the appellant of his right was particularly acute in these circumstances given the length of that had elapsed between the time the order for recalling of witnesses was made and the time the trial continued. In the circumstances, we quash the conviction.
8. We have considered whether to order a re-trial. In ***Fatehali Manji v R [1966] EA 343***, the East African Court of Appeal held, inter alia, that, *"In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."*
9. The appellant has been in custody for the last 13 years and given the length of time that has elapsed; we think that the appellant may not get a fair trial in these circumstances.
10. We allow the appeal and therefore quash the conviction and sentence. The appellant is set free unless otherwise lawfully held.

**SIGNED at EMBU this 29<sup>th</sup> day of May 2014**

**D.S. MAJANJA**

**H. I. ONG'UDI**

**JUDGE**

**JUDGE**

**DELIVERED on this 29<sup>th</sup> day of May 2014**

**H. I. ONG'UDI**

**JUDGE**