REPUBLIC OF KENYA
Migot v Republic

Court of Appeal, at Kisumu
December 3, 1991

Gachuhi, Cockar JJ A & Omolo Ag JA

Criminal Appeal No 67 of 1991

(Appeal from a Judgment of the High Court of Kenya at Kisumu (Khamoni J)

dated 14/6/1991 in Criminal Appeal No 162 of 1990)

JUDGEMENT

The appellant was charged with the offence of robbery with violence contrary to section 296(1) of the Penal Code and in the alternative with the offence of handling stolen goods viz: the stolen Peugeot 504 pick up described therein. The trial commenced before Miss Ondeyo, Senior Resident Magistrate, Kisumu. After the evidence of three prosecution witnesses had been heard and recorded the hearing was taken over by Mr Ongudi, the Principal Magistrate, who then heard the remaining witnesses and concluded the trial. The appellant was acquitted on the charge of robbery with violence but was found guilty and convicted on the alternative charge of handling stolen goods and was sentenced to 6 years' imprisonment. An appeal to the Superior Court followed, and the judge who found that as the Principal Magistrate had not satisfied the requirements of section 200 of the Criminal Procedure Code a vacuum had therefore been left in the case. He, therefore, allowed the appeal on that ground, quashed the conviction, set aside the sentence, ordered the release of the appellant and finally ordered a re-trial under section 200 (4) of the Criminal Procedure Code.

This appeal before us from the decision of the Superior Court is directed against the order for re-trial. In his grounds of appeal the appellant has stated that he had already served one year of the sentence and that before that he had been in remand for about 3 months. A re-trial would be to his prejudice as he has suffered a lot. In his submissions before us the appellant added that a re-trial would enable the defect in the proceedings to be cured and also give the prosecution an opportunity to call further evidence. As far as the curing of the defect in the proceedings is concerned, the only defect which had proved fatal was the finding if non-compliance with section 200 of the Criminal Procedure Code. The record shows that after he took over and commenced the hearing the succeeding magistrate, that is the Principal Magistrate, had made a note in the following terms:

> "The provisions of section 200 Criminal Procedure Code are explained to accussed who understands and replies that the matter proceeds where the former trial magistrate left through his counsel Mr Aluoch."

This appeal is not dealing with the correctness or otherwise of the finding of non-compliance with section 200 of the Criminal Procedure Code by the judge but we cannot help in observing that we do not find anything fatally wrong in the way the Principal Magistrate dealt with the matter particularly in view of the fact that the appellant was represented by an advocate in whose presence he did that. Be that as it may sub-section 4 of 200 of the Criminal Procedure Code empowers the High Court to order a re-trial in such circumstances.

As regards the appellant's fear that a re-trial would give the prosecution an opportunity to fill in gaps left during the previous trial by calling further evidence he can certainly encounter that during the re-trial. There is no merit in this appeal which we now dismiss. We further give directions, which the Superior Court should have done and did not do, that the appellant should forthwith be taken before the Principal Magistrate for arrangements to be made for the re-trial without any delay.

We also hope that in the event of the appellant being convicted after the retrial that the period of sentence that he has already served will be taken into account by the trial magistrate. Orders accordingly.

Dated and delivered at Kisumu this 3rd day of December,1991.

JOHN MWANGI GACHUHI

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JUDGE OF APPEAL

A. M COCKAR

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JUDGE OF APPEAL

RIAGA S OMOLO

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AG. JUDGE OF APPEAL