

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 1785 OF 1983

CHARLES KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant was charged before a learned Senior Resident Magistrate for the offence of stealing a cheque leaf (contrary section 275 of the Penal Code cap 63), forging a signature on the said cheque (contrary to section 349 of the Penal Code), uttering the said false cheque (contrary to section 353 of the Penal Code) and obtaining by false pretences (contrary to section 313 of the Penal Code).

The said learned magistrate heard all the evidence for the prosecution as well as statutory statement of the appellant and adjourned the hearing to enable the appellant to call a defence witness before the appointment of the said learned magistrate to the Office of Solicitor General, he was succeeded by another learned Senior Resident Magistrate under section 200 of the Criminal Procedure Code (cap 75) who after ascertaining from the appellant that he had no objection to the said learned succeeding magistrate to continue with the hearing of the case where the previous trial magistrate had left, proceeded to hear the witness of the appellant, deliver the judgment and convict and sentence the appellant on the counts of theft, forgery and uttering but acquitted him of the count of obtaining. Under section 200(3) of Criminal Procedure Code, an accused person is entitled to demand that any witness be resumoned and reheard and a duty is imposed on the succeeding magistrate to inform the accused person of such right.

In the instant case the appellant was not, according to the records, informed of his right to demand that any witness be resumoned or reheard.

It may be observed that our section 200 is similar to *Raphael v Republic* [1969] EA 544, a Tanzanian case it was held that:-

"(1) it is a prerequisite to the second magistrate's exercising jurisdiction that he should apprise the accused of his right "to demand that the witnesses of any of them be resumoned and reheard" under S,196 of the Criminal Procedure Code; (2) if the second magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction and the trial is a nullity".

In the above Tanzanian case the succeeding magistrate informed the accused that he had a right to recall and cross-examine any of the witnesses, whilst in the instant case, all that the succeeding magistrate asked the appellant was whether he had objection to the succeeding magistrate continue with the case where the first magistrate had left off.

The prosecution's case before the lower court was that the appellant brought a stolen forged cheque for Kshs 1200 to one Irungu Kahiga (P W I) as payment of meal sold to the appellant few days before, which the appellant denied. It would therefore appear that the question of credibility of the witnesses for the prosecution was at issue.

In the circumstances, the appellant having a right to resummon and rehear the witnesses, of which right he was not informed, though a duty was imposed on the succeeding magistrate to inform the appellant of such right, we think that the assumption of jurisdiction by the said succeeding magistrate without

informing the appellant of his right, was clearly wrong and the trial by the succeeding magistrate was a nullity

We allow the appeal. We quash the conviction and set aside the sentences.

In the instant case, the trial having been declared a nullity, the proper course would be to order a new trial but we realize that the appellant who was alleged to be involved in fraud of sum of Kshs 1200 albeit accompanied by theft and forgery, has already served a sentence of about 9 months. We have anxiously considered a retrial and we are of the opinion that the appellant may not undergo peril of the second trial.

The appellant may be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 27th day of July , 1984.

F.E ABDULLAH

J.A ALUOCH

JUDGE

JUDGE