**Ndegwa v Republic**

**Court of Appeal, at Nakuru September 23, 1985**

**Madan, Kneller & Nyarangi JJA**

**Criminal Appeal No 125 of 1984**

**(Appeal from the High Court at Nakuru, Masime J)**

**September 23, 1985, Madan, Kneller & Nyarangi JJA delivered the following Judgment,**

The appellant was convicted of stealing from the person Kshs 2,200 and a Seiko wrist watch, the property of Joseph Maina, contrary to section 279(a) of the Penal Code (cap 63). His appeal to the High Court (Masime J) having been summarily rejected, he has appealed again.

Before the appellant's trial, which had progressed about half way could be completed, the trial magistrate was transferred to another station. His successor took over. He recorded in his judgment that he had complied with the provision of section 200 of the Criminal Procedure Code (cap 75).

The prosecution case against the appellant was that at about 5.30 am on December 11, 1983 he gave a Seiko wrist watch to a waitress named Mary Jane Akinyi Otieno at the Mirangi Day and Night club within the Nakuru District (are there no liquor licensing hours) to keep it for him saying that the was very drunk and the watch could be stolen from him.

The complainant, Joseph Maina testified that on the 10th/11th December he had Kshs 2,200 in coat pocket and also a Seiko wrist watch. He was at Mirangi Night club. He slept there on a seat and woke up at 4.0 am (shades of Falsestaff). One Ndungu came and pointed out the appellant, and told him that his money and wrist watch had been stolen by him. Maina went and fetched some askaris. The appellant was arrested when h e was having lunch. Kshs 965 was found on him. The most important witness at the trial was Harrison Kagone Ndungu who had been to prison previously together with the appellant. His evidence would have to be carefully scrutinized. He said he was outside, he called it the Murangi Town Hotel bar, at 5.00 am on the 10th/11th.

He saw the appellant through the glass window under the table where Maina was sleeping. He saw him remove something from Maina's coat pocket, and also his wrist watch. He could not call the watchman as the bar was crossed. He told Maina about it the next morning. They made a report about it at Nakuru Police Station. He himself was locked up in the cell, and released at 3.00 pm after the appellant was found.

In his unsworn statement the appellant told the court that he was arrested when he had come from home. He had Kshs 1,000 with him to be deposited with the post office. The wrist watch was recovered by the workers at t he scene. He was not involved in the case at all.

Section 200 of the Criminal Procedure Code enacts :

(a) 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 :

Deliver a judgment that has been written and signed but not delivered by his predecessor; or

Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.

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 exercise that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered the judgment.

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.

Where an accused person is convicted upon evidence that 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.

Section 200 is a provision of the law which is to be used very sparingly indeed, and only in cases where the exigencies of the circumstances, not only are likely but will defeat the end of justice, if a succeeding magistrate does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial.

Section 200 is not to be invoked where, as seemingly in the instant case, such a halfheard trial is a short one, it could be conveniently started de novo because the prosecution witnesses are still available locally, and passage of time when the trial first commenced and another magistrate taking over almost midway, is so short so as not to cause or produce any accountable loss of memory on their part, whether actual, presumed or pretended, to the prejudice of either the prosecution or the accused.

No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration.

It could be also argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of witnesses. It has been and will be so in the other cases that will follow. In this case, however, the second magistrate did not himself see and hear all the prosecution witnesses even though he said that he carefully “observed” the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case, in our opinion.

The succeeding magistrate was as helpful as he could possible make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the swift conclusion of litigation.

For the reasons we have stated, in our view the trial was unsatisfactory. We need not therefore dwell upon some of the other disturbing features such as why Ndungu, a person of no fixed abode and himself a character with an unflattering past, was outside the hotel at 5.00 am. Secondly, as the appellant could only have given the watch having previously stolen it while Mary Jane was still there and the bar was open, how come it had to be closed when Ndungu saw the appellant robbing Maina; thirdly, why was there no investigation carried out to find out what happened to the balance of Kshs 1,235 or Kshs 2,200 stolen only a few hours before.

Orders accordingly.