Abang' v Republic (Criminal Appeal 355 of 2019) [2025] KECA 1019 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 1019 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 355 OF 2019

HA OMONDI, LK KIMARU & WK KORIR, JJA

MAY 30, 2025

BETWEEN

ERICK OCHIENG ABANG' .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kisumu (H.K. Chemitei, J.) dated 8th March 2016 in HCCRC No. 16 of 2010)

JUDGMENT

1. Erick Ochieng Abang' (the appellant) is dissatisfied with his conviction for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, as well as the death penalty ensuing therefrom. The particulars of the information were that on the 6th May 2010 at Agoro West Sub-Location, Nyakach District, within Nyanza Province, the appellant murdered Johannes Odawo Okwany.

2. In the memorandum of appeal dated 15th March 2024, the appellant raises six grounds of appeal, which we have condensed into four grounds as follows: that the sentence was passed in its mandatory nature; that the prosecution failed to discharge the burden of proof as the evidence was marred by contradictions; that section 200(3) of the *Criminal Procedure Code* (CPC) was not complied with; and that the trial court relied on a dying declaration without exercising the caution required by law.

3. As this is a first appeal, our mandate under section 379 (1) of the *Criminal Procedure Code* is akin to a retrial, incorporating a reconsideration of the facts and the law, as they pertain to both conviction and sentence. The appellant expects us to subject the evidence to a fresh and exhaustive examination by weighing conflicting evidence and drawing our own conclusions. However, in doing so, we must be mindful of the fact that we did not have the benefit of hearing and observing the witnesses testify; hence, we lack authority to render an opinion on their demeanour. (See Dickson Mwangi Munene

& Another vs. Republic [2014] eKLR). With these principles in mind, we will revisit the evidence presented in this case before conducting our independent analysis of it.

4. The prosecution called ten witnesses in support of its case. Lazarus Omollo (PW1), who served as a teacher, was the deceased's employer and a neighbour to the appellant. The deceased worked for him as a herdsman. He stated that on 4th May 2010, when he returned from work, he was informed that the deceased had been assaulted by the appellant for grazing livestock on the land of the appellant's grandmother. He noted that the deceased had a swollen penis. He also stated that the deceased informed him that the appellant had assaulted him. PW1 then proceeded to Rose Ondiek (PW5), the appellant's grandmother, told her what happened, and asked her to organize for the deceased to be taken to the hospital, but this did not happen. The following day, PW1 opted to take the deceased to the hospital on a wheelbarrow, but he succumbed on the way.

5. Peter Nyambok Aketho (PW2) is an uncle to the appellant. He testified that while he was harvesting sisal in his land, the deceased was herding cattle. His testimony was that when the deceased went to collect a cow which had strayed into the land belonging to the appellant's grandmother, the appellant assaulted the deceased. He then approached the scene, which was about 50 meters away, and separated the two. He witnessed the appellant whipping the deceased for about five minutes and also carrying him while the deceased did not defend himself.

6. Abraham Juma Aura (PW3) was on the material day looking after his father's animals when the deceased approached while limping and holding his stomach. He stated that the deceased who was not walking upright as usual, informed him that he had been assaulted by Ochieng because one of his animals had trespassed into someone's land. The deceased then left his cows with him, and he looked after them.

7. Dr Michael Oduor (PW4) was stood down as he had not worked with Dr. Clarice Onyango, who had conducted the postmortem.

8. Rose Ondiek (PW5) recalled that PW1 had indeed approached her and requested her to take his herdsman to hospital as her grandson, the appellant, had assaulted him, but she did nothing about the request.

9. Joseph Obwor Oyiego (PW6) on his part narrated how he was informed of the deceased's death by PW1. He then called the police and proceeded to the scene, where he found the deceased's body.

10. Corporal Linda Juma (PW7), attached to Nandi Hills Police Station, testified that on 7th May 2010, while at the station alongside her colleagues, they received information from someone that he was hosting a relative who was on the run. With the help of their informer, they arrested the appellant the same day and later handed him over to officers from Katito Police Patrol Base.

11. Police Constable Francis Gitau (PW8), in his testimony, provided an account similar to that of PW7 regarding the arrest and subsequent hand over of the appellant to the police officers from Katito Police Patrol Base.

12. Dr. Evalyne Okello (PW9) from Jaramogi Oginga Odinga Hospital produced a post-mortem report by Dr. Clarice Onyango. According to the report, the deceased had no external injuries, while the covering of the lungs had a fracture. There was a haematoma in the centre of the right temporal region. The pathologist concluded that the deceased died as a result of a head injury secondary to an assault.

13. Police Constable Charles Musungu (PW10) testified that when they received the report of the deceased's demise, they proceeded to the scene where they found the body atop a wheelbarrow. He established that the deceased had been assaulted by the appellant and died while being taken to the

hospital. He was also informed that the appellant had fled to Nandi Hills, after which he liaised with the officers at Nandi Hills who apprehended him and handed him over to him.

14. In his defence, the appellant testified that on 6th May 2010, police officers from Nyando went to Nandi Hills looking for Fredrick. He was arrested while in the company of one Erick Thompson and escorted back to Nyanza. He was then taken to see a Dr. Onyango and later arraigned in court with a charge he never understood.

15. When the appeal was canvassed before us on 3rd February 2025, learned counsel Ms. Omollo appeared for the appellant, while Senior Principal Prosecution Counsel Mr. Patrick Okango appeared for the respondent. Counsel mainly relied on their written submissions, accompanied by brief oral highlights in plenary.

16. The submissions by Ms. Omollo on behalf of the appellant were dated 15th November 2024. Concerning the dying declaration, counsel referred to section 33 of the *Evidence Act* and the holding in Pius Jasunga s/o Akumu vs. Republic [1954] 21 EACA 333 to buttress the need for corroboration and caution when dealing with a dying declaration. Counsel argued that the learned Judge erred in failing to approach the evidence of PW1 and PW3 with the required caution. Counsel further submitted that the evidence of PW1 and PW3 could not be corroborated as it remained unclear which part of the body of the deceased was injured as a result of the alleged assault.

17. Turning to the issue of non-compliance with section 200(3) of the *Criminal Procedure Code* (CPC), counsel submitted that the record is clear that the provision was not complied with and the conviction should therefore be set aside on that ground.

18. Finally, on sentence, Ms. Omollo referred to the Supreme Court decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR to urge us to interfere with the sentence and impose a prison term as the sentence was imposed in its mandatory nature.

19. In opposition to the appeal against conviction, Mr. Okango relied on the submissions dated 2nd February 2025. According to counsel, the trial court correctly applied the law regarding dying declarations, as expounded in Kihara vs. Republic [1986] KLR 473. Counsel submitted that the trial court noted that, while there was no mandatory rule requiring a dying declaration to be corroborated, in the instant case, the dying declaration was corroborated by the testimony of PW2, an eyewitness. He argued that the case against the appellant was proved, first by the testimony of PW2, the eyewitness to the assault, and corroborated by the dying declaration given to PW1 and PW3. According to Mr. Okango, the cumulative evidence of the prosecution as adduced by PW1, PW2, PW3, and PW5 is that it is the appellant who assaulted the deceased, and therefore, there were no contradictions whatsoever.

20. Regarding the breach of section 200(3) of the CPC, counsel urged that the said provision places the discretion of compliance in the hands of the trial magistrate, not the accused person. According to counsel, the practice of giving the accused person the right to determine how to proceed is inconsistent with the sanctity of the court's record. To quote counsel:

> "Once proceedings are put on record, that record becomes solemn, and unless the new magistrate is unable to comprehend (primarily due to handwriting style), then the court should always exercise deference to the existing record and let the matter proceed."

21. Counsel referred to Gombe & 2 Others vs. Republic [2023] KECA 299 (KLR) to buttress this position. Referring to the decision in Joseph Kamau Gichuki vs. Republic [2013] eKLR, counsel urged that the appellant had not established sufficient grounds to challenge the exercise of discretion by the trial court.

22. Finally, Mr. Okango conceded the appeal against the death penalty and urged that we substitute it with a sentence of 25 years' imprisonment.

23. We have reviewed the record and submissions from both parties. At the centre of this appeal is whether the offence of murder was proved against the appellant, and if so, whether the death sentence was appropriate in the circumstances of the case. However, before tackling the identified issues, there is the pertinent question as to the consequences of non-compliance with section 200 (3) of the *Criminal Procedure Code*.

24. We find it appropriate to first determine the question regarding the import of alleged non-compliance with section 200 (3) of the CPC. The appellant has argued that there was non-compliance with the provision, and therefore, the trial was rendered a nullity. On the other hand, the respondent contends that the application of section 200 (3) of the CPC is discretionary and failure to invoke it should not be fatal to the trial.

25. Section 200 (3) of the C.P.C provides that:

> "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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

26. The provision applies mutatis mutandis to the trials in the High Court by virtue of section 201 (2) of the CPC. In Ndegwa vs. Republic [1985] KLR 535, it was emphasized that the trial court in applying section 200 (3) of the CPC should ensure that the accused person is not prejudiced. The Court stated that:

> "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."

27. Section 200 (3) provides in peremptory terms that the succeeding magistrate or judge must inform an accused person of his right to demand that any witness be re-summoned and re- heard. There is no doubt that the failure to inform an accused person of this right may, in certain situations, lead to a mistrial.

28. Mr. Okango, for the respondent, had an interesting view, which, in our understanding, is a misapprehension of the provision and intent of section 200 (3) of the CPC. His view was that whether the provision would be applied or not depended on the discretion of the trial officer. Contrary to the interpretation adopted by counsel, we reiterate that section 200 (3) places upon a succeeding magistrate or judge the duty to inform the accused of his/her right to determine how he/she wishes to proceed with a partly heard matter and that it is only after such a duty is dispensed with, and upon the accused person making the election, that the trial court, after considering the exigencies of the trial at hand, is seized of the discretion to decide how the matter will proceed. The exercise of that discretion accrues once the accused person has been informed of his right to decide how his/her trial should proceed under the new magistrate or Judge.

29. Similarly, in determining whether the trial should start de novo, the trial court will take into consideration the prospects of the availability of witnesses and the age of the case, among other factors.

The holding in Joseph Kamora Maro vs. Republic [2014] KECA 66 (KLR), among other decisions, lends credence to our view herein. In that case, the Court pointed out that:

> "The position in law is that a trial Magistrate taking over a case that is partly heard is mandatorily obligated to inform an accused person of his right to recall witnesses. After an accused person has been informed of his right, he/she may elect to have the witnesses recalled. What happens thereafter is for the court to decide depending on the availability of witnesses, the length the trial has taken, because if it has taken too long, chances are that some witnesses may have left the jurisdiction of the court as was the case here or some may even have died. To this extent we are in agreement with the learned Judges of the High Court that "this provision does not oblige the succeeding magistrate to start de novo" but what is mandatory is to inform an accused of his right under section 200 (3) of the *Criminal Procedure Code*."

30. The rationale for the above interpretation was aptly captured by the Court in Joanes Oketch Ongoro vs. Republic [2014] KECA 63 (KLR) as follows:

> "It is not difficult to see the raison d'etre for the provisions of section 200 (3) of the *Criminal Procedure Code*. A trial court unlike an appellate court, is seized of an opportunity to assess the demeanour of witnesses and come to the conclusion of their trustworthiness or otherwise. A Magistrate who takes over a trial mid-way, has clearly not had the benefit of seeing the witnesses. The law imposes an obligation on the trial court to inform an accused person of his right to recall witnesses in respect of a Magistrate who takes over a trial. That right however, may be waived by an appellant but unless and until an accused is advised accordingly, the court cannot presume that an accused has waived his right to recall witnesses."

31. As opposed to the submission by Mr. Okango, we do not therefore think that the Court in Gombe & 2 Others vs. Republic [2023] KECA 299 (KLR) departed from these principles. In that case, an order to restart the trial was set aside by the trial court upon application by the prosecution and on appeal this Court found no fault with the trial court. It is important to note that in Gombe & 2 Others vs. Republic (supra) the right to have the case start de novo had been explained to the appellants.

32. Having established the applicable principles, the question begging for an answer is whether section 200 (3) of the CPC was complied with and, if not, what are the consequences. This matter was first heard by Ali Aroni, J. (as she then was), who took the evidence of eight witnesses. On 26th February 2013, Chemitei, J. took over the matter. On the same day, Mr. Makoria, representing the State, informed the Court that the matter had been partly heard. The learned Judge proceeded to make an order that the proceedings be typed. Fast forward to 21st January 2015, the matter proceeded, and the learned Judge took the evidence of PW9 and PW10. He also recorded the defence evidence of the appellant and delivered the judgment. This leaves no doubt that the succeeding Judge did not inform the appellant of his right under section 200(3) of the CPC.

33. Having established the foregoing, the next question is whether non-compliance with section 200 (3) automatically nullifies the proceedings. A consideration of the decisions of this Court reveals that non-compliance with the provision will automatically vitiate the trial. For instance, in FWN vs. Republic [2017] KECA 491 (KLR), the Court held that non-compliance with section 200 (3) automatically

rendered the subsequent proceedings a nullity. The same position had earlier on been adopted in Richard Charo Mole vs. Republic [2010] KECA 400 (KLR) where the Court held that:

> " The trial in this case was not a short one as the first trial magistrate had heard ten prosecution witnesses whose credibility and personal demeanour she had observed. Section 200 (3) (supra) requires in mandatory tone that the succeeding magistrate shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. The duty is reposed on the court and there is no requirement that an application be made by the accused person. The failure to comply with that requirement would in an appropriate case render the trial a nullity. In the case before us, we agree with both Mr. Kenyariri and Mr. Kaigai that the omission to comply with the section was grossly prejudicial to the appellant and the trial was thus vitiated."

34. In Abdi Adan Mohamed vs. Republic [2017] KECA 517 (KLR), the Court, while decrying the mechanical nature in which section 200 (3) was being implemented, allowed an appeal because the trial magistrate erred in reviewing an order for a de novo hearing without hearing from the side of the defence. In reaching its decision, the Court placed reliance on Ndegwa vs. Republic (supra).

35. More recently, the Court in Gitau vs. Republic [2022] KECA 33 (KLR) faced with non-compliance with section 200 (3) of the CPC held that:

> "In this case there was total non-compliance with the provision and it cannot be said that the subsequent trial of the appellant was not prejudicial to him as urged by counsel for the state given that the evidence led by the prosecution was purely circumstantial. The prosecution concedes that it was an error on the part of the trial court to have not complied with the requirements of the law aforesaid. However, this concession does not remedy the fatal omission. The provisions of Section 200 as has been constantly stated by this Court in the past is couched in mandatory terms and therefore none-compliance is not an option. It requires the succeeding judge to explain to the accused his right under this section and give him an opportunity to elect whether to proceed with the trial from where it had reached or to commence de novo or resummon some of the witnesses who had testified. As already demonstrated, when Mutuku, J. took over the case from Muchemi, J. the appellant was entitled to be informed of the change and to decide how he wanted the matter to proceed. Though the appellant was represented by counsel, this did not take away this right from him, as counsel for the respondent seems to suggest."

36. We have reproduced the above authorities to affirm the prevailing jurisprudence that compliance with section 200 (3) of the CPC remains a mandatory obligation of the trial court failure to which a trial is rendered a nullity. We appreciate that sometimes magistrates and judges forget to comply with the provision, and it would behoove the other actors in a trial being the prosecution and the defence to alert the magistrate or Judge of the omission. The consequences of nullifying a trial and ordering a fresh one inconveniences all the parties involved and is a total waste of scarce judicial resources. In this case we have established from the record that when Chemitei, J. took over the matter from Ali Aroni, J. (as she then was), there was non-compliance with section 200 (3) of the CPC. From the foregoing discussion, it is inevitable that the trial must be declared a nullity. We accordingly quash the conviction and set aside the sentence.

37. Having arrived at the above conclusion, the other issues in this appeal become moot. The only question we need to answer is whether an order of retrial should issue. Even though neither the appellant nor the respondent addressed us on this issue, the principles for considerations before an order a retrial

can be made are well settled. In Rwaru Mwangi vs. Republic [2007] KECA 338 (KLR) the Court summarized the principles as:

> " Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not. See Muiruri vs. Republic [2003] KLR 552. It is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial – See Mwangi vs. Republic [1983] KLR 522."

38. And in Benard Lolimo Ekimat vs. Republic [2005] KECA 329 (KLR), the Court in rejecting a request for a retrial held that:

> "There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.
>
> In our view, having carefully considered various aspects of the case including the charge, that was before the court plus the evidence that was adduced in support of it and the period the appellant has stayed under confinement, we are of the view that it would not be in the interest of justice to order a retrial and we decline to do so."

39. This is a case that commenced on 3rd June 2010 and the appellant has been in custody since then. The appellant will have been in custody for close to fifteen years by the time of the delivery of this judgment. The mistake herein was one by the trial court and not the prosecution. Even though the potentially admissible evidence on record is likely to return a conviction, we are of the view that an order of retrial will cause injustice to the appellant. We also take note that the appellant was a first offender and that the prevailing jurisprudence in this Court on sentence for the offence of murder is that the appellant is likely to get a term sentence. The term sentence may likely be the one that the appellant has already served. In the circumstances of this case, we therefore find an order to retry the appellant to be inappropriate and would not serve the broader interest of justice

40. In the result, we allow this appeal. We quash the conviction of the appellant and set aside the sentence of death imposed on him. Consequently, the appellant shall be set at liberty unless he is otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR