



**Mwavingi & 3 others v Republic (Criminal Appeal 124 of 2022)
[2023] KECA 1572 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1572 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CRIMINAL APPEAL 124 OF 2022
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJ
NOVEMBER 10, 2023**

BETWEEN

**SAMSON MBOGA MWAVINGI 1ST APPELLANT
ELAM NJAKA MWAMODO 2ND APPELLANT
EZEKIEL MWAKIO MBOGA 3RD APPELLANT
SIMON MWAKINA MWAMBAGAH 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Voi (E. Ogola J.) delivered on 29th October 2020 and sentence of 29th June 2022 in High Court Criminal Case No. 4 of 2015.)

JUDGMENT

1. Samson Mboga Mwavingi, Elam Njaka Mwamodo, Ezekiel Mwakio Mboga and Simon Mwakina Mwambagah (hereinafter the 1st, 2nd, 3rd and 4th Appellants respectively), were the 1st to 4th accused persons in Voi H. C. Criminal Case No. 4 of 2015, in which they were charged with, and convicted of the offence of murder, and each sentenced to twelve (12) years imprisonment by the High Court at Voi (E. Ogola J.). The particulars of the offence were that on 6th February 2013 at Sagalla area within Taita Taveta County, jointly with others not before Court murdered Humphrey Kimbio. The said Appellants have appealed to this Court against the said judgment, conviction and sentence.
2. The trial commenced on 30th March 2015 before Muya J. where the Appellants denied the charges and a plea of not guilty was entered, and on 22nd February 2016, Kamau J. commenced the hearing of the prosecution witnesses, and heard eight (8) witnesses who gave evidence in support of the prosecution's case. Faustine Liverton Mwavula testified as PW 1 that the deceased was known to him and was a friend from the same village, while the Appellants were all known to him by name. That on 6th February 2013



he was at home with his mother, wife and young son when at about 8.00pm, the 1st Appellant who was armed with an iron rod, the 2nd Appellant who was armed with a rope and a wooden stick (fimbo) and the 4th Appellant who was armed with a wooden stick (fimbo), came to his home and informed him that timber belonging to one Sarah Mwakina had been stolen at about 1.00 pm, and he was the one who had taken the timber. That PW 1 explained his whereabouts that day, and the 1st Appellant told him they would take him to the chief, that he was taken by the 1st, 2nd and 4th Appellants on the pretext that he was going to the chief's house but was instead taken to Sarah Mwakina's house and later to Kanyanga where the Appellants tied him with ropes and beat him.

3. He recalled that he saw the 2nd and 3rd Appellants holding the Deceased and that they tied him with ropes then proceeded to beat the deceased together with PW1; that the Appellants set PW1 with the deceased on fire after placing a tyre on their heads, and his screams attracted onlookers. He said that the deceased was hit on his head by a boulder and as he staggered away, the Appellants pursued him into a maize plantation. On his part, that he lost consciousness after the beating and regained consciousness whereupon he was taken to hospital; and informed that the deceased had died. He identified the photos that were taken of the deceased's body in a culvert and recalled that he saw the Appellants on the material day attacking him and the deceased. When recalled he tendered the P3 from dated 22nd March 2013 that documented the injuries he sustained.
4. PW2, Gideon Mtoe Mwasi, testified that he was at a bar on the material day where he witnessed the 2nd and 3rd Appellants manhandle the deceased who was a reveller. PW2 then left the bar and was attracted to the sound of noise and the sight of a fire; that he saw the 2nd and 3rd Appellants interrogating persons on the ground who had been tied with ropes. He identified the persons on the ground as PW1 and the deceased. He witnessed the 1st Appellant and 2nd Appellant armed with clubs and beating the deceased, and burn injuries on PW1's body and also noticed that the deceased attempted to escape to a maize plantation where the 1st and 2nd Appellants followed him, only to return without the deceased. He received information that the deceased's body was found lying in a culvert and identified photos of the body of the deceased that were taken at the scene.
5. Mwae Mwanduka, PW1's father, testified as PW3. He stated that on 6th February 2013, the 1st, 2nd and 4th Appellants, all armed with clubs came looking for PW1, whom they found and tied his hands on the allegation of having stolen Sarah Mwake's timber. The following morning, he received information that the deceased had been killed. Geoffrey Mwachoo (PW4) and John Mwawasi (PW6) identified the body of the deceased when the post mortem was conducted on it, while PC Shem Asher (PW5), a forensic crime scene investigator, took 8 photos of the deceased's body at the scene and tendered the same as Exhibits.
6. Dr. Kagona Gitao, who testified as PW7, stated that the post mortem was conducted on the deceased by Dr. Charo, whose handwriting he was familiar with. The examination revealed that the deceased had multiple bruises on the face, anterior chest wall and on both legs with cut wounds; blood on the chest wall under the skin and on the scalp; and intracranial bleeding on the left hemisphere. The cause of death was revealed as cardio- pulmonary arrest secondary to head injury as a result of an assault. The post mortem form was produced as an exhibit. Also tendered was the P3 form in respect of the examination conducted on PW1 to the effect that he had multiple cut wounds on the scalp, wounds over the left elbow, burn wounds on the left thigh. The weapons used were opined as a mix of blunt, sharp and hot objects.
7. The last prosecution witness, IP Patrick Amwayi (PW8), testified that he investigated the subject murder. He visited the scene and investigations revealed that the 2nd Appellant, a village elder and the 1st, 3rd and 4th Appellants, who were members of community police were informed that PW1 had stolen



timber and the deceased had stolen a phone; that PW1 and the deceased were arrested and were to be taken to the police station but the deceased was found dead. He testified that the Appellants had told him that the members of the public intercepted them en route and beat PW1 and the deceased with stones on the allegation that they were thieves; but that he disbelieved the story because the Appellants did not give the names of the persons involved in beating the deceased and the inquest was not satisfied that the deceased were killed by members of the public. The witness also testified that the Appellants did not seek the assistance of the police to arrest the deceased and PW1 given that there was an AP camp within the proximity of the scene of the crime.

8. The Appellants were put on their defence, and the defence evidence of DW1 to DW5 was taken by Farah Amin J. In his defence, the 1st Appellant (DW1) gave evidence that he was a member of community policing, and in execution of his duties he pursued PW1 to his house on allegations of having stolen timber; he admitted having taken PW1 to the complainant's home and later to a workshop at Kanyanga trading centre where he tied his hands with ropes. He told court that the deceased later joined PW1 after having been arrested. He lamented that when on his way to chief's office, members of the public intercepted them and pelted them with stones, after which he fled for safety; and he later on 7th February 2013 heard that a person identified as the deceased was found lying dead along the road.
9. The 2nd Appellant (DW2) testified that he received information that PW1 had stolen timber belonging to Sarah and decided to take PW1 to the chief's office; that en route to the chief's office, he received information that there was another suspected thief in a bar. He told court that he went to the bar and collected the deceased with the intention of taking him to the chief's camp. He revealed that as he and the two suspects were en route to the chief's camp, members of the public intercepted them and pelted them with stones, after which he fled for safety; that he later heard that a person identified as the deceased was found lying dead along the road.
10. The 3rd Appellant (DW3) gave evidence where he denied killing the deceased; that he joined the 2nd appellant who was in the company of PW1, on the allegation of him having stolen timber. He disclosed that he went to the complainant's workshop where PW1's hands were tied; that the 2nd Appellant received information that the deceased had been arrested in a bar for having stolen a phone so he accompanied PW2 to the bar and took him to the workshop where he joined PW1. He indicated that he had the intention of taking PW1 and the deceased to the chief's office, however enroute members of the public intercepted them and pelted them with stones, after which he fled for safety; he later on 7th February 2013 heard that a person identified as the deceased was found lying dead along the road.
11. The 4th Appellant (DW4) testified that upon receipt of information from the 2nd Appellant that PW1 was caught stealing timber from Sarah Mwakina's place, he went to confront PW1 who took him to a workshop at Kenanga Trading Centre where the stolen timber was. He told court that as he was interrogating PW1, he received information from the 2nd Appellant that there was another suspect who was tracked down at Suje Bar; that the suspect who turned out to be the deceased was brought to the workshop where he and PW1 were tied and the troop embarked on a journey to the Chief's office. The witness told court that while en route, members of the public intercepted them and pelted them with stones, after which he fled for safety; he later on 7th February 2013 heard that a person identified as the deceased was found lying dead along the road.
12. Adamson Mwangoje Makina testified as DW5 and told court that he assisted to ferry the recovered wood to the Chief's office but did not make it, as he was intercepted by members of the public. At this point the defence hearing continued before Ogola J. and last defence witness, Humphrey Kitengela



- (DW6) testified that the Appellants arrested the deceased and PW1 who were suspected thieves, but he later heard that the deceased had died but did not know how the deceased met his death.
13. Judgement was rendered by Ogola J. on 17th May 2022 who noted that PW1 and the deceased were in the custody of the Appellants; that the deceased was seen in the company of the 2nd and 3rd Appellant at Juja Bar where he was apprehended by them; that PW1 saw the Appellants surrounding and beating the deceased; PW 1's evidence with regard to the Appellants' violent actions was corroborated by PW2, and the 1st and 2nd Appellants admitted that they tied up PW1 and the deceased. The court found that the Appellants intended to cause harm to the deceased as they were armed, they apprehended the deceased and PW1 at odd hours and they knew that the act of tying them up or the omission of freeing them when the mob started coming towards them would result in death. The Judge therefore concluded that the Appellants had malice aforethought.
 14. It was also noted by the learned Judge that the evidence of the doctor was that death was caused by cardio pulmonary arrest due to head injury as a result of the assault, and although it was not clear who dropped the boulder on the deceased or which weapons were used by the Appellants, it was clear that the deceased was in custody of the Appellants who inflicted injuries on the deceased and left with the deceased but did not return with him. Therefore, that the deceased's death was as a result of the Appellants' actions that led to his death, and that the prosecution had proved its case beyond reasonable doubt. The Appellants were accordingly found guilty of the offence of murder and convicted, and after considering their mitigation, the learned Judge sentenced the Appellants to each serve 12 years imprisonment. It was this decision that prompted the instant appeal.
 15. The Appellants have raised five (5) grounds of appeal in their Memorandum of Appeal dated 31st January 2023 as follows:
 1. That the Learned Trial Judge of the High Court erred in law and fact in reaching a finding that the Appellant had a prior intention to cause grievous harm to the deceased
 2. That the Learned Trial Judge of the High Court erred in law and fact in placing blame on the Appellants even after accepting the possibility that the deceased was killed by a mob.
 3. That having accepted that the cause of death was a boulder which had hit the deceased on the head and having accepted that whoever threw it was unknown, the Learned Trial judge of the High Court erred in law and fact in failing to find that the Appellants were not blameable
 4. That the Learned Trial Judge of the High Court erred in law and fact in failing to analyse the evidence and weigh it together with the Defence testimony and thereby reaching an unjust conclusion
 5. That the sentence was manifestly excessive in the circumstances
 16. The appeal came up for virtual hearing on 15th May 2023. The Appellants were present appearing virtually from Manyani Prison, and were represented by learned counsel, Mr. Magolo, while the Respondent was represented by the learned Senior Principal Prosecution Counsel, Ms. Fuchaka. The learned counsels highlighted their respective submissions dated 15th February 2023 and 27th February 2023.
 17. This being a first appeal, the duties of this Court are set out in the case of *Okeno v Republic* [1972] EA 32 which is to submit the evidence adduced at the trial Court to a fresh and exhaustive examination and draw its own findings and conclusion. However, in doing so, we are alive to the fact that the trial Court had the advantage of hearing and seeing the witnesses. Also see *Peter v Sunday Post* [1958] EA 424.



18. Mr. Magolo's submitted that the trial itself was so flawed procedurally as to be unjust and was in fact a nullity, and stated that three (3) judges heard parts of the testimony at different times and that when F. Amin J. proceeded with the hearing on 18th June 2019 there was no compliance with section 200 of the *Criminal Procedure Code*, while the attempt by E. Ogola J. to comply with the section was wanting as there was no record of what each of the Appellants each said or chose. Further, that the record of proceedings as recorded before F. Amin J. was verbatim in terms of question and answers, sentences were not complete and prejudiced the Appellants because of the lack of proper recording their testimony. On the prosecution case, counsel submitted that there were several gaps and weaknesses and it was unsafe to base a conviction upon them, since PW 2 admitted that the deceased and PW 1 were subjected to assault by many people and it was a case of mob justice, and the testimony by PW5 was that there was interference with the scene of crime and the cell phone found at the scene was released.
19. Ms Fuchaka on her part submitted that the Appellants planned to cause grievous harm to the deceased since they picked him under the pretext that they were taking him to the chief, they were armed with crude weapons and the eye witnesses stated that the Appellants attacked the deceased and PW 1. PW 1 also testified that he knew the deceased and the Appellants and PW 2 corroborated the testimony of PW 1 and PW 3. That the evidence tendered was credible and sufficient and the eight (8) prosecution witnesses were able to prove the case beyond reasonable doubt. Further the prosecution laid a basis for Dr. Gitau to testify on behalf of Dr. Charo and the Appellants did not object. The counsel submitted that the sentence that the Appellants were given was lawful, reasonable and lenient, and were sentenced to serve 12 years imprisonment as opposed to the sentence of death prescribed under Section 204 of the *Penal Code*.
20. On the flawed trial, Ms. Fuchaka submitted that the trial was fair and the Appellants were represented by advocates of their own choice during the whole trial and were given adequate time and facilities to prepare their defence and the case was determined within reasonable time. The counsel while conceding that there was non-compliance with section 200 of the *Criminal Procedure Code*, submitted that the section is not mandatory, and that the Court has the discretion to consider whether it was convenient to commence the trial and the prejudice likely to be suffered by the parties in the case. Reliance was in this regard placed on the decision in *Ndegwa v Republic* [1985] KLR 534, that the provisions of section 200 ought to be used very sparingly.
21. It is prudent to commence our determination with a consideration of the preliminary issue of whether the conduct of the trial was flawed for non-compliance with section 200 of the *Criminal Procedure Code* which provides as follows:
 1. 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—
 - a. deliver a judgment that has been written and signed but not delivered by his predecessor; or
 - b. where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.
 2. 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 exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.



3. 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.
 4. Where an accused person is convicted upon evidence 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.
22. Section 201(2) of the [Criminal Procedure Code](#) provides that section 200 of this Act shall apply mutatis mutandis to trials held in the High Court. A perusal of the proceedings confirms that there is no record of any compliance with section 200 of the Criminal Procedure Code on 29th May 2018, when Farah Amin J. took over conduct of the trial, and also when the learned Judge thereafter proceeded to take the evidence of DW1 to DW5. On 8th March 2021, when E. Ogola J. took over the trial the record indicates as follows:

“Court: I have explained to the accused persons the effect of section 200 of the [CPC](#) under which they have the right to leave (sic) this matter proceed afresh upon a new judge taking over. I have also explained to them their right to recall earlier witnesses They have decided to have this matter proceed from where it stopped with Justice Farah Amin.

In this regard, the court has given them leave to proceed with defense witness No. 6”

23. It is evident from the various decisions of this Court that compliance with section 200 and particularly section 200(3) of the Criminal Procedure Code is mandatory, as its purpose is to protect the rights of an accused person to a fair trial as guaranteed by [the Constitution](#) under Article 50(2). The only discretion which the trial Court has is as regards the choice of the course of action to take after complying with the provisions of section 200(3), as between the choice of proceeding with the trial from where it has reached, or starting the hearing de novo. This position was extensively explained by this Court (Makhandia, Ouko & M’Inoti JJA) in the case of [Abdi Adan Mohamed v Republic](#) [2017] eKLR where the Court in explaining the decision in [Ndegwa v Republic](#) (*supra*) that the provisions of section 200 should be resorted to sparingly, explained that as much as it is practically possible, it is desirable that the trial magistrate or judge must hear the case to conclusion and ultimately render judgment as it is important for the final arbiter to be in a position to weigh the evidence taken together with his or her observation of the demeanour of witnesses.
24. The Court went ahead to advise that even where the trial magistrate or Judge has been transferred, arrangements ought to be made for him or her to return to the former station to complete the trial, unless in cases where only a few witnesses had testified, in which cases the succeeding magistrate may continue with the trial from the stage it had reached, or where the evidence already recorded is more or less formal or largely uncontroverted. Further, that the purpose particularly of section 200(3) of re-summoning of witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate or judge is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly.
25. The next question we therefore need to answer, having found that it is mandatory to comply with the provisions of section 200(3), is the effect of non-compliance. In [Abdi Adan Mohamed v Republic](#) [*supra*] the Court held as follows:

“Because of the importance of having a trial conducted from commencement to conclusion by the same magistrate or judge Section 200(4) provides that;



"Where an accused person is convicted upon evidence 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 therefore entrenches the accused person's rights to a fair trial as provided for today under Article 50(1) of *the Constitution*."

26. The Court went on to emphasise and reiterate that "the Court said in *Ndegwa v. R.* (*supra*) that the most sacrosanct individual in the system of our legal administration is the accused person. By reviewing his order without first hearing the appellant the magistrate erred and the appellant was thereby prejudiced", and found in that appeal that there was a mistrial when the trial magistrate reviewed his earlier order of a fresh hearing and directed that he would rely on the previously recorded evidence without giving the appellant an opportunity to comment.
27. In the present appeal we find that noncompliance with section 200(3) of the *Criminal Procedure Code* by Farah Amin J. did prejudice the Appellants for two main reasons. Firstly, eight prosecution witnesses had already testified, whom the succeeding Judges had not had the opportunity to assess; and secondly, the unclear manner of recording of the evidence by Farah Amin J. in question and answer form when taking the evidence of the five defence witnesses including of the Appellants. It is notable that even though there is evidence of compliance of section 200(3) by E.Ogola J. when he took over the defence hearing, he wrote the judgment based on the evidence irregularly taken and recorded by Farah Amin J. We therefore have no option but to declare a mistrial, and we do not think any purpose will be served in considering the other issues in this appeal.
28. The only remaining question we need decide is whether or not to order for a retrial. The main considerations in this regard are the availability of witnesses, possible loss of memory by the witnesses, the time that has lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused. It is our view that given that the offence occurred in 2013, over ten years ago, there may be difficulty in accessing witnesses and a retrial is not a feasible option. We have also considered that the Appellants have been serving the sentence imposed on them from 17th May 2022.
29. This appeal therefore succeeds and is allowed. We hereby quash the conviction of the 1st, 2nd, 3rd and 4th Appellants for the offence of murder, and set aside the sentence of twelve years' imprisonment imposed upon each of the Appellants. The said Appellants shall forthwith be set at liberty unless for any lawful reason held.
30. Orders accordingly

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G V ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

