IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ASIKE MAKHANDIA, KIAGE & ODEK. JJ.A)

CRIMINAL APPEAL NO. 66 OF 2018

BETWEEN

MARK LIMO CHESIRE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Eldoret, (Ngenye, J) dated 7th July, 2015

in

HCCR.A NO. 40 OF 2006)

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JUDGMENT OF THE COURT

MARK LIMO CHESIRE, *"the appellant"* was charged in the High Court at Eldoret, with two counts of murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars in the information in respect of the 1st count were that on 30th January, 2006 at Kapcherebet Sub-Location in Baringo District within Rift Valley Province, the appellant murdered **Tereki Chepkonga**, hereinafter *"1st deceased"*. In the second count, it was alleged that the appellant on the 31st January, 2006 in the same Sub-location, District and Province, murdered **Esther Kabon Chebungei,** hereinafter *"2nd deceased*". The charges were initially preferred by separate informations which were subsequently consolidated and heard as one. The appellant denied both counts and his trial soon thereafter ensued in earnest. In a bid to prove its case against the appellant, the prosecution lined up a total of 9 witnesses. Their testimonies were in brief as follows:

PW1, Chepchirchir Chelimo, on 30th January, 2006 at about midnight, while sleeping at the house of the 2nd deceased suddenly felt something cold getting in contact with her legs. This caused her to wake up. She then saw someone standing beside her bed whom she recognized as the appellant. She testified further that the door to the house was always left open as the 2nd deceased was blind. She added that there was enough moonlight that enabled her to recognize the appellant whom she had known for five (5) years. She screamed upon recognizing the appellant who in turn cut her several times on the arm with a machete. She managed to get up, screamed and ran towards the 2nd deceased. The appellant followed her and cut the 2nd deceased on the legs and twice on the head. It is then that she ran to **Everlene Chelimo's** house (PW2). She informed her that they had been attacked by a person she did not know and asked her to call for assistance. PW2 got scared that she too would be attacked and refused to honour the request. The following morning, in the company of members of the public they proceeded to the house of the 2nd deceased and found her dead. The police were called who came and took PW1 to hospital and the body of the 2nd deceased to the mortuary.

PW2 stated that on 29th January, 2006 she was at the home of the 2nd deceased when the appellant and his father came by at about 6.00 p.m. The deceased asked the appellant's father why they were passing through her homestead. The appellant and his father and the deceased then exchanged bitter words. The appellant's father left but the appellant stayed on. Indeed he even sat down. PW2 went out to bring home the 2nd deceased's cows and upon her return, found the appellant had left. At about midnight on 30th January, 2006 PW1 woke her up and told her that someone whom she did not know had entered the 2nd deceased's house and cut them. The following morning, they went to the house of the deceased where they found her dead. The body of the deceased had cuts on the head and other parts of the body. The police were summoned who came and ferried the body of the 2nd deceased to the local mortuary.

PW3, M K K, was living with his grandmother, the 1st deceased. At about 6.30 p.m. on 30th January, 2006, the appellant went to the 1st deceased's house and gave him what he said was money wrapped in a paper and asked him to go and buy tobacco for the 1st deceased. While on his way, he opened the paper to see how much money there was, only to see something written *'trust'*. He then went back to ask what was happening. That led to an argument between the two. The appellant then ordered the 1st deceased to lie down on the bed but she declined. The appellant then took a panga from under the 1st deceased's bed and cut her on the head close to the ear. PW3 ran to call his father **J C K**, who was 30 metres away. They came back and found the deceased already dead and the appellant was nowhere to be seen.

PW4, William Koima Lemoi, the Assistant Chief of Kapcherebet Sub-Location recalled that early on the morning of 31st January, 2006 certain youths by the names **Anthony Kandie** and **Henry Rotich** went to his home and reported that two women, the 1st and 2nd deceased, had been killed from cut wounds and that another lady had also suffered cut wounds on the hands and legs. They stated that the three women were from the same family. The reportees suspected the assailant to be a young man who lived with the 1st deceased, one Joseph Kitilit, a grandson of the 1st deceased. Acting on the information he proceeded to Kabarnet Police Station and reported the incident. Accompanied by police officers, they went to the home of the 1st deceased and found her dead with cut wounds on the neck and head. Thereafter they went to the house of the 2nd deceased who they also found dead with severe cuts on the head. They collected the two bodies and PW1 whom they dropped at the Kabarnet District Hospital. The bodies of both deceased were taken to the hospital mortuary. The following morning he was told that the appellant had been arrested by members of the public who was thereafter re-arrested by the police officers.

PW5, Steven Chichimo recalled that on 31st January, 2006 at about 8.00 a.m., while at Kaptumo, one Kiboino Kandako informed him that his mother, had been killed. Kiboino further informed him that in addition his wife too had been killed but he was not told by whom. He then went home and confirmed the deaths. He stated that police officers soon arrived at the scene and took the bodies to the mortuary.

PW6, Joseph Chelimo Chepkonga the son to the 1st deceased was told of the killings of the deceased persons but did not go to the mortuary to identify the bodies.

PW7, Daudi Chepkonga, also a son to the 1st deceased stated that he knew that the appellant had killed his mother, the 1st deceased. He testified that his son, Moses Teriki, who lived with his mother, informed him on the morning of 1st January, 2006 about the killing of the deceased persons. He proceeded to inform the chief and the police. The police visited the scene. According to PW7, his son informed him that it was the appellant who had killed his mother.

PW8, Mark Kiprop Chebungey, a relative of both deceased on 7th February 2006, while accompanied by three of his other relatives, identified the bodies of the deceased at the Kabarnet District Hospital for purposes of port-mortem which was conducted in their presence.

PW9, Dr. Joseph Kiplimo, worked at Kabarnet Hospital and produced in evidence the post-mortem report prepared by Dr. Stephen Mwangi with whom he had worked for 3 years and was therefore, familiar with his handwriting. With respect to the 2nd deceased, PW8 testified that an external examination revealed multiple stab wounds on the front side of the body extending to the jaws completely distorting the skeleton. The deceased had three (3) deep cut wounds on the right shoulders, two (2) cut wounds on the left shoulder, one (1) wound on the left knee and suffered a fracture of the skull causing severe injury to the brain tissue. Following this examination, it was concluded that the cause of death was severe head injury with subsequent haemorrhage secondary to multiple cut wounds. From the record, it is apparent that no post mortem was conducted in respect of the 1st deceased.

Put on his defence, the appellant in his sworn statement denied killing the two deceased persons. He stated that on 30th January, 2006 he had gone to see his land in Kerio Valley and while on his way home he met three people who arrested him. He could not recall anything that happened on 31st January, 2006. He did not know the deceased persons nor the people who arrested him.

The Learned Judge in her considered judgment held that the death of the deceased persons was not in doubt. That the death of the 2nd deceased was confirmed by the post mortem report. That there was no post mortem in respect of the death of the 1st deceased though it was not disputed that she had been attacked and suffered fatal injuries. That both deceased died as a result of fatal stab wounds inflicted on them, and as such, their death was unlawfully caused. That PW-1 knew the appellant for five years and PW-3 gave direct evidence hence the issue of mistaken identity was ruled out. There could not have been any intervening circumstances between the time the deceased were attacked and their death. On malice aforethought, the Learned Judge held that the injuries inflicted on the deceased were vicious and deliberate. The person who inflicted the injuries intended to cause their death. The prosecution had satisfactorily established that the death of the deceased persons was caused by the Appellant acting with malice aforethought. Accordingly, she convicted the appellant and upon considering his mitigation, sentenced him to death.

Aggrieved by the conviction and sentence on both counts, the appellant filed this appeal on five grounds; that the trial Judge erred in law in convicting him; on the evidence of a minor (PW3) without adhering to the provisions of Section 19 of the Oaths and Statutory Declaration Act; on prosecution case in which the investigating officer was not called to testify; on prosecution case which contravened the provisions of section 200 (3) of the Criminal Procedure Code "hereinafter CPC"; on prosecution case which was not proved beyond reasonable doubt; and convicting the appellant on contradictory and uncorroborated evidence.

When the appeal came up for hearing, **Mr. Korir**, learned counsel appeared for the appellant; whereas **Ms. Oduor**, learned Prosecution Counsel represented the respondent. They respectively submitted orally in support of and in opposition to the appeal.

Mr. Korir submitted that the conviction of the appellant was based on no evidence at all that the appellant caused the death of the deceased. That the learned Judge should not have relied on the evidence of PW1 to convict the appellant. That the identification of the appellant by way of recognition by PW1 was not safe considering the circumstances obtaining at the time of the alleged recognition. That the time was at midnight and PW1 and the 2nd deceased were asleep when they were rudely woken up. That the source of light was moonlight. The attack happened inside the house. It was impossible that the moonlight could have penetrated the house sufficiently to enable PW1 to positively

recognize the appellant. Counsel further submitted that the evidence of PW2 was critical to the identification of the appellant. However, PW2 testified that PW1 had told her that she did not know the person who had cut them and fatally injured the 2nd deceased. That it was incredible for PW1 to say she had recognised the appellant and yet at the same time claim not to have recognized the assailant when reporting the incident to PW2. It would thus appear according to counsel, that the recognition of the appellant was a mere afterthought.

On the 1st count, counsel faulted the learned Judge for relying on the evidence of PW3 a single witness and a minor at that. There was no corroboration of the minor's evidence in any case. The witness never made any reference to the deceased in his entire evidence. There was a possibility that someone else could have committed the crime. PW4 gave the name of one such suspect as Joseph Kitilit. To counsel this raised a reasonable doubt in the prosecution case that should have been resolved in favour of the appellant. The evidence of the remaining witnesses was merely hearsay and of little assistance to the court. Counsel further submitted that during trial the evidence of PW1, 2 and 3 was taken by Mwilu, J. *(as she then was)*, before the trial was taken over by G. W. Ngenye, J. who took the evidence of the remaining witnesses, crafted and delivered the judgment. However, section 200(3) of the CPC was not complied with according to counsel. Failure to fully comply with the provisions of the said section was fatal to the prosecution case and rendered the trial a nullity, counsel submitted. Finally, counsel submitted that a key witness, the investigating officer, was never called to testify. His evidence was crucial to link the appellant to the crime and to tie up the loose ends in the prosecution case. In the absence of such testimony, reasonable doubts were cast on the prosecution case which should again have been resolved in favour of the appellant.

Opposing the appeal, Ms. Oduor submitted that the prosecution called a total of 9 witnesses who placed the appellant at the scene of crime and linked him to the offences. That the offence of murder was proved as there were witnesses at the scene and those who went to the scene later all confirmed the deaths of the deceased. On identification, counsel submitted that the appellant was recognized by PW1 which was much safer and free from possibility of mistake. PW1 testified that she was with the 2nd deceased on the fateful night. The 2nd deceased was blind and for this reason the door to her house was never closed at night. There was moonlight which enabled her to recognize the appellant whom she had known for five years.

With regard to the 1st deceased, counsel submitted that PW3 and the appellant met and had a conversation which accorded him the opportunity to know and easily recognize the appellant. The appellant then sent him to buy tobacco for the 1st deceased. When the witness came back he found the appellant ordering the 1st deceased to lie down. She did not comply and the appellant took a panga from under the bed and cut her on the head. Thus this was also a case of recognition as opposed to visual identification. With regard to compliance with Section 200 (3) of CPC, Counsel submitted that it was fully complied with. The appellant was represented by counsel who informed the court that the appellant wished to proceed with the case from where it had reached. The appellant did not ask for the witnesses who had testified to be recalled and or that the case start *de novo.* It was the submission of counsel that the appellant was never prejudiced in his defence as the remaining witnesses were cross-examined by his counsel. The failure to call the investigating officer was not fatal to the prosecution case as he was not a key witness.

We have considered the appeal, the submissions made by counsel and the law. We appreciate that all the grounds raised by the appellant are all important. However, the first issue we wish to address and which may as well determine the fate of this appeal is the alleged failure by the trial court to fully comply with the provisions of Section 200 (3) of the CPC. The record shows that the plea was taken before Ibrahim, J.; the evidence by PW-1, 2 and 3 was taken by Mwilu, J.; at some point the file was handled by Azangalala, J., Karanja, J. and Mshila, J. but they did not record any evidence. However, the evidence of the remaining witnesses was taken by G.W. Ngenye, J. who subsequently crafted and delivered the judgment.

The record shows that on 11th March, 2013 when the matter came up for hearing before G.W. Ngenye, J., Mr. Ngelechei, learned counsel holding brief for Mr. Kamau for the appellant informed the court that the case was part-heard and requested for proceedings to be typed and availed to the court and to the parties. He also applied that the case proceeds from where it had reached. The court then acquiesced to the request and ordered that the case proceeds from where it had reached. It is evident from the record that the learned Judge did not inform or formally request the appellant whether he wanted to exercise the options available to him under Section 200 (3) of the CPC as was required of her.

Section 200 (3) of the C.P.C provides *inter lia;*

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

This section applies Mutatis Mutandis to the trials in the High Court by dint of section 201 (2) of the Criminal Procedure Code.

The court in **Ndegwa v. R (1985) KLR 535** emphasized that the court in applying Section 200 of the CPC must 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…."***

Section 200(3) provides in peremptory terms that it is the duty of the trial court to inform an accused person of his right to demand that any witnesses be re-summoned and re-heard. It would appear therefore that failure to inform the accused of those options would result in a mistrial as it would amount to an infringement of the right to fair trial under article 50 of the Constitution. In **Moses Mwangi Karanja v Republic (2014)eKLR** this Court addressed section 200(3) as follows:

> ***"The record before us, the relevant part of which we have reproduced above clearly shows that the Judge did not comply as was***

required of him with the provisions of Section 200 (3) of the Criminal Procedure Code which as per Section 201 (2) was to apply mutatis mutandis in this case. He did not explain to the appellant his right to demand the recall and re-hearing of any witness as was required under that provision. Miss Oundo counters that by saying the appellant was represented by an advocate and so there was no need for that. Our short answer to that is that, it was the appellant who was on trial and the duty of the court was to the appellant and not to his advocate. The written law makes that duty mandatory. The mention in the judgment that section 200 was complied with is hollow without any evidence on record" Emphasis ours.

This Court while further emphasizing the imperious nature of Section 200 (3) of the CPC stated thus in the case of **Paul Kithinji v Republic [2009] eKLR**:

> ***"…Sub-section (3), above, is worded in mandatory terms. The failure by the succeeding Judge to comply with it rendered all the proceedings before him a nullity."***

Similarly, in the case of **Richard Charo Mole v Republic (2010)eKLR** this court held that:

> ***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.*** Emphasis ours.

This position was reinforced in **Henry Kailutha Nkarichia & another v. Republic [2015] eKLR** where this Court, sitting at Meru; delivered itself thus:

> **"The requirement that the court inform the accused of the right to recall witnesses is plain, admitting to no obscurity. The duty on the court is mandatory and a failure to comply with it wholly vitiates the trial since it goes to the very heart of an accused person's right to a fair trial. We need do no more than reiterate what we recently stated in DAVID KIMANI NJUGUNA –VS- REPUBLIC, NAKURU CRIMINAL APPEAL NO. 294 OF 2010 (David Kimani Njuguna V. Republic [2015] eKLR] after a review of several decisions of this Court on the subject;**
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> ***"All of these decisions declare that the provisions of Section 200 (3) [of the Criminal Procedure Code] are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable by the accused person himself and not through an advocate and a Judge or magistrate complies with it out of statutory duty requiring no application on the part of an accused person. Further, failure to comply by the court always renders the trial a nullity."***

From the foregoing cited authorities, it is clear that Section 200(3) of the CPC must be complied with fully and the court record must demonstrate such compliance. It was not sufficient for counsel for the appellant to merely say that the case should proceed from where Mwilu, J left. It was paramount and the court record should show that the trial court took the trouble to inform the appellant of his rights as enshrined in that provision of the law. It was not up to counsel for the appellant to tell the court how to go about its business. The appellant's counsel did not say anything as regards recalling or re-summoning witnesses.

We are satisfied that there was non-compliance with the mandatory provisions of Section 200 (3) of the CPC. The consequences of such failure leads to a mistrial. The appellant's rights to a fair trial were therefore infringed and violated under Article 50(1) of the Constitution.

Having found that the omission was fatal to the trial, the next question then is *what next?* Do we order a retrial or not? In the case of **Ahmed Sumar v Republic (1964) EA 481**, at page 483, the predecessor to this Court stated as follows:

> ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered".*** Emphasis ours

The court continued at the same page paragraph H and stated:

> ***"We are also referred to the judgment in Pascal Clement Bragan za v R [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless Court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".*** Emphasis ours.

Similarly, in the recent case of **Charo Karisa Salimu v Republic (2016)eKLR this Court** observed:

> ***"Where a trial is declared a nullity, the first option usually is to order a retrial. A retrial will, however, not be resorted to where it is likely to occasion injustice, or where it will be used merely to fill up gaps in the prosecution case. The Court will also consider the length of time that has elapsed since arrest, and whether the mistake leading to the quashing of the conviction was entirely of the prosecution's making or not."*** Emphasis ours.

The most glaring feature in this case is that it took about nine years to hear nine prosecution witnesses and conclude the case. From the

record the prosecution on several occasions had the matter adjourned. We are not sure whether the prosecution will be able to mount a successful retrial and avail witnesses to testify given that it has now been 12 years or so since the trial was concluded. Throughout this period the appellant has been in custody.

Further, our review of the evidence leaves us in no doubt at all that the prosecution case was very weak. The investigations were casual, shoddy and poorly conducted. PW1 claimed to have recognised the appellant as he brutally attacked her and fatally injured the 2nd deceased. The source of light was the moonlight. There was no interrogation of the strength or intensity of the light by the moon. Nor was there interrogation of how long PW1 observed the appellant, the direction of the moonlight *vis a vis* where the appellant and PW1 were. The scene of crime was inside a house and at night. The alleged light was through the open door. There was no description of the type of house and whether the door, left ajar would let in the moonlight rays. If the appellant was facing PW1 and the deceased and his back was against the incoming light, then how could PW1 have been able to see the face of the appellant? Further, PW1 had been sleeping when she was suddenly woken up by something touching her. She must have been frightened and not collected at all. Given all the foregoing, it cannot be said with certainty that the circumstances obtaining at the scene were conducive as to enable PW1 positively recognise the appellant.

In the case of **Cleophas Otieno Wamunga v Republic [1989]eKLR**, this Court stated:

> ***"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly stated by Lord Widgery C.J, in the well known case of R v Turnbull [1976] 3 All E.R. 549 at page 552 where he said:***
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> ***"Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.""***

Could this be one of those cases? Perhaps! After all PW1 claimed to have recognized the appellant but told PW2 immediately after the incident that they had been attacked by a person whom she did not know. Surely if she had recognized the appellant as she initially claimed, she could not have told PW2 hardly minutes after the incident that they were attacked by an unknown person. Was the alleged recognition of the appellant by PW1 therefore an afterthought; probably: The possibility then that this could have been a case of mistaken recognition cannot be ruled out.

With regard to the 1st deceased, the evidence that places the appellant at the scene was that of a minor, PW3. It was never corroborated. Neither did he make any reference to the deceased in his entire evidence. Further, no post mortem was carried out on the body of the 1st deceased for no apparent reasons. Lastly there was reference to one, Joseph Kitilit as the person who may as well have been responsible for the deaths. This angle of the case was never investigated and ruled out completely. Thus the possibility exists that another person may have killed the 1st deceased other than the appellant.

These loose ends in the prosecution case would have been tied up through the evidence of the investigating officer. However, he was never called to testify for no apparent reason(s). The consequence is that the loose ends still remain unresolved thereby creating doubt in the prosecution case which must be resolved in favour of the appellant.

In our view, and for the foregoing reasons, we are satisfied that it will not serve interest of justice to order a retrial; on the evidence on record, a conviction may be a long shot and lastly, such an order may accord the prosecution a chance to fill up gaps in their case.

The upshot is that we allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall forthwith be set at liberty unless otherwise lawfully held.

This judgment has been delivered under **Rule 32(2)** of the Court of Appeal Rules Kiage, JA having declined to sign it.

Dated and delivered at Eldoret this 6th day of June, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.