IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ. A.)

CRIMINAL APPEAL. 86 OF 2015

BETWEEN

JOSEPH ANGOLE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kitale ***(J. R. Karanja, J.)*** *delivered on 30th April, 2013*

in

HCCRC NO. 3 OF 2008)

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JUDGMENT OF THE COURT

[1] Joseph Angole (hereinafter referred to as the appellant), was tried and convicted by the High Court (J. R. Karanja, J.) for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. He was sentenced to serve 30 years imprisonment.

[2] Being dissatisfied, he lodged an appeal in person against his conviction and sentence raising 11 grounds. Before the hearing of the appeal commenced, Mr. Miyienda who appeared for the appellant in the appeal filed supplementary grounds of appeal in which 10 grounds were raised. These were the grounds that were argued during the hearing of the appeal.

[3] The grounds raised include: that no medical evidence was adduced to prove the cause of death; that the appellant was convicted on mere suspicion as there was neither direct nor circumstantial evidence adduced against him; that during the trial, the mandatory provisions of section 200 CPC were not complied with; that written submissions were admitted contrary to the provisions of the Criminal Procedure Code; that there was no evidence to prove that the appellant had malice aforethought, that an alleged confession was admitted contrary to **section 25A** of the **Evidence Act**; and that the appellant was wrongly sentenced for manslaughter after being convicted for murder.

[4] The appellant's trial in the High Court took place between 12th May, 2008 when he first took his plea before G. B. M. Kariuki, J. (as he then was) and 30th April, 2013 when he was sentenced by J. R. Karanja J. The actual hearing was handled by three judges. These were Koome J (as she then was) who heard the first four prosecution witnesses, Muketi J who also heard four prosecution witnesses and J R Karanja J who heard the appellant who was the only witness for the defence. Section 200 CPC that deals with evidence partly recorded by one magistrate and partly by another states as follows:

> ***"Section 200***
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> ***(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***
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> ***(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummons 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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right."

(5) By virtue of section 201 (2) section 200 applies to proceedings in the High Court. The record of proceedings of the High Court reveal that on 29th November, 2011 when Muketi J took over the matter, she did not explain section 200 to the appellant. Instead it was the appellant's advocate who informed the Court that the matter should proceed from where the previous judge had left it and that they did not intend to recall any witnesses.

[6] It is evident that for the appellant to exercise his right under section 200 to recall witnesses or to have the hearing start *de novo,* he must be informed of the right. However, where the appellant has had benefit of counsel and counsel informs the Court of the option that the appellant has opted to take, it can only be assumed that the defence counsel discussed the options with his client, and that an informed decision has been made based on that advice. We do not therefore find violation of section 200 of the Criminal Procedure Code in this regard.

[7] J. R. Karanja J. took over the matter on 9th February, 2012. The record shows that although the appellant was present in Court, his advocate was not present. There is no record of the court explaining section 200 of the Criminal Procedure Code or giving the appellant an opportunity to exercise the right to recall witnesses or have the hearing start *de novo*. Instead the court record of the proceedings reflects as follows:

"Coram: J R Karanja J

M/s Baroo for the State - Present

Court Clerk-Kasachoon Interpreter in English/Kiswahili Accused - Present

Court:

Part heard matter. Proceedings to be typed for further hearing and/or summons on 28th May, 2012. Defence counsel be notified. Accused be taken to Kitale District Hospital …"

[8] The learned judge thereafter adjourned the hearing several times for the remaining prosecution witnesses to testify and upon the witnesses failing to attend court, had the prosecution close its case, heard the appellant in his defence and finalized the matter by delivering a judgment.

[9] It is apparent from the above that the learned judge did not comply with the provisions of section 200 of the Criminal Procedure Code. The question is whether the appellant was prejudiced by this lapse and what is the effect on the proceedings? In a hearing, the observation of the demenour of witnesses is very crucial and this is why an appellate court would ordinarily take seriously a comment made by a trial judge on the demenour of witnesses. Therefore, a judge who has not had the benefit of seeing witnesses testify may be at a disadvantage to the prejudice of an accused person. It is for this reason that the accused person is given the opportunity to make an election whether to have the hearing of the case start *de novo,* or witnesses recalled or the hearing proceeds from where the former trial judge had left it. Where an accused person has not had the benefit of this right, his right to a fair trial may be compromised depending on the circumstances of each case.

[10] Although **section 200(1)(b)** as read with **section 200(1)** of CPC permits a judge who was succeeded by another to act on the evidence recorded by the predecessor, acting on such evidence may cause substantial prejudice to an accused person.

Section 200(4) provides in essence that where the court is of the opinion that an accused has been materially prejudiced by conviction by a judge who did not wholly take the evidence, it may order a retrial. In this case, the trial judge who took over the trial and eventually convicted the appellant did not have the benefit of seeing and hearing any of the prosecution witnesses. There was no eye witnesses to the murder of the deceased. The prosecution case depended on the credibility of the witnesses on what the appellant is alleged to have told them to do and what the appellant said to the witnesses. A proper finding of guilt or otherwise could only have been made on the basis of the credibility of the witnesses.

In the circumstances of this case, we are satisfied that failure by the judge to comply with the provisions of section 200(3) of CPC is a procedural irregularity which occasioned substantial injustice to the appellant thereby vitiating his conviction.

[11] The question is whether this Court should order a retrial. In **Ahmed Daramshi Sumar vs Republic [1964]** E.A. 481, the former Court of Appeal held that the Court will not order a retrial where a conviction is vitiated by a gap in evidence or defect for which the prosecution is to blame; and that where the conviction is vitiated by a mistake on the part of the court, an order for retrial will not be automatic, but the court will have to weigh the circumstances. In **Fatehali Manji vs Republic [1966]** E.A. 343 the predecessor of this Court stated as follows:

"In general a retrial will be ordered only where the original trial, was defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first

trial; even where conviction is vitiated by the mistake of the trial court for which the prosecution is not to blame, it does not necessary follow that a retrial should be ordered each case must depend on its own facts and circumstances, and an order for a retrial should only be made where the interest of justice require it".

[12] There is no doubt that the trial in the High Court was vitiated by a mistake on the part of the court for which the prosecution is not to blame. The appellant was facing a serious charge of murder. As noted above, he first took his plea on 6th of March, 2008, and was convicted on 30th April, 2013. This means that this case has been hanging over the appellant's head for the last ten (10) years five (5) of which he was in remand and another five (5) years in prison as a convict. We have no doubt that a lot has happened within the period of ten (10) years and memories have faded such that even if witnesses were to be available, the reliability of their evidence after ten years would be questionable.

[13] We have not found it necessary to analyze the sufficiency of the evidence that was adduced against the appellant. Suffice to note that one of the grounds raised on appeal is the absence of medical evidence to prove the cause of death, as there was no evidence adduced by the doctor who performed the post mortem examination nor was the postmortem examination report produced in evidence. The record of proceedings from the lower court supports this contention. This means that if a retrial is to be ordered, the prosecution would have the advantage of being able to address a serious omission in their evidence. In the circumstances of this matter, it would neither be fair nor just, to order a retrial.

[14] Accordingly, we allow this appeal, declare the appellant's trial in the High Court irregular, quash his conviction and set aside the sentence of imprisonment imposed upon him. We order that the appellant be set free unless otherwise lawfully held.

Dated and delivered at Eldoret this 17th day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.