IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 44 OF 2014

BETWEEN

JOHANNES AMADI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu (Chemitei J) dated the 22nd day of January, 2014

in

HCCR NO. 24 OF 2018)

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JUDGMENT OF THE COURT

[1] Johannes Amadi (hereinafter referred to as the appellant), was arraigned before the High Court at Kisumu, jointly with **Nicholas Oyombe Agai** (co-accused), for the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code.** It was alleged that on the night of 20th and 21st July, 2004, at Marenyo Sub-location of Siaya District, they murdered John Magambo (deceased). The record is not clear, but it would appear that the appellant's co-accused died during the cause of the trial.

[2] The trial initially commenced before Mwera J on 22nd January, 2009 when three witnesses testified. However, the trial had to commence de novo on the 8th July, 2009, as it was discovered that the appellant and his co-accused had been represented by a person who was not qualified as an advocate. Thereafter, four witnesses testified before Mwera J. On 6th May 2010 the matter came before J. R. Karanja J, who directed that the proceedings be typed so that the matter could continue before any other judge. No reason was given for this turn of events, but it would appear that Mwera J had been transferred from the station. On 19th January 2011 Ali-Aroni J took the evidence of one witness. The matter came before her again on 17th March 2011 when she took the evidence of another witness. On 5th October 2011 Mr Ogonda the appellant's advocate made a submission that no prima facie case had been established against the appellant. On 18th November 2011, in a ruling read by Chemitei J., Ali Aroni J ruled that the prosecution had established a case against the appellant and required the appellant to be put on his defence.

[3] On the 5th of February 2013, the matter came up before Chemitei J, who directed that since the matter was substantially heard, the proceedings be typed for the case to proceed. On the 7th November 2013, the matter came up before Chemitei J, and the appellant who at this time was the only accused was put on his defence and he gave unsworn evidence. On 21st January 2014, Chemitei J delivered his judgment convicting the appellant.

[4] From our perusal of the record and the above chronology of events, it is apparent that three judges conducted the appellant's trial. Under **sections 200** as read with **section 201(2)** of the **Criminal Procedure Code,** subject to compliance with section 200, another judge can take over the conduct of a trial before the case is finalized.

[5] Regarding conviction on evidence partly recorded by a different magistrate, section 200 of the Criminal Procedure Code states 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 resummon 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.

[6] Section 201(2) of the **Criminal Procedure Code** provides that **section 200** is applicable to trials in the High Court. Therefore in trials in the High Court before a judge proceeds with a trial in which another judge has partly heard and recorded evidence, the accused person must be informed of his right to have the hearing of the case proceed *de novo* or proceed from where the previous judge had reached. Should the accused person choose to proceed with the trial from where it has reached, the court must inform him of his right to have any of the witnesses who have already testified re-summoned and reheard.

[7] In this case, the record shows that the decision to proceed with the trial after Mwera J had stopped hearing the matter was made by a judge other than the one before whom the trial proceeded, without any reference to the appellant or his advocate. Secondly, the appellant was not at any stage informed of his right to recall any of the witnesses. At that stage four crucial witnesses upon whose evidence the appellant's conviction was anchored had testified. Judge Aroni, the second Judge who proceeded with the hearing only heard the evidence of two witnesses. One was Sgt Joseph Chekon an administration police officer who received a report of the incident, visited the scene and arrested the appellant. The second was Samuel Otieno Ogweno a clinical officer who examined the body of the deceased and carried out an autopsy and prepared a post mortem report. Chemitei J who prepared the judgment only heard the evidence adduced by the defendant in his defence.

[8] We reiterate what this Court stated in **Abdi Adan Mohamed v Republic [2017] eKLR**:

"As much as it is practically possible it is highly 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. This was succinctly explained by this Court in Ndegwa v. R (1985) KLR 535 where Madan, (as he then was) Kneller and Nyarangi, JJ.A said that:-

'It could also be 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 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.'

[9] The appellant in this appeal did not have the benefit of the judge who determined his case seeing and assessing the credibility of the witnesses, and this was crucial. The prejudiced suffered by the appellant was apparent as we shall demonstrate shortly in the way the judge addressed the evidence. This means that the appellant's right to a fair trial was violated.

[10] The prosecution evidence was that on the morning of 20th July 2004, the appellant and the deceased were at a funeral where Shadrack Orido Otieno (Shadrack) heard the appellant threaten the deceased that he would be in a coffin like **Omware** (whose funeral they were attending). Later in the evening at about 7.30p.m, the deceased took Fredrick Otieno Orido (Fredrick) and his brother to a drinking den where he bought them some liquor. However the drinking spree was interrupted when the appellant and his co-accused arrived at the den. There was an altercation between the deceased and the appellant with some exchange of words. Fredrick and his brother intervened and took the deceased who was apparently very drunk outside to rest under a tree. After a while, the appellant and his co-accused left. At about 8pm on the same night, Raphael Okumu (Okumu) a neigbour to the appellant heard the appellant and the deceased quarrelling in the appellant's home. In the process Okumu heard the deceased asking the appellant why he was beating him, and the appellant responded that he was killing him. At about 9.00 pm Fredrick who by this time had left the drinking den met the appellant who was in the company of two police officers, and the appellant pointed at him and said "This is the man whose father we have killed." Fredrick was asked to accompany the police officers and they went to the house of the appellant where they found the deceased dead, his body lying behind the appellant's house.

[11] There was no eyewitness to the commission of the offence. The prosecution evidence was anchored purely on circumstantial evidence arising mainly from the evidence of the three witnesses that is Shadrack, Fredrick and Okumu. What was not disputed is the fact that the deceased was found dead within the compound of the appellant next to the kitchen. The inculpatory facts were that the appellant had earlier threatened the deceased, that the appellant and the deceased had been involved in an altercation the same night of the murder; that Okumu had heard the appellant beating the deceased and telling him that he was killing him; and that the appellant; and that the appellant told the

police officers in the presence of Fredrick that they had killed his father.

[12] In his judgment the learned judge stated as follows:

> ***"The accused alleged that the deceased was killed by a mob but in his evidence he did not mention any person who was in the mob. He neither called any of them as witnesses.***
>
> ***Equally, puzzling is why did PW3 the neighbor fail to hear any commotion caused by the mob or the crowd as alleged by the accused? Why was he the only one who witnessed the mob and nobody else.***
>
> ***I do conclude that the prosecution has proved their case against the accused for PW1 and PW2 heard the accused threatening the deceased; there was a fight in the drinking den which shows that there was a grudge between the accused and the deceased; PW2 heard the accused beat up the deceased and even shouting that he would kill him and on going there he found the deceased dead, a fact not controverted by the defence and finally, nobody heard screams from the alleged mob or the accused raising any alarm. The accused is therefore convicted as charged."***

[13] From the above it is evident that the learned judge did not address the issue of credibility of the evidence of Shadrack, Fredrick and Okumu, but simply accepted their evidence as the cardinal truth. This was not surprising as the learned Judge had not seen the witnesses testify, and was therefore not in a position to confidently assess their demeanor or credibility. The issue of credibility of these witnesses was crucial as it was their evidence that linked the appellant to the commission of the offence.

[14] Secondly, the learned judge shifted the burden of proof onto the appellant and faulted the appellant for failing to identify persons who were in the crowd or to call witnesses in support of his defence. This was misdirection on the part of the learned judge, as an accused person the appellant had no responsibility to prove anything. He could as well have decided to remain silent, but the responsibility still remained upon the prosecution to prove its case and not just merely capitalize on the weakness of the defence.

[15] Furthermore, the learned judge rejected the appellant's defence without properly addressing it or considering the evidence for the prosecution, which, was consistent with the defence. For instance Inspector Thomas Sambili (PW4) testified that the appellant explained to him that he raised an alarm after the deceased was found within the appellant's compound near the cattle shed, that the deceased was suspected to be a cattle rustler, and that the mob responded to the alarm and attacked the deceased. Sgt Joseph Chekon (PW 5) testified that Nancy Akinyi and Okoth Otuoma went to the AP Police post and reported that a person had been apprehended in their home after entering the compound with the intention of stealing cattle and that upon the witness accompanying the two to their home they found the man within the appellant's compound dead.

[16] The prosecution evidence reveals that Nancy Akinyi and Okoth Otuoma were bonded as prosecution witnesses but the prosecution opted not to call them to testify. It is clear that the body of the deceased was indeed found within the appellant's compound. From the post mortem report that was produced in evidence, the body had injuries on the face, trunk, fractured left leg and left wrist, fractured ribs, injuries on the lungs and subdural hematoma on the scalp. Samuel Otieno the clinical officer who produced the Post Mortem form conceded that the injuries could be the result of a mob attack. The appellant's defence was therefore not an afterthought, nor was there any good reason for its rejection. The defence raised a reasonable doubt the benefit of which should have gone to the appellant.

[17] In **Paul v Republic [1976-80] 1KLR 1622 at 1624**, this Court stated as follows:

> ***"In a case depending exclusively upon circumstantial evidence the court must before deciding upon conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis than of guilt; see Simon Musoke v R [1958] EA 715 where the following extract from Teper v R [1952] AC 480,489, was quoted [1958] E.A. at page 719):***
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> *'It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.'*

[18] We come to the conclusion that the appellant was highly prejudiced by the violation of his right to fair trial through the failure by the learned judges to comply with **section 200** of the **Criminal Procedure Code.** The consequent result was as stated in **Ndegwa vs Republic** (supra) "a fatal vacuum" in the proceedings, as the learned judge who determined the case could not assess or gauge the demenour and credibility of the witnesses. We are alive to **section 200(4)** of the **Criminal Procedure Code** that gives the Court the power to order a retrial where an accused person has been materially prejudiced in a trial. However, as we have demonstrated herein, the circumstantial evidence that was before the learned judge, was not such as can be said that there was no other reasonable explanation other than the guilt of the appellant. In the circumstances, it would not be in the interest of justice to order a retrial fourteen (14) years after the offence was committed.

[19] The upshot of the above, is that the appellant's conviction cannot be sustained. We allow the appeal, and set aside the appellant's conviction and sentence. In addition, we order that the appellant shall be set free unless otherwise lawfully held.

DATED and Delivered at Kisumu this 15th day of November, 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.