IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CRIMINAL APPEAL NO. 203 OF 2016

BETWEEN

JOHN NJENGA KAMAU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nairobi
(H. I. Ong'undi, J.) dated 14th September, 2016

in

H. C. Cr. Appeal No. 146 of 2015)

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JUDGMENT OF THE COURT

This appeal calls for consideration of the principles applicable in making orders for retrial of a successful appellant.

There is only one appellant before us, but it appears from the record that in a charge sheet substituted on 26th October, 2010, there were two accused persons who took the plea before the trial commenced. The judgment of the trial court made on 10th June, 2015 indeed refers to the appellant having been *'jointly charged with a company known as Heiwa Auto Kenya Ltd'***.** The conviction was, however, on the appellant only, while nothing was said about the 2nd accused. The first appellate court also noted this anomaly but for obvious reasons said nothing more about it, choosing to deal with the appellant before it. We say nothing more about it either.

From the charge sheet on record, the appellant alone faced two counts of obtaining money by false pretences contrary to **section 313** of the **Penal Code** in that: firstly, on the **25th September, 2009** at Anniversary Towers along University Way in Nairobi area, he jointly with others not before the court with the intent to defraud, obtained cash of KShs.995,000 from one ***Harun Ardens Kipchumba Ego Kenei (the complainant)*** by falsely pretending that he was in a position to import for him a Mitsubishi Canter vehicle from Japan, a fact he knew was false. Secondly, on 30th October, 2009, at the same place and with the same intention, he obtained KShs.180,000 from the same complainant by pretending that he was in a position to import for him an engine for an Isuzu lorry from Japan, a fact he knew to be false. He denied the charges.

His trial, from the time he first took the plea on 3 March, 2010 until he was sentenced on 17th June, 2015 was rather bumpy as it went through several trial magistrates. ***Mrs. G. W. Ngenye Macharia (PM)***, as she then was, dealt with some preliminary matters and took the evidence of one witness before she was transferred in February 2012. The matter commenced de novo when **Mrs. E. Nduva (SRM)** took over on 30th October, 2012, and she heard two witnesses before she too was transferred in January 2014. **Mr. E. Cherono (SPM),** as he then was, then took over and proceeded, with the consent of the appellant, from where Mrs. Nduva had stopped. He heard the remaining four prosecution witnesses before the case was closed. On two occasions during the trial, and during the defence hearing, the trial court proceeded in the absence of the appellant's counsel, despite protests, and the appellant declined to testify in his defence. He called in vain for the trial court to disqualify itself. Undaunted by such protests, the court went ahead to close the case and write the judgment. Cherono SPM then proceeded on transfer whereupon **Mr. A. Kithinji (PM)** delivered the judgment convicting the appellant on 10th June, 2015 and sentencing him to serve three (3) years probation after the appellant expressed his willingness to refund the money paid out by the complainant.

The appellant was aggrieved by the manner the trial had been conducted and therefore appealed to the High Court. His major

protest was the violation of his right to counsel and failure by the trial court to give him a fair hearing. After examining the record closely, the High Court, **(Ong'undi, J.)**, found that:

> ***"..when Mr. Cherono (SPM) took over the matter, he proceeded as if the appellant was unrepresented, when this was not the case. The record is clear on this. In the coram before him upto the close of the prosecution case, there is no mention of counsel for the defence yet there was one before. It is not anywhere indicated that Mr. Nyongesa had withdrawn from acting for the appellant. Four out of six witnesses testified in the absence of the defence counsel, with no effort made to have him explain his absence. Advocates are officers of the court and are duty bound to explain their absence."***

The court also found that:

> ***"..when the prosecution closed its case, it is nowhere shown that the appellant was asked by the court if he had anything to say. Having been represented by an advocate, he could not have lacked something to say and even if he didn't the question should have still been put to him. Upon being placed on his/her defence, an accused person must be explained to, the provision of section 211 of Criminal Procedure code. The explanation must be borne by the court record. The record does not show that the court explained the provisions of section 211 of the Criminal Procedure Code to the appellant on 30h May, 2014 and/or on 7h April, 2015. In as much as the trial magistrate was proceeding on transfer, caution ought to have been taken to ensure that acceptable procedure was followed in taking the appellant's defence. The trial court had all the power to summon the defence lawyer to appear and explain his absence or his withdrawal from acting. "***

Finally, the court held that:

> ***"... the appellant was denied the right of representation by an advocate of his choice and the provisions of section 211 of Criminal Procedure Code were not complied with. He was denied an opportunity to adequately prepare for his defence on 7th April, 2015 since he had all along expected his counsel to be present. The court should have given him a conditional adjournment to enable him prepare even if it meant taking the defence the next day. This contravened article 50 (2) (c) and (g) of the Constitution. Failure to comply with section 211 of Criminal Procedure Code was unprocedural. "***

On the basis of those findings, the court declared the trial of the appellant a mistrial, quashed the conviction of the appellant, set aside the sentence, and ordered that the case be heard afresh by any magistrate other than E. Nduva and E. Cherono. A period of 9 months was set aside for completion of the retrial.

It is against those findings that the appellant comes before us listing four (4) grounds complaining that the learned Judge failed to re-evaluate the evidence before the trial court; erred in issuing orders of a new trial where the conviction was vitiated by the mistakes of the trial court; erred in ordering a new trial without considering that the retrial would prejudice the appellant who had already paid the complainant a sum of KShs.235,000 as ordered; and in failing to consider that a new trial would cause injustice and unnecessary hardship to the appellant.

Learned counsel for the appellant **Mr. Wanjohi Gichango,** urged the grounds orally and emphasized that the trial was vitiated by mistakes of the court in which case an order for retrial would be inappropriate. For that proposition, he cited the case of **Benard Lolimo Ekimat vs Republic [2015] eKLR** where the court held in part, thus:

> ***"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. "***

He singled out the issue of prejudice which the appellant would suffer going through a second trial when he had spent more than six years going through the first trial. He submitted that the appellant may not find the documents necessary to mount his defence after such a long time. He further observed that the appellant had not only served the sentence of probation fully but also refunded a huge sum of KShs.230,000 to the complainant from his own pocket although the complainant had paid it to a company which had since collapsed. In counsel's view, the appellant was exposed to double jeopardy and would suffer injustice. He cited the cases of **Muiruri vs Republic [2003] eKLR, and George Karanja Mwangi & 2 Others vs Republic [1983] eKLR** for the principles applicable in ordering for a retrial.

In response, learned Senior Assistant Director of Public Prosecutions, **Mr. Moses O'Mirera** submitted that the prosecution was not to blame for the debacle in the first trial. It was purely the mistake of the trial court and the prosecution should not be deprived of the opportunity to prosecute the case which it was ready and able to do. According to counsel, there was clear evidence that the appellant, and not the company, was responsible for the fraudulent acts against the complainant, which he should not answer for. A conviction, in his view, would result and a fresh consideration of an appropriate sentence would follow. He relied on the **Ekimat case** (supra) for the principles applicable.

We have anxiously considered the appeal and the submissions of counsel on both sides of the argument. As stated earlier, the central matter of law raised is whether the order for retrial made by the first appellate court should be upheld. Fortunately, there is no dearth of authorities on the principles applicable. This Court in the case of **Jason Akhoya Makhokha vs Republic [2014] eKLR** summarized some of them as follows:-

> ***"The question we have to ask ourselves now is whether this is a proper case for a retrial. In the case of Mbae Morison and Another vs Republic (Nyeri Cr. Appeal No. 306 & 305 of2006 it was held inter alia that a retrial should only be ordered where interests of justice require it. In Kanyeki vs Republic [2004]***
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> ***2 KLR 164 there is the proposition that a retrial will be ordered where witnesses could be easily traced. In Sinaraha & Another vs***

Republic [2004] 2 KLR 328, the proposition is that a retrial will be ordered only when the original trial was illegal or defective but not for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. In the case of Ekimat vs Republic [2005] 1 KLR 182 there is the proposition that a retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence, a conviction might result and should not be ordered where it is likely to cause an injustice to an accused person.

In M'Obici & Another vs Republic [2006] 2 KLR 166, the Court ruled that a retrial should not be ordered unless the appellate Court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. See also the case of Kedisia vs Republic [2009] KLR 604for the proposition that regarding an order for a retrial, the Court of Appeal is entitled to look at all the circumstances surrounding the case, taking into account the admissible or potentially admissible evidence available for determination as to whether a conviction was likely to be obtained or not; save that each case must depend on its own peculiar circumstances."

More recently, in **Charo Karisa Salimu vs Republic [2016] eKLR** this Court

observed thus:-

" 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. See Muiruri vs R (2003) KLR 552."

The unmistakable thread in all the authorities is that 'each case must depend on its particular facts and circumstances and an order for a 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 the appellant.' Explaining what the 'interests of justice' entail, and in its own summary, the court, in the English case of **Reid vs R - (1978) 27 WIR 254**, held:-

"The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury... It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. Among the factors to be considered in determining whether or not to order a new trial are:

(a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive."

In this case, the High Court was right in declaring a mistrial on the basis of contravention of the statutory provisions of **section 211** of the Criminal Procedure

Code and **Articles 50 (2) (c)** and **(g)** of the Constitution, both of which provide the bedrock of fair trial. As the Indian Supreme Court observed in the case of ***Natasha Singh vs CBI (2013) 5 SCC 741-***

"Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized."

The most glaring feature in the matter before us is that it took about six years to hear six prosecution witnesses! There is no suggestion that the prosecution was to blame in any way over that delay. Indeed, the finding by the first appellate court was that the problem lay with the trial court. The prosecution insists that it is possible to mount a retrial within a limited time frame as its witnesses are available and ready to testify. According to the prosecution, there are no gaps to fill in that evidence which on its own would sustain a conviction. As it is, what transpired before the trial court was nullified leaving the prosecution at square one where it needs to discharge its constitutional duty to society in prosecuting the case. We think the prosecution is on firm ground in making these assertions.

The flipside is the continued delay in finalizing the case which continues to hang on the appellant's neck. A proper trial may or may not exonerate him but, either way, the cause of justice will have been served The appellant will not have to repay the money involved in the fraud if he was not guilty of it. If he was guilty of the fraud, he will pay his debt to society.

Upon consideration of the relevant factors, we think the order for retrial was properly made and we uphold it. It follows that the appeal is for dismissal and we order that it be and is hereby dismissed. We reiterate the order issued by the High Court that the retrial be completed within 90 days from the date of service of this order on the new trial magistrate.

Orders accordingly.

Dated and delivered at Nairobi this 7th day of December, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR