IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CRIMINAL APPEAL NO. 1 OF 2017

BETWEEN

ABDI ADAN MOHAMED ……. APPELLANT

AND

REPUBLIC ……RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Emukule & Otieno, JJ.), dated 24th September, 2015 in Criminal Appeal No. 271 of 2012)

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JUDGMENT OF THE COURT

The Principal Prosecution Counsel, Mr. Yamina, conceded this appeal but on a totally different ground from the two proffered by the appellant. The appellant, for his part argued, first that the learned Judges, like the trial court erroneously and heavily relied on the evidence of a key witness who did not testify and secondly, that both courts also used a flawed police identification parade to link the appellant with the crime charged.

For his part Mr. Yamina drew our attention to pages 29, 30, 53, and 56 of the record to demonstrate that following the transfers of Hon. Nzioki, S.R.M and Hon. R. Makungu, S.R.M, who had respectively heard several witnesses, the hearing on each of those two occasions had to start *de novo.* On the last occasion, which concerns us in this appeal Hon. Omburah, SRM having taken over the trial from Hon. Makungu, pursuant to the provisions of **Section 200** of the Criminal Procedure Code and on application of the appellant directed, on 22nd February, 2010 that the trial proceeds *de novo.* After those directions only one witness testified, followed by several and prolonged adjournments. On 24th February, 31st May, and 30th June, 2011 the prosecution expressed difficulty in tracing the witnesses and applied to the court to proceed under **Section 34** of the Evidence Act. In a terse ruling, the learned magistrate believed that the appellant, perhaps being aware of the difficulty in availing the witnesses who had already testified, sought to use **Section 200** to escape criminal liability and so concluded that what the appellant was engaged in amounted to abuse of the process of the court. In the end he found that, since the same witnesses had testified twice before, without any plausible reason being advanced by the appellant for recalling them, it would not be prejudicial to order the trial to proceed from the stage Hon. Makungu had reached. He so directed relying on **Section 34** of the Evidence Act, and in effect reviewing his earlier orderfor *de novo* hearing.

With that the prosecution case was closed and the appellant put on his defence after a ruling of a case to answer. The appellant had no defence to offer.

Relying on the evidence recorded by Hon. Makungu, the learned magistratein his judgment found the appellant guilty of robbery with violence contrary to **Section 296(2)** of the Penal Code; that on 24th January, 2008 the appellant, while armed with a G3 rifle and using actual violence robbed **Francis Nderitu Mugo** (the complainant) of a motor vehicle, cash, mobile phone, shoes and a shirt. The appellant was convicted and sentenced to death. He was however acquitted of the offences of stealing a firearm and of being in possession of a firearm without a certificate.

Because this is second appeal where we are only concerned with questions of law, but we shall give the following brief background before considering the grounds raised by the appellant and the respondent.

At 4.45 am on the night of the robbery the complainant who was engaged by **Swaleh Muksin** as a taxi driver was at his station at Mwembe Tayari when a customer who introduced himself as a police officer approached him and asked to be taken to Changamwe Police Station. The man though not in police uniform had a pocket radio ordinarily used by police officers and was also armed with a rifle. On the way, the two having settled on the fare of Kshs.300, the customer's true colours emerged. He pointed the rifle at the complainant and directed him to stop the car. The robber then took control of the car with the complainant in the boot, having robbed him of the items we have listed in the preceding paragraphs. As the car moved the complainant realised that the boot was not locked and waited for convenient time. When the time came, as the car slowed down he jumped out and ran to Changamwe Police Station where he reported the robbery. He gave thedescription of the lone robber; that he was of Somali extraction with two missing teeth and the rest stained.

The rifle had earlier on in the day been stolen from a police officer who had fallen asleep while on patrol duties. A few days after the theft of the rifle one **Abubakar Mwanzia** went to the police station to report that a stranger had left it with him for safe custody. When the police got to where he had hidden it they also recovered a clinic card in the name of **Abdi Adan** with the telephone number scribbled on it. While the said **Abubakar Mwanzia** was still being interrogated at the station, the appellant, who is of Somali extraction, and answering to the description earlier given, arrived at the station seeking a P3 form. He produced a treatment card in the name of **Abdi AdanMohamed**. From him NHIF and NSSF cards in those names were also retrieved. **Abubakar Mwanzia** pointed him out to the police as the person who had given him the rifle. To complete the circle the complainant identified the appellant at a police identification parade. **Abubakar Mwanzia** was, however not summoned to testify for the prosecution.

On the basis of this evidence the learned trial magistrate found as he did that the appellant was properly identified and was therefore guilty of robbery with violence.

Although the two grounds raised by the appellant are as important questions of law as the single one raised by the respondent, we are of the view that the latter deserves our full consideration first given its novelty before dealing with the grounds proffered by the appellant.

We reiterate that the learned trial magistrate having specifically made an order pursuant to the provisions of **Section 200** of the Criminal Procedure Code to have the hearing start *de novo* changed his mind upon application by the prosecution to invoke **Section 34** of the Evidence Act after it failed to procure the attendance of the witnesses who had previously testified.

In the High Court the learned Judges noted that, although the question of the invocation and application of **Section 34** aforesaid was not raised before them, in their view the learned magistrate properly applied it and that he had the power as the presiding officer to curb abuse of the court process since, to them the appellant appeared determined to frustrate the trial; and that the learned magistrate was convinced there would be no prejudice to the appellant by relying on the testimonies of the witnesses who had testified before.

Because of their relevance to the question before us we reproduce the two sections herebelow:

"34. (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—

(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—

(b) the proceeding is between the same parties or their representatives in interest; and

(c) the adverse party in the first proceeding had the right and opportunityto cross-examine; and

(d) the questions in issue were substantially the same in the first as in the second proceeding.

(2)For the purposes of this section—

(a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused". (Our emphasis).

The section has been applied in civil as well as criminal cases.

Section 200, on the other hand provides, in pertinent areas that;

"200. (1) Subject to sub-section (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 re-summon the witnesses and recommence the trial.

(2) …..

(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 re-heard and the succeeding magistrate shall inform the accused person of that right.

(4) ….."

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 judgmentas it is important for the final arbiter to be in a position to weigh the evidence taken together with his or herobservation 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. .....for these reasons we have stated, in our view the trial was unsatisfactory."

In other words **Section 200,** as was emphasised in **Ndegwa** (supra) will be resorted sparingly and only in cases where the exigencies of the case dictates. Even where the trial magistrate 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 such a case the succeeding magistrate may continue with the trial from the stage it had reached. The provision can also be used where the evidence already recorded is more or less formal or largely uncontroverted.

Section 200 envisages two situations in a trial that is incomplete at the time the trial magistrate ceases to exercise jurisdiction. The trial magistrate will have either recorded the whole or part of the evidence. Where judgment has been written and signed by the former magistrate, the succeeding magistrate is only required to deliver it. Where all the witnesses have been heard and the trial magistrate is transferred, no issue arises. The succeeding magistrate may act on the recorded evidence. But the succeeding magistrate may also **recommence** the trial and **resummon** witnesses.The transition of criminal cases from a magistrate or judge who has ceased to have jurisdiction to the one succeeding him or her remains a matter of concern.

Problems are normally encountered in the last scenario where the succeeding magistrate decides to adopt the evidence recorded by the predecessor or altogether recommence the trial. In that case the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right. As we have said earlier where only a handful of witnesses have testified or where the evidence so far recorded is not contested or is only formal in nature, the hearing need not start *de novo.*

The re-summoning of a witness or witnesses and re-hearing of the case is intended to ensure that the succeeding magistrate is able to assess personally and independently the demeanour and credibility of the particular witness or witnesses and to weigh their evidence accordingly.

The learned Judges in **Ndegwa** (supra) emphasised that the court in applying the provisions of **section 200** must ensure the accused person is not prejudiced. They said:

"…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…."

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.

It must, however be remembered that it is the demand by the accused persons to re-summonwitnesses, in

circumstances that make such demands impossible to grant, particularly in situations where the witnesses cannot be traced or are confirmed dead that has been the single-most challenge to trial courts.To ameliorate this, some of the considerations developed through practice to be borne in mind before invoking **Section 200** include, whether it is convenient to commence the trial *de novo*, how far has the trial reached, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused. See **Joseph Kamau Gichuki v. R** CR. Appeal No. 523 of 2010, cited in ***Nyabutu & Another v. R,*** *(2009) KLR 409*, where the Court stressed that;

> "**By dint of section 200(1) (b) of the Criminal Procedure Code a succeeding judge may act on the evidence recorded wholly by his predecessor. However, Section 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial started by a predecessor owing to the latter becoming unavailable to complete the trial. See Ndegwa v. R. (1985) KLR 535. In this case the trial judge passed on after having fully recorded evidence from 7 witnesses and from the two appellants and had in fact summed up to the assessors. The trial, moreover, was not a short one but a protracted one which had taken over five years to conclude. The passage of time militated against the trial being started *de novo*. Though prosecution witnesses might have been available locally, re-hearing might have prejudiced the prosecution, and possibly also, the appellant because of accountable loss of memory on the part of either the prosecution witnesses or the appellants. Musinga, J. in our view acted in an attempt to dispatch justice speedily and cannot be faulted because the law permitted him to do so. It cannot be lost in mind that public policy demands that justice be swiftly concluded."**

Was **Section 34** aforesaid intended to supply the evidence envisaged by **Section 200** so that upon a magistrate who succeeds another who has partly heard a case can rely on the earlier recorded evidence if it is demonstrated that the witness sought to be re-called for the reasons, among others that the witness is dead?

Where, in the language of **Section 200(3)** the accused demands that any witness be**"re-summoned and re-heard**," the demand must be subject to availability of the witnesses sought to be re-summoned. It, of course, will be impractical where it is demonstrated that the witness sought to be re- summoned is deceased, to insist on calling such a witness. Similarly if a witness cannot be traced and it is demonstrated to the satisfaction of the court that efforts to trace him have failed, the magistrate or judge may adopt and rely on the evidence on record previously recorded by the outgoing magistrate or judge. That is why in demanding the re-summoning of any witness, the accused person must do so in good faith.

The language of **Section 34** is wide enough to encompass situations where the witness who had already testified is dead, or cannot be found, or is incapable of giving evidence, or is prevented by the accused person from attending court, or where his presence cannot be obtained without an amount of delay or expense which in all fairness would be unreasonable. In such a case the evidence recorded by the previous trial magistrate or judge is admissible in the trial by the succeeding magistrate or judge. To resort to previously recorded evidence under **Section 34**, the proceeding must be between the same parties as the previous proceeding and in criminal trial the parties are deemed to be the prosecutor and the accused person; the adverse party in the first proceeding had the right and opportunity to cross-examine the witnesses; and the questions in issue were substantially the same in the first as in the second proceeding.

In this appeal we have pointed out that the hearing started *de novo* three times. Hon. T. Nzioki heard five of the six witnesses the prosecution intended to call and was transferred at that stage. When Hon. Makungu took over the hearing started *de novo* and heard four witnesses before he was also transferred from Mombasa court. Hon. Omburah was the third trial magistrate. He too ordered for a fresh hearing upon application by the appellant. On his part he heard only two witnesses when the trial ran into headwinds as it became apparent that the witnesses who had testified earlier were not available, forcing the prosecutor to invoke **Section 34** for the court to consider the evidence already on record, blaming the

appellant for demanding re-hearing each time a new magistrate took over.

The learned magistrate, without hearing the appellant on the application, proceeded to review his earlier order and directed that he would rely on the previously recorded evidence.We reiterate what 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 therebyprejudiced. It ought to be remembered always that where an accused person demands for the recalling of a witness or witnesses who are said to be unavailable due to death, or cannot be found, or is incapable of giving evidence, or whose presence cannot be obtained without unreasonable or expense, the burden of proving these things is on the prosecution. At no stage did the prosecution avail evidence of which witnesses they were unable to avail and why. Throughout the issue for some time was that the availability of the prosecution. Towards the end, it was generally intimated that the investigating officer had difficulty in tracing some witnesses. What is more telling is the fact that even after the trial magistrate ordered that the trial would proceed from where the last magistrate stopped, the prosecution sought time to establish who in the list of witnesses had not testified.

For the reason that the trial magistrate failed to establish why the witnesses could not be called and instead went ahead for review his own order without giving the appellant an opportunity to comment on the prosecution application, there was a mistrial. Though alive to the history of the trial, the learned Judges merely agreed with the course employed by the learned magistrate to adopt the evidence presented before his predecessor but erred for failing to interrogate whether there was any basis for the magistrate to do so without establishing why the witnesses were unavailable.

Having concluded that there was a mistrial, we do not think any purpose will be served in considering the other grounds in this appeal save to say, with regard to a retrial that, in view of the history of this case a retrial is not a feasible option. The case has been in court for nine years and like never before we cannot guarantee the availability of the witnesses.

As we conclude we think this appeal demonstrates quite clearly how **Section 200** has been applied mechanicallyin disregard to the implications on the overall administration of justice, even in cases undeserving that ought to proceed without re-calling witnesses or those that should be completed by the outgoing magistrate, for example, in the matter before us, the trial that commenced in 2008 was not concluded until 2012, a period of 4 years due to transfers of trial magistrates. We do not understand why Hon. T. Nzioki who had heard virtually all the witnesses, except one could not return to complete the trial. Starting one hearing afresh three times can cause witness fatigue and apathy. Trial courts ought to comply with the guidance given in the case of **Ndegwa v. R** [supra] that **Section 200** should be used sparingly; that in cases where only a few witnesses have testified and are available, a new trial may be ordered.

Finally we must point out that, by the proviso to **Section 201(2)** of the Criminal Procedure Code **Section 200** what we have said in this judgment applies *mutatis mutandis* to trials held in the High Court.

This appeal for all the reasons given must succeed. It is accordingly allowed, the conviction quashed and sentence set aside. The appellant shall forthwith be set at liberty unless for any lawful reason held.

Dated and delivered at Mombasa this 11th day of May, 2017.

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……..……

JUDGE OF APPEAL

K. M'INOTI

……..……..

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR