IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE MOHAMMED, & JJ.A.)

CRIMINAL APPEAL NO. 54 OF 2016

BETWEEN

REUBEN SHANGI AKELO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court at Nairobi dated 26th

November, 2013 by Achode, Ngugi JJ.

in

HC.CR NO. 410 OF 2008)

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JUDGMENT OF THE COURT

The Appellant **REUBEN SHANGI AKELO** was charged with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars of the offence were that on the 18th November, 2004 along Jogoo Road in Nairobi within Nairobi area jointly with others not before court while armed with dangerous weapons namely pistols robbed Moses Macharia Kamau of cash Ksh.1,800/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Moses Macharia Kamau.

On 10th February, 2005 the appellant entered a plea of not guilty and it was not until 21st February, 2006 when his trial commenced before F. Nyakundi the then SRM Nairobi who recorded the evidence of 7 prosecution witnesses. On 3rd June, 2006 the prosecution closed its case and the case was adjourned for purposes of recording submissions on no case to answer. On 16th January, 2007 upon the appellant's request Mutoka SPM directed that the case to start *denovo*. However on 10th May, 2007 Meoli Ag CM (as she then was) who had taken over the conduct of the case, inquired whether the appellant wished to recall any witness and the answer provided is "**I will not recall any witness.**" The two conflicting positions became the subject of a ruling dated 25th February, 2008 by the then PM Nairobi, Mrs. Wamae who found that the appellant had opted not to recall any witness. On 10th May, 2001, Mrs. Wamae directed that the matter proceed from where it had reached. She further informed the appellant that he had a right

of appeal within 14 days in the event that he was not satisfied with her ruling. The appellant was dissatisfied with the outcome of the ruling and he challenged the ruling vide High Court Application No. 140/2008 which was subsequently disallowed. On 16th October, 2008 Mrs. Wamae asked the appellant to defend himself. The appellant sought an adjournment on account of ill health but the court declined, given the numerous adjournments that had been sought by the appellant in the past. The appellant walked out of the courtroom and the trial magistrate seized of the matter then made the following remarks:-

> **"It appears the accused is avoiding giving his defence (sic) which has been pending since June, 2006. Litigation must surely come to an end. Accused's previous efforts to derail the hearing has led to a delay of 2 years since the prosecution case was closed. All considered I take it that the accused has no evidence to offer."**

The learned magistrate thereafter noted that the appellant had closed his case and proceeded to render a judgment dated 13th November, 2008 wherein the appellant was found guilty of robbery with violence and sentenced to death as by law prescribed. The appellant was dissatisfied with the outcome of the case and he duly filed an appeal in the High Court. On 26th January, 2013 Ngugi and Achode, JJ. dismissed the appellant's appeal. Undeterred the appellant filed the appeal before us.

During the plenary hearing before us on 9th March, 2017, Miss Nelima learned counsel for the appellant abandoned the appellant's homemade grounds of appeal filed on 24th April, 2014. Instead she relied on the Supplementary Memorandum of appeal dated 27th July, 2016. The grounds set out therein are as follows:

> **1. That the trial was a nullity for failure by the magistrate to comply with section 200 of the Criminal Procedure Code and also section 306 (1) of the CPC**.
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> **2. That the trial court and the first appellant court erred in law in convicting the appellant on the evidence of identification which evidence was improper, unreliable and unacceptable.**
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> **3. That the appellant court erred in law in failing to consider and evaluate the evidence thereby arriving at a wrong conclusion.**
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> **4. That the appellant was not accorded a fair trial as he was denied a chance to give his defence.**

Miss Nelima for the appellant urged us to find that the failure to comply with **S.200** and **S.306 (1)** of the Criminal Procedure Code was fatal to the prosecution case.

She argued that whereas Hon. Nyakundi conducted the trial until the prosecution closed its case, on 13th September, 2006 the trial was taken over by several other magistrates, some of whom failed to comply with **Section 200 (3)** of the **CPC**; that on 16th January, 2007, the appellant applied to have the case start *de novo*, which prayer was not granted and further that the trial court erred in relying on the identification parade which was irregular.

In opposing the appeal, Mr. Mailanyi, the SADPP urged us to dismiss the appeal on the basis that the appellant had used all the tricks in the book to delay the finalization of the trial; that although on 5th April, 2007 Meoli Ag. CM ordered for the trial to proceed under **section 200** of the CPC, on 10th May, 2007 the appellant indicated that he did not wish to recall any witness. It was Mr. Mailanyi's further submission that when the appellant was asked to make his defence he did not raise an objection to the effect that no ruling (on whether he had a case to answer or not) had been made but instead the appellant walked out of the court room. On the issue of irregular identification, it was learned counsel's submission that this was properly conducted by PW4. In conclusion, Mr. Mailanyi submitted that any errors or omissions in the manner the trial was conducted is curable under **section 382** of the CPC.

This being second appeal, this Court will not as a general rule interfere with the concurrent findings of

fact of the two courts below unless they are shown not to have been based on evidence. In **David Njoroge Macharia v. R [2011] eKLR** it was stated that under **section 361** of the Criminal Procedure Code:

> **"Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings** (see also Chemangong vs Republic (1984) KLR 213)."

We have considered the record, the memorandum of appeal, the rival oral submissions, the authorities cited and the law.

Firstly, on the issue that the appellant was not given a fair trial as he was not accorded an opportunity to give his defense, the first appellate trial court considered this complaint and summed up the position as follows:

> "**As can be discerned from the brief procedural history of this case set out above, the appellant appears to have employed every tactic possible, including filing proceedings in the High Court, to avoid having his trial proceed to full hearing and determination. When all else failed, he elected to walk out of court and not present his defence, in such circumstances, it appears to be to stretch the truth somewhat for the appellant to now allege that he was denied facility to prepare his defence, and that therefore his constitutional rights were violated, this ground also, in our view, is totally lacking in merit."**

We too are of a similar view. The trial court having given the appellant the opportunity to defend himself and given his past antecedents of putting every spanner on the works so as to delay the trial, the trial magistrate was right in concluding that the appellant had opted not to give his defence by walking out of the court room.

The other ground of appeal raised by the appellant was that the identification evidence was unreliable. Again the trial court considered this contention and in our view rightfully found that the appellant was identified by PW2 and PW3 who were at the scene of the robbery on 18th November, 2014. The robbery was committed in broad daylight and the time of the day was around 1-2 pm. Furthermore, PW5 had known the appellant since birth. PW5 knew the appellant's mother and his siblings, having been a resident of Mbotela Estate (where the appellant also resided) for 42 years. The 1st appellate court considered the evidence of PW5 as well as that of PW2 who picked out the appellant from the identification parade carried out by PW4 and concluded that.

> **"... the totality of the evidence can lead to no other conclusion than that reached by the trial court with regard to the guilt of the appellant".**

We agree with the above summation of the first appellate court.

The other ground of appeal raised by the appellant was that the trial court failed to comply with **S.200** and **S.306 (1)** of the CPC **Section 200** of the CPC provides:-

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

The non compliance of Section 200 of the CPC was addressed by Hon. Mrs. Wamae who in a ruling dated 25th February, 2008 stated:

"The brief history of this case is that accused was arraigned in court on 10th February, 2005 and was charged with robbery with violence contrary to section 296(2) of the Penal Code Cap 63 Laws of Kenya. The prosecution case was heard and concluded before Hon. Nyakundi Mrs-SRM on 13th June, 2006 and she was thereafter transferred before she could hear the defence case.

When the matter came up for further hearing on 16th January, 2007 before Hon. Nyambura Mrs – SRM accused applied to have the matter heard afresh. His application was objected to by the prosecutor and when accused intimated that nthe court wanted to oppress him, the magistrate disqualified herself from hearing the matter and on the same date, Hon. Mutoka SPM ordered that the case be heard de-novo.

On 10th May, 2007 accused appeared before Hon. Meoli, Chief Magistrate (as she then was) and after section 200 CPC was explained to him and upon being asked if he wished to recall any witnesses replied in the negative. When this matter came up for further hearing before me on 18th October, 2007 accused applied to have the matter heard afresh. In view of the conflicting orders made earlier, I referred the matter for directions and Hon. Murage Senior Principal Magistrate (as she then was) ordered that the case proceeds for hearing from where it had reached.

When this matter came up for further hearing before me again on 20th February, 2008 accused made another application to have the case heard afresh. The learned prosecutor objected to accused's application on the grounds that court had already made an order that the case proceeds from where it had reached. He further submitted that accused had on several occasions made applications to have the matter adjourned and that his application ought to be disallowed.

I have considered the submissions by the accused and by the prosecution in the light of the record before me. It is on record that an order to have the case recommence de novo was made on 17th January, 2007 but thereafter and more specifically on 10th May, 2007, the court ordered that the case proceeds for further hearing after accused opted not to recall any witness. Having intimated that he did not wish to recall any witnesses, accused waived his right under section 200 CPC. He cannot now be permitted to go back on his earlier demand that the case be heard de novo because that issue has already been determined and this court has no jurisdiction to undo its own orders.

This trial is at an advanced stage. This court is required to function expeditiously and from 13th June, 2006 when the prosecution case was closed the court has done its best to make progress in the hearing of this case but accused has shown by his conduct that he does not wish the trial to proceed. I hold that court cannot condone such mischief because what accused attempts to do is to derail the proceedings. From the foregoing the application by accused is disallowed and I hereby order that the hearing shall proceed without further delay."

The appellant was dissatisfied with the ruling and he filed his appeal to the High Court. On 25th

September, 2008 in the presence of the appellant the court was informed that the appellant's appeal was rejected. The court thereafter directed that the appellant to offer his defence. On 16th October, 2008 the appellant declined to make his statement and walked out of the court room. In our view, the appellant's contention of non-compliance with Section 200 of the CPC is without merit.

As regards non-compliance with Section 306 (1) of the CPC, the section provides as follows:

> "**(1) when the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offense shall, after hearing, if necessary, any argument which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.**
>
> **(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the a court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.**
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> **(3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence".**

As stated above the appellant had taken the court in twists and turns. Although he had initially stated that he wanted to recall the witnesses, on 10th May, 2001 he dispensed with the recall of the witnesses. Again, when called upon to make his submission on no case to answer, he demanded an OB from the Police Station. In its ruling of 25th February, 2005, the court directed that the appellant makes his defence. This admittedly was without compliance with **S.306** of the CPC. However, it is noteworthy to point out that the appellant did not object that **S.306** had not been complied with. Further we are of the view that no miscarriage of justice was occasioned to the appellant. **S. 382** of the CPC provides as follows:

> "**Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.**
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> **Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.**

In our view, although it is regretted that the trial court failed to comply with **S.306** of the CPC, and given the appellant's conduct of making every effort to derail his trial, we find that no miscarriage of justice was occasioned. As stated above when the appellant was called upon to make his defence, he simply walked out of the court room. The appellant was not denied a fair trial as he was given an opportunity to defend himself, but he opted to walk out of court.

As regards the contention that the appellate court failed to re-analyse and re-evaluate the evidence and hence arrived at a wrong conclusion, we think that this contention is not supported by the evidence. This is because the appellant was arrested on 3rd January, 2005 after PW1 frisked him and found him to be in possession of a gun. The appellant was taken to the Central Police Station. On the other hand PW2

witnessed the robbery on 18th November, 2004 at about 2 pm. On 9th February, 2005 PW2 identified the appellant at Buruburu Police Station on an identification parade conducted by PW4. There was also the evidence of PW5 a resident of Mbotela Estate, who knew the appellant from birth. PW5 witnessed the robbery on 18th November, 2004 and recognized the appellant as one of the robbers. Indeed, the appellant's eyes and that of PW5 'locked' and PW5 fearing for his life, took cover. In its analysis the first appellate court rendered itself as follows:-

> **"The appellant was convicted on the evidence of recognition by PW5, and on the identification evidence of PW2."**

It is also our view that the evidence against the appellant was water tight and it is preposterous to blame the first appellate court of failure to re-analyse and re-evaluate the evidence tendered in the trial court. The upshot of the above is that we find no merit in this appeal. It is hereby dismissed.

Dated and delivered at Nairobi this 28th day of July, 2017.

G.B.M. KARIUKI, SC

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JUDGE OF APPEAL

F. SICHALE

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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