**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**CRIMINAL APPEAL NO. 22 OF 2011**

**(CORAM: WAKI, NAMBUYE, & KIAGE, JJA)**

**BETWEEN**

**PETER OMITO OYUEKA……...…….....…....1ST APPELLANT**

**PAUL MBOYA AJEWE.....2ND APPELLANT**

**NICHOLAS OKOTH OYOMBA.....3RD APPELLANT**

**DENNIS OTIENO OYOMBA.....4TH APPELLANT**

**AND**

**REPUBLIC.....……..……...…….. RESPONDENT**

***(Being an appeal from the judgment of the High Court of Kenya at Kericho (G.B.M. Kariuki, Maraga JJ.) dated on 9th day of March, 2011***

**in**

***H.C.CR.A. No. 33B OF 2009***

***(Consolidated with Appeals Nos. 34/09, 35/09, 36/09 & 37/2009)***

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**JUDGMENT OF THE COURT**

Both **Mr. Nyangiri,** learned counsel for the appellants and **Miss Ngovi,** the learned Prosecution Counsel agree, correctly, that our determination of whether or not there was compliance with the requirements of **Section 200 (3)** of the **Criminal Procedure Code** when the succeeding Magistrate took over the trial of the case midway is determinative of the appeal without going into the merits of it.

The appellants alongside another were charged, tried, convicted and sentenced to death on two counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code. They faced other counts but were acquitted on them. Their first appeals to the High Court at Kericho **G.B.M Kariuki** and **D. K. Maraga JJ.** (as they then were), were all dismissed save that of their co-accused one **SAMUEL MUIRURI**

**NGURE** who was acquitted and set at liberty.

From the record before us, it is apparent that the appellants' trial at the subordinate court was heard by a succession of learned Magistrates who each heard different witnesses piece meal. On 25th May 2007, for instance, **K. Mogambi SRM** took over after **W. Nyarime** was apparently transfered having taken the evidence of PW1 and PW2. The attempt at complying with **Section 200** by the learned succeeding Magistrate is recorded as thus;

> ***"S. 200 (1) CPC explained to the accused. Accused 1 the case to proceed.***
>
> ***Accused 2 - the case to proceed***
>
> ***Accused 3 "***
>
> ***Accused 4*** "

We are not satisfied that this was a full compliance with the statutory requirement which is set out in the relevant provision of the CPC as follows;

> ***"Section 200 (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."***

It will be noted that the right of the appellant to recall any witnesses who had testified before the previous Magistrate, which the succeeding Magistrate is duty bound to inform the accused about, it at sub-section (3). There is no indication that the said sub-section was explained to the appellants. That omission is fatal and renders the trial a nullity as has been stated repeatedly by this Court. See **NDEGWA VS. REPUBLIC [1985] KLR 534** and **JOHN BELL KINEGENI VS. REPUBLIC [2015] eKLR.**

The record does contain several other procedural miss steps but we need not go into them as that single non-compliance in itself renders the entire trial a mistrial.

The question that remains for our determination is whether we should order an outright acquittal of the appellants as urged by Mr. Nyangiri or a retrial as besought by Miss Ngovi. The decision we make must be that which meets the ends of justice. Some of the factors we consider include whether the mistrial has been occasioned by the Prosecution or by the court; the length of time that the appellants have spent in custody and the availability of witnesses, which implicates the viability and fairness of a new trial. We also cannot ignore the interest of the victims of crime. There is an undeniable public interest need for allegations of criminality to be judicially interrogated so as to provide vindication and closure.

The issue is best expressed as it was in **MUIRURI VS. REPUBLIC [2003] KLR 552** thus;

> "***The principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."***

Having borne those principles in mind, we are of the view that even though the appellants have been in custody for long, the interests of justice compel a retrial.

The upshot is that the convictions of the appellants are quashed and the sentences set aside. They shall be presented before the Chief Magistrate's Court at Kericho within two weeks of this order with a view to taking plea for a new trial.

***Dated and delivered at Nakuru this 27th day of April, 2016.***

***P. N. WAKI***

**……**

***JUDGE OF APPEAL***

***R. N. NAMBUYE***

**……**

***JUDGE OF APPEAL***

***P. O. KIAGE***

**……..**

***JUDGE OF APPEAL***

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

***DEPUTY REGISTRAR***