IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

CRIMINAL APPEAL NO. 309 OF 2011

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

BETWEEN

MUTABIRI MITHIKA KOOME.......………....….........................APPELLANT

AND

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

(Being an appeal from the Judgment of the High Court of Kenya at Meru (Lesiit, J.) dated on 26th day of February, 2011

in

H. C. Cr. A. No.77 of 2003

****

JUDGMENT OF THE COURT

1. There are six grounds of appeal raised by learned counsel for the appellant, **Ms. Nelima Jacqueline**, in a supplementary memorandum of appeal, to challenge the decision of the High Court in this murder trial. On one ground however, the appeal was conceded by learned Senior Prosecution Counsel **Mr. Kariuki Mugo** and we think he was right to do so. In the event, we do not intend to delve into the facts and merits of the case. The ground was framed as follows:

   "1. That the trial was a nullity as Section 200 of the Criminal Procedure Code was contravened".

2. The appeal arises from the judgment of the High Court **(Lesiit J.)** delivered on 24th November 2011, in which the appellant was convicted for the offence of murder contrary to **section 203** as red with **section 204** of the **Penal Code**. It had been alleged in the Information filed by the Attorney General, that on the 8th day of April 2003 at Machungulu sub-location in Meru North District, he murdered Peter Murugu M'Itumitu.
3. The trial opened before **Emukule J.** on 11th June 2008 who heard three witnesses before the case was adjourned . Several other adjournments followed but Emukule J. left the station before the matter landed before Kasango J. for further hearing on 24th April 2010. **Kasango J.** heard a

complaint by the appellant that his case had taken too long to be heard and concluded since his arrest 7 years earlier. He blamed his advocate for the delay and the advocate was substituted, only to be reinstated at the request of the appellant. Kasango J. then heard a Preliminary Objection raised on the entire prosecution case by the appellant on the ground that he was detained by the police after his arrest beyond the period stipulated in the Constitution and was therefore entitled to an acquittal. That application was dismissed on 3rd March 2011 and the further hearing of the case was set to continue.

4. Kasango J. appears to have left the station before the case landed before Lesiit J. on 31st May 2011. Without much ado, Lesiit J. proceeded to hear one witness who was availed by the prosecution that day. An application for adjournment to call four other witnesses was rejected due to the lengthy time taken to complete the trial, and the prosecution closed its case. Lesiit J. also heard the appellant and recorded the submissions of counsel before delivering her judgment in which she convicted the appellant and sentenced him to death.
5. On those facts, it was the submission of Ms. Nelima that Lesiit J. failed to comply with **Section 200** of the CPC which was a mandatory requirement of fair trial. That is the submission conceded by Mr. Mugo.
6. ***Sections 200 (3) & (4)*** of the ***Criminal Procedure Code*** (CPC) provide as follows:

"(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 the 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."

Those provisions are applicable to the High Court by dint of **Section 201(2)** *of the CPC.*

7. On numerous occasions, this Court has construed those provisions of the law and we take it from ***John Bell Kinengeni v Republic [2015] eKLR*** where the Court stated thus:-

"In Richard Charo Mole NRB Criminal Appeal No. 135 of 2004 this Court approved the principles set in Ndegwa versus Republic [1985] KLR 534 and stressed that the duty is reposed on the court and there is no requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 200(3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. In Cyrus Muriithi Kamau and another versus Republic Nyeri Criminal Appeal No. 87 & 88 of 2006 the Court added that the use of the words "shall inform the accused person of that right" in section 200 (3) (supra) was clearly meant to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms. In Bob Ayub Alias Edward Gabriel Mbwana Alias Robert Mandiga (supra) the court ruled that the mere mention in the judgment that section 200 (3) was complied with is hollow without any evidence from the record that it was actually complied with in accordance with the law. This court stressed in Ndegwa versus Republic [1985] KLR 534 thus:

"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 as he is the most sacrosanct individual in the system of our legal administration."

8. *We are satisfied that a mandatory procedural requirement was breached in this case and we declare that the entire trial before the High Court was irredeemably vitiated and is hereby*

nullified. What remains is to decide whether a retrial should be ordered.

9. *Ms Nelima strongly argued that there should be no retrial because the evidence on record, especially that of PW1 and PW2 who were accomplices. Pw3's evidence on the injuries suffered, she contended, was also contradictory to other prosecution evidence and therefore no sense can be made out of the entire prosecution case. Furthermore, she observed, the trial before the High Court took 8 years to complete and the appellant will end up having been in custody for more than 13 years if a retrial is ordered. That would be unjust to him. Or his part, Mr. Mugo submitted that it was only a retrial which would meet the ends of justice in this matter where human life was lost. The evidence, in his view, was sufficient to sustain a conviction and the witnesses are not difficult to find as they came from the same village as the appellant.*
10. *The principles that apply in considering whether a retrial should be ordered are now old hat. We take it from* ***Fatehali Manji v. Republic (1966) E.A 343****:*

    "In general a retrial will be ordered when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial;even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be where the interests of justice require it".

11. *There is no denying that the trial before the High Court took many years to conclude and the appellant has been in custody for a considerable time. That would favour the release of the appellant without trial. But human life was lost in this matter and a balance has to be struck between according the family of the deceased some measure of restitution for a heinous crime which led to the loss of their loved one and extending the benefit of doubt to the appellant. The error was committed by the court and not the prosecution. The witnesses come from the same village and are available. We are persuaded by the justice of giving the appellant the opportunity to vindicate himself in a retrial even as the victim's family gets a lawful closure to this incident.*
12. *Accordingly, the appeal is allowed and the conviction and sentence of the appellant is set aside. The appellant shall be retried afresh at the High Court in Meru before any Judge other than* ***Lesiit J.*** *He shall be produced before that court within 14 days of this order.*

Dated and delivered at Meru this 24th day of June, 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