



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)

CRIMINAL APPEAL NO. 105 OF 2013 (R)

BETWEEN

MOSOBIN SOT NGEIYWA FIRST APPELLANT

JAPHETH SIMIYU WEKESA SECOND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kitale

(Karanja, J.) dated 28th June, 2012)

in

HCCRC NO. 19 OF 2008)

JUDGMENT OF THE COURT

INTRODUCTION

1. The post-election violence that rocked this country, particularly in the then Rift Valley Province in 2008, was unparalleled. The case that gave rise to this appeal was as a result of one of those incidents of the post-election violence. **Mosobin Sot Ngeiywa** and **Japheth Simiyu Wekesa**, the 1st and 2nd appellants respectively, were convicted by the High Court of Kenya at Kitale, on four counts of murder. The appellants were sentenced to death. Being dissatisfied with the said conviction and sentence, the appellants preferred an appeal to this Court.

THE CHARGES

2. In all the four counts, the offences were said to have been committed on the morning of **16th January, 2008** at Kalaha Farm in Tranz-Nzoia West District, Rift Valley Province.

3. In the first count, the appellants, jointly with others not before court, were alleged to have murdered **Gladys Nanjala**, in the second one, they allegedly murdered **Alex Simiyu**, while in the third and fourth

counts, they were said to have murdered **Vincent Waswa** and **Smith Wekhoyela John**, respectively.

4. The prosecution called 13 witnesses. Each of the appellants tendered unsworn testimony in defence and called no witnesses.

5. This being a first appeal, this Court is enjoined to reconsider and re-evaluate the evidence on record and reach its own conclusion, but bearing in mind that it neither saw nor heard the witnesses. See **OKENO V REPUBLIC [1972] E.A. 32**. We shall therefore re-state the evidence, albeit briefly, consider the relevant grounds of appeal and arrive at our conclusion.

THE PROSECUTION CASE

6. All the prosecution witnesses testified before Koome, J. (*as she then was*) and the defence evidence was tendered before Muketi, J., except the appellants' written submissions that were placed before Karanja, J., after the sad demise of Muketi, J. The judgment was prepared and delivered by Karanja, J.

7. The prosecution evidence, briefly stated, was that on 16th January, 2008 at about 6.30 a.m., **Joseph Simiyu Wekhoyela, PW 1**, a farmer at Kalaha farm in Saboti, was at his home, next to that of his deceased father, John Simiyu Wekhoyela. PW 1 heard his father screaming, pleading with his assailants to spare his life. PW 1 was unable to assist his father because he feared for his own life. Instead, he hid himself in a forest, about 20 meters away from his house. His father's house had been torched. From his hiding place he was able to see one of the attackers, the 1st appellant, a neighbour, struggling with his father but he could not go near as the situation was very dangerous. The 1st appellant was commonly known as **Kilel**. PW 1 did not see the 2nd appellant.

8. After sometime police officers went to the scene. PW 1 realized that his father, his mother, Florence Wahilla and a niece, Stella welima, had been killed by the assailants. His father had been cut on the neck and the legs, while his mother and niece had been shot with arrows and cut with a panga.

9. On the same day at about 6.30 a.m., **Linnet Wasike Mukenya, PW 2**, was woken up by screams. She rushed out of her house holding her three year old child. Houses were on fire. She stood briefly near the house of Gladys Nanjala before she ran and hid in a forest. She saw three people, who were armed with guns, and thought they were from the Kenya Wildlife Services (KWS) or Kenya Police Reservists (KPR). PW 2 noticed that one of the three armed people was a neighbour whom she knew, the 2nd appellant, nicknamed "**Mose**". The three shot and killed Gladys Nanjala together with her child, Alex Simiyu.

10. **Stella Nelima, PW 3**, ran out of a burning house to her uncle's home. She saw the 1st appellant, whom she knew, among the raiders, and he was the one who attacked and killed her grandfather, Smith Wekhoyela John. The 1st appellant also cut her on the head with a panga.

11. The evidence of PW4 was corroborated by **Patrick Juma, PW 5**, who also recognized the 1st appellant as one of the assailants. Patrick Juma (PW 5) also saw the 1st appellant leaving the house of the late Mzee Wekhoyela.

12. **Florence Naliaka, PW 6**, the widow of Wekhoyela, said that their house was set on fire when she was inside with her late husband. She named the 1st appellant, their neighbour, as being one of the three people who slashed her husband to death.

13. Similarly, **Ibrahim Simiyu Wasike, PW 7**, woke up to find the neighbouring houses on fire. He escaped into a nearby forest while being pursued by a group of people who were armed with bows and arrows as well as firearms. From where he hid, he saw the 1st and 2nd appellants setting his house on fire. They were accompanied by a big group of people.

14. The 1st appellant was also recognized by **Wilfred Simiyu, PW 11**, as one of the people who set his

house on fire.

15. According to the Investigating officer, **P.C George Amasha, PW 14**, who recorded statements from the victims of this heinous attack, the appellants had been named as being among the persons that had attacked and killed the four deceased persons as stated in the charge sheet. The appellants were arrested on 9th June, 2008.

16. The appellants were represented by an advocate known as **Mr. Bororio**. When Muketi, J. took over the hearing of the case from Koome, J, the record shows that **Ms Bartoo**, learned prosecution counsel, urged the court to invoke the provisions of **section 200(3)** of the **Criminal Procedure Code** and proceed from where Koome, J. had reached. The defence counsel indicated that he had no objection. Consequently, the learned judge recorded:-

“Section 200 of the CPC complied with, matter to proceed from where it had reached”

THE DEFENCE CASE

17. In his defence, the 1st appellant said he was arrested on 5th June, 2008 because of cutting a tree. Later some people were coerced to give evidence against him. Thereafter, he was arraigned in court on charges of murder. On 26th June, 2008 four of the prosecution witnesses told him that they wanted to withdraw their complaints against him, since they had realized that they had made a mistake in their identification of their assailants. They showed him a letter to that effect. The trial judge admitted the said letter as an exhibit, D.Exh.1; despite the prosecution’s objection. The letter was addressed to the Resident Judge, High Court at Kitale. It purported to say that Joseph Wakhoela, Patrick Juma, Linet Wekesa and Joyce Mutenyo, having recorded statements implicating the 1st appellant in the murder of the deceased persons, had realized that they were unable to identify the 1st appellant, the incident having occurred at 5.00 a.m. The said persons further stated that they wanted to enhance good neighbourhood. The said letter was however not signed by the alleged authors.

18. The 2nd appellant said that on 13th January, 2008, he left his home at Kalaha farm to visit his mother. When he was there, he heard through the radio that violence had broken out at Kalaha farm. He went back to his home, only to find that his house had been burnt; so he stayed at the local shopping Centre. On 9th June, 2008 he was arrested and taken to Kitale Police Station and was subsequently arraigned in Court on 23rd June, 2008 on a charge of murder.

SUMMARY OF THE APPELLANTS’ GROUNDS OF APPEAL

19. The 1st appellant, through his learned counsel, **Mr. Korir**, raised seven grounds of appeal to the effect that: the learned judge failed to consider and determine all the issues raised by the prosecution and the defence; that the charge was defective; that the charge was at variance with the evidence; that the 1st appellant was not positively identified; that the learned judge took into consideration matters that he ought not to have considered and failed to take into consideration matters he ought to have taken into consideration; and that the learned judge failed to comply with the provisions of **section 200 (3)** of the **Criminal Procedure Code**.

20. The 2nd appellant, through his learned counsel, **Mr. Tororei**, argued that there were no favourable circumstances for positive identification; that the trial judge erred in law in failing to give any consideration to the letter addressed to him by various prosecution witnesses withdrawing their complaints and recanting their earlier statements; and that the second appellant did not plead to the 1st count and therefore his conviction on that count was a nullity.

SUMMARY OF THE RESPONDENT’S SUBMISSIONS

21. **Mr. Omwega**, Assistant Director of Public Prosecutions, opposed the appeal. He submitted, **inter**

alia, that the appellants were positively recognized by several witnesses; that the purported letter by some prosecution witnesses recanting their earlier statements (*D. Exh 1*) was of no value as it was introduced after the witnesses had testified; and that the provisions of **section 200 (3)** of the **Criminal Procedure Code** were complied with.

ANALYSIS OF THE GROUNDS OF APPEAL

22. We shall first consider whether the provisions of **section 200 (3)** **Criminal Procedure Code** were appropriately complied with.

The section stipulates that:

“(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 witnesses be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right”.

By dint of **section 201 (2)** the provisions of section 200 apply **mutatis mutandis** to trials held in the High Court.

23. Although the record of appeal shows that when Muketi, J. took over the hearing of the case from Koome, J. she indicated that the provisions of section 200 of the Criminal Procedure Code had been complied with and the matter was to proceed from where it had reached, the 1st appellant’s advocate took issue with that, arguing that it was Mr. Bororio, the defence counsel, and not the appellants in person, who indicated that he had no objection to proceeding with the case without having to recall the witnesses who had already testified before Koome, J.

24. Beyond indicating that section 200 of the Criminal Procedure Code had been complied with the exact words that **Muketi, J.** used to inform the applicants about their right to recall the witnesses who had testified before the judge she had succeeded are not indicated. There is equally nothing on record to suggest that Mr. Bororio did not take instructions from his clients, the appellants, before he told the court that the appellants had no objection to proceeding with the case from where Koome, J. had reached.

25. We are aware that this Court, differently constituted, has held that the use of the words that “*the succeeding magistrate shall inform the accused person of that right*” in **section 200 (3)** of the **Criminal Procedure Code** implies that it is a peremptory duty that must be performed and accorded to the accused personally, even if he is represented by an advocate.

26. In **DAVID KIMANI NJUGUNA V REPUBLIC, NAKURU CRIMINAL APPEAL NO. 294 of 2010**, the Court reviewed a number of authorities relating to compliance with **section 200 (3)** and came to the conclusion that:-

“All of these decisions declare that the provisions of section 200 (3) of the Criminal Procedure Code are mandatory and a succeeding judge or magistrate must inform the accused directly and personally of his right to recall witnesses. It is a right excisable by the accused person himself and not through an advocate and a judge or magistrate complies with it out of a statutory duty requiring no application on the part of the accused. Further, failure to comply by the Court always renders the trial a nullity”.

27. Likewise, in **HENRY KAILUTHA NKARICHIA & ANOTHER V REPUBLIC, Criminal Appeal No. 21 of 2013** the Court held:

“The requirement that the court inform the accused of the right to recall witnesses is plain, admitting to no obscurity. The duty on the court is mandatory and a failure to comply with it wholly vitiates the trial since it goes to the very heart of an accused person’s right to a fair trial.”

28. While we entirely agree that a trial court has to comply with the provisions of **section 200 (3) of the Criminal Procedure Code** whenever a succeeding magistrate or judge takes over the conduct of a criminal case from another, in our view, where an accused person is represented by an advocate, we do not think that the communication should strictly be between the trial magistrate or judge and the accused, to the total exclusion of the defence counsel. Unlike a plea, to which an accused person must personally plead, one way or the other, the accused's advocate may communicate his/her client's instructions to the court on the issue of compliance with **Section 200** of the **Criminal Procedure Code**.

29. **Article 50 (2) (h)** of the **Constitution of Kenya, 2010**, guarantees every accused person the right to have an advocate assigned to the accused by the State and at State expense if substantial injustice would otherwise result. Such an advocate plays a critical role in a criminal trial. We do not think that any prejudice or miscarriage of justice is likely to be occasioned where the trial court informs the accused of the right prescribed under **section 200 (3)**, then the advocate explains to the accused the implications thereof; takes instructions and notifies the trial court whether the accused wishes to have any witness recalled, and if so, the particular one. Either way, the record must show that there was due compliance with that provision of the law. In this particular case, Muketi, J. recorded:

“Section 200 of CPC complied with, matter to proceed from where it had reached.”

We think the provisions of **section 200 (3)** of the **Criminal Procedure Code** were substantially complied with.

30. However, the record of appeal does not reveal that before Karanja, J. commenced writing the judgment, the hearing having been finalized before Muketi, J; he complied with the provisions of **section 200 (1) (b)** as read together with **section 200 (3)** of the **Criminal Procedure Code**. Under **section 200 (1) (b)**, where a judgment has not been written and signed by his predecessor, a succeeding judge or magistrate may act on the evidence recorded by the predecessor(s), or re-summon the witnesses and recommence the trial. Either way, the court is required to first inform the accused of his right under **section 200 (3)** then proceed to act in the most appropriate manner, in the circumstances of the case.

31. Did the omission by Karanja, J. to comply with **section 200 (1) (b)** and **(3)** occasion a miscarriage of justice? We do not think so. All the evidence had been recorded by his predecessors. The trial had gone on for a period of nearly four (4) years and a total of 13 prosecution witnesses had testified. The prosecution and the defence counsel chose to file written submissions.

32. In **NYABUTO & ANOTHER V REPUBLIC [2009] KLR 409**, this Court considered a similar appeal where Musinga, J. (*as he then was*), acted on the evidence that had been recorded by a deceased Judge, Bauni, J. and prepared a judgment. The court delivered itself thus:

“ It is plain that the late Kaburu Bauni, J. died after he had heard and recorded the whole of the evidence in the trial. By dint of the provisions 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 5 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. We find no merit on this ground of appeal. We accordingly reject it.”

See also **JOSEPH KAMAU GICHUKI V REPUBLIC [2013] e KLR**

33. We find the ground relating to non-compliance with **section 200 (3)** lacking in merit and dismiss it.

34. We now turn to the issue of identification of the appellants. The offences were committed at about 6.30 a.m. when there was sufficient sunlight to enable PW1, PW2, PW3, PW4, PW5, PW6 and PW7 recognise the appellants. The appellants and the aforesaid witnesses were neighbours and therefore the question of mistaken identity did not arise. Evidence of recognition is always better than that of identification of a stranger. See **ANJONONI & 2 OTHERS V REPUBLIC [1980] eKLR**.

35. The aforesaid prosecution witnesses had no difficulties in stating to the Investigating Officer, PW 14, the names of the appellants. We find no merit in the ground of appeal regarding identification of the appellants.

36. The 1st appellant’s counsel submitted that the charge against his client was defective because, although it cited the first appellant’s name as Mosobin Sot Ngeiywa, PW1 referred to him as “*Clay*” or “*Kilel*”, while PW3 referred to him as Ngeiywa and PW5 called him Mosebin. Counsel submitted that it was not shown that all those names referred to one and the same person, the 1st appellant. Counsel cited this Court’s decision in **FRANCIS MUGARI JOSEPH V REPUBLIC [2014] eKLR**, where the court held that the charge sheet should have indicated the **alias** name of the appellant to remove any doubt or confusion as regards identity of the person referred to.

37. Responding to that ground of appeal, Mr. Omwega submitted that PW7 clarified that all the names mentioned by PW1, PW3 and PW5 referred to the 1st appellant and it was not necessary to cite them as alias names.

38. Looking at the evidence of those three witnesses, it is quite clear that they were referring to the 1st appellant. The witnesses were close neighbours of the appellants. Although the name “*Clay*” is a variant of “*Kilel*”, PW1 clarified that the 1st appellant was commonly known as Kilel. The 1st appellant did not deny that he was also known as Kilel.

39. Both PW3 and PW5 cited only one name of the 1st appellant but not his full name. PW3 referred to him as “*Ngeiywa*”, whereas PW5 called him “*Mosebin*”, which may be a typographical error, as the first name of the 1st appellant is “*Mosobin*”.

40. In our view, the charge was not therefore defective, given that the three witnesses were citing a person who was well known to them. There was no prejudice or miscarriage of justice by failing to add the *alias* name in the charge sheet.

41. Mr. Tororei submitted that the 2nd appellant did not take a plea in respect of count I relating to the murder of Gladys Nanjala. In the circumstances, his trial and conviction in respect of that count was a nullity, counsel added.

42. Mr. Omwega conceded this ground of appeal, and in our view rightly so. Although evidence was led against the second appellant regarding murder of Gladys Nanjala, the record of the High Court shows that the trial judge inadvertently failed to take a plea in respect of count I, it is only the 1st appellant who pleaded to that count. That ground of appeal must therefore be allowed, which we hereby do.

43. Lastly, Mr. Tororei faulted the trial judge for failing to take into consideration the letter that was purportedly addressed to the court by PW1, PW2, PW4 and PW5, D.Exh.1, purporting to withdraw their complaints against the appellants. He submitted that had the judge given due consideration to the said letter he would have arrived at a different conclusion since their evidence would have been deemed as

withdrawn.

44. In opposition to that ground of appeal, Mr. Omwega submitted that D. Exh.1 was not signed by the prosecution witnesses who were alleged to have authored it; it was not put to the witnesses when they testified against the appellants; it was only brought up when the appellants were giving their defence, and so it was of no consequence.

45. Taking into consideration the nature and form of D.Exh 1 and the manner in which it was produced before the trial court, we agree with Mr. Omwega that the learned judge was right in not giving it any consideration. In any event, being an unsigned letter, it had no probative value.

46. The prosecution was not aware of the said letter, and most important, the prosecution had not made any application to withdraw the case or any part of it. The learned judge could not have disregarded the evidence of Pw1, PW2, PW4 and PW5 on the basis of the purported letter. We reject the above ground of appeal.

47. Having considered the entire evidence that was adduced by the prosecution against the appellants, we are satisfied that their conviction was safe and well founded. Notwithstanding the fact that we have found that the 2nd appellant was wrongly convicted in respect of count I, there was overwhelming evidence to convict the two appellants on all the other counts.

48. Save for that finding regarding count I as far as the 2nd appellant is concerned, this appeal is without merit. Consequently, we dismiss it and affirm the 1st appellant's conviction and sentence on all the four counts. The 2nd appellant's conviction and sentence on counts II, III and IV is also affirmed.

DATED and delivered at Eldoret this 25th day of November, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.