



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)**

**CRIMINAL APPEAL NO. 327 OF 2010**

**BETWEEN**

**PHILIP KIPNGETICH TERER ..... APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(An Appeal from a Judgment of the High Court of Kenya at Kakamega, (Lenaola, J.) dated 26<sup>th</sup> July, 2010*

**in**

**H.C.CR.C. NO. 33 OF 2000)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. When this appeal came up for hearing before us on 30<sup>th</sup> June, 2015, Mr. Ogoti, Senior Assistant Director of Public Prosecutions, conceded it on the ground that Lenaola, J. did not comply with **Section 200(3)** of the Criminal Procedure Code (the CPC), having taken over the trial of the case from G.B.M. Kariuki, J. (as he then was).
2. Mr. Ogoti however sought a re-trial arguing that justice demands it. He said the prosecution is not to blame for the error and that it will avail its witnesses to testify once again.
3. Although he welcomed the concession, Mr. Katwa Kigen, learned counsel teaming up with Mr. Onyango Jamsumbah for the appellant, strongly opposed the plea for a re-trial. He argued that the appellant has been incarcerated for over fifteen years during which his case has been heard by three Judges. Even if the appellant were culpable, which the defence does not admit, the fifteen years the appellant has been incarceration is more than enough punishment. He said the appellant is not in any way to blame for the mistake made by the last trial Judge and in the interest of justice he should therefore be set free unconditionally.
4. We have considered the matter and read the record of appeal. As Mr. Kigen quite correctly observed, the appellant's trial giving rise to this appeal was conducted by three Judges of the High Court. The case was first fully heard by Waweru, J. with the aid of assessors. Before he could sum up to them, he was

transferred. G.B.M. Kariuki, J. (as he then was) who took over from him heard the case *de novo* also with the aid of assessors. Before he could sum up the case to the assessors, he was also transferred. Ochieng and Chitembwe, JJ. thereafter mentioned the case but they did not themselves conduct any hearing. Lenaola, J. took over the case but as Mr. Ogoti correctly observed, the learned Judge did not comply with **Section 200(3)** of the CPC.

5. **Section 200(3)** read with **Section 202(2)** of the CPC requires that:

**“where a succeeding ... [Judge] 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 ressumoned and reheard and the succeeding ...[Judge] shall inform the accused person of that right.”**

6. The record of this appeal shows that Lenaola, J. slipped. He didn't inform the appellant of his said right under **Section 200(3)** of the CPC. Instead the learned Judge simply perused the proceedings, summed the case to the assessors and thereafter delivered his judgment. In the circumstances we agree with the learned Senior Assistant Director of Public Prosecutions that that omission caused prejudice to the appellant. Consequently, and pursuant to **Section 200(4)** of the CPC we declare the appellant's trial a nullity.

7. As we have stated, Mr. Ogoti, learned Senior Assistant Director of Public Prosecutions has sought a retrial which has strongly been opposed by Mr. Kigen, learned counsel for the appellant.

8. The law as to when a retrial should be ordered has long been settled. In the case of **Fatehali Manji Vs Republic [1966] EA 343** the predecessor of this Court, when dealing with the same issue, gave the following guideline:-

**“In general a retrial will be ordered only 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 a retrial should only be made where the interests of justice require it.”**

9. These principles have been reiterated in several subsequent cases including the cases of **Sospeter Mwangi Vs Republic, Criminal Appeal No. 164 of 2005; Mwangi Vs Republic [1983] KLR 522; Sumar Vs Republic [1964] EA 481 and Muiruri Vs R [2003] KLR 552**. In **Muiruri Vs R [2003] KLR 552**, this Court added:

**“It [retrial] will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See *Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980)*); the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's.”**

10. In **Mwangi Vs Republic [1983] KLR 522** this Court following *Braganza Vs Republic (1957) (CA)* and *Pyarala Bassam Vs Republic [1960] EA 854*, stated at page 538 that:-

**“... a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible, evidence a conviction might result.”**

11. From these authorities, it is clear that in deciding whether or not to order a retrial, the court must strike a balance between the interest of justice on the one hand and those of the accused person on the other.

12. Having perused the record in this appeal, we find the interest of justice demand for a retrial in this case. We say no more lest we prejudice the retrial. Consequently, we allow this appeal, quash the appellant's conviction and set aside the death sentence imposed upon him. The appellant shall be retried by another Judge. We direct that the High Court file be transmitted to and the case be mention at the High Court at Kakamega as soon as possible for purposes of taking a hearing date. In the interim, the appellant shall remain in custody.

**DATED and delivered at Kisumu this 25<sup>th</sup> day of September, 2015.**

**D.K. MARAGA**

.....

**JUDGE OF APPEAL**

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy\_of the original

**DEPUTY REGISTRAR**