**IN THE COURT OF APPEAL**

**AT NYERI**

**(SITTING AT NAKURU)**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)**

**CRIMINAL APPEAL NO. 294 OF 2010**

**DAVID KIMANI NJUGUNA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Emukule, J.) dated 15th July, 2010*

*In*

*H.C. CR. A. No. 25 of 2007)*

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**JUDGMENT OF THE COURT**

The appellant **DAVID KIMANI NJUGUNA** appeals to this Court against the entire judgment of the High Court at Nakuru (Emukule J) delivered on 15th July 2010 whereby he was found guilty and sentenced to death for having murdered three-year-old Mary Wamaitha Waithera (the deceased) on the night of 5th and 6th February 2007.

Even though there are altogether more than a dozen grounds raised in the appellant's self-crafted memorandum of appeal and the 'Supplementary Grounds of Appeal' filed by **Ms Karanja-Mbugua & Co. Advocates** on record for him, our decision on this appeal is on Ground 1 of the latter document which is expressed thus;

> ***"THAT the learned Judge of the superior court erred in law in failing to strictly comply with the mandatory provision of Section 200 as read with Section 201 of the Criminal Procedure Code, Chapter 75 and instead entertained a consent arrangement between the learned State Counsel and Counsel for the Appellant."***

When arguing the appeal before us, **Ms Gathecha**, learned counsel for the appellant directed us to the record which showed that on 10th February 2010, a date which had been fixed for further hearing by **Mugo J**, who had already taken the evidence of some six witnesses, the case came before **Emukule J**, the former judge having left the station. The coram shows that **Mr. Njogu** appeared for the State and **Ms Ndeda** was for the appellant, then, the Accused. The learned Judge recorded thus;

> ***"COURT: By consent of Counsel for the accused and state counsel, this matter to proceed from where Lady Justice Mugo left."***

The matter was then placed aside to 10.00 a.m. when the prosecution's seventh and last witness, **Dr Phillip Wainaina Kamau** gave evidence as to the cause of the deceased's death, and the prosecution closed its case.

**Ms Gathecha** submitted that the manner in which the learned Judge took over and proceeded with the case contravened **Section 200** of the **Criminal Procedure Code** and occasioned the appellant prejudice. She contended that the non-compliance with or contravention of the said provision of the C.P.C. rendered the entire trial null and void and urged us to so find, quash the conviction, set aside the sentence and order a re-trial.

Responding to that specific issue, **Miss Ngovi** the learned Prosecution Counsel for the Republic, took a different view of the import of what

transpired with regard to **Section 200** of the **CPC** and the legal consequence thereof. Counsel submitted that her learned counterpart was proceeding on a misunderstanding that the provision requires that a trial should start *de novo* upon the transfer of the judicial officer first seized of the matter. She asserted that there is no such requirement in the plain letter of the statute. All that is required is for an accused person to make a decision whether or not to exercise his right to recall any of the witnesses who had testified before the previous judicial officer. In this case, submitted **Miss Ngovi,** the accused made a legitimate election not to recall any as was communicated to the court by his advocate. To her, it is counsel who makes that communication to the court where an accused person is represented, and he does so on the instruction of his client.

Making reference to **Sub-Section 4** of the same section, learned counsel contended that even if there was non-compliance with the requirement in the section, which she did not concede, the trial was not thereby vitiated as the appellant was not materially prejudiced especially because **Emukule J *"took the evidence of only one witness."*** The trial was not a nullity, she concluded.

With respect, whereas the last submission by the State appears attractive, it is in fact rather spurious. That the learned Judge took the evidence of only one witness after taking over from the previous Judge who had taken the rest of the evidence against the appellant exercabates rather than ameliorates the prejudice sought to be avoided by a strict compliance with **Section 200**. This is so because the learned Judge ended up determining the case and convicting the appellant on the basis of evidence he did not himself record, from witnesses he did not himself hear and observe so as to be in apposition to determine their credibility and to have a real feel of the case as a whole. In so doing, he denied the appellant a fundamental feature of his fair trial guarantee.

There is now a dearth of authority on this subject and we find it rather astonishing that the learned Judge proceeded as he did without a strict compliance with that critical procedural step upon taking over the case. He was under statutory compulsion to strictly follow the procedure under **Section 200** of the **Criminal Procedure Code,** which we set out in full;

> ***"200. (1) Subject to Sub-Section (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;***
>
> > ***(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, or resummons the witnesses and recommence the trial. (****emphasis added)*
>
> ***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.***
>
> ***(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 resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.*** *(emphasis added)*
>
> ***(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."***

The Section refers to magistrates but the immediate following **Section 201** applies the provision to Judges of the High Court in plain and unambiguous terms;

> ***"The provisions of Section 200 of this Act shall apply mutatis mutandis to trials in the High Court."***

Faced with a situation and submissions similar to the ones made before us, this Court sitting in Kisumu delivered itself as follows in **BOB AYUB 'ALIAS' EDWARD GABRIEL MBWANA 'ALIAS' ROBERT MANDIGA –VS- REPUBLIC** CRIMINAL APPEAL NO. 106 OF 2009;

> ***"The record before us, the relevant part of which we have reproduced above, clearly shows that Musinga J. did not comply as was required of him, with the provisions of Section 200(3) of the Criminal Procedure Code which as per Section 201(2) was to apply Mutatis Mutandis in this case. He did not explain to the appellant his right to demand the recall and rehearing of any witness as was required under that provision. Miss Oundo counters that by saying the appellant was represented by an advocate and so there was no need for that. Our short answer to that is that it was the appellant who was on trial and the duty of the court was to the appellant and not to his advocate. The written law makes that duty mandatory. The mere mention in the judgment that Section 200 was complied with is hollow without any evidence from the record."***

The Court had also addressed the issue right here in Nyeri, in **CYRUS MURIITHI KAMAU & ANOR -VS- REPUBLIC,** CRIMINAL APPEAL NO. 87 AND 88 OF 2006 in the following terms;

> ***"It is true that in the case of these appellants, it was their counsel who pleaded with Mr. Muiruri to proceed with the trial from the stage where Mr. Muchelule had left it, but we do not understand the advocates' plea to have meant that they were waiving the appellants' rights under Section 200 (3) of the Code and that the succeeding Magistrate was relieved of his duty to inform the appellants of their rights. As we have seen, the evidence of PW1 was not merely formal; he directly connected the two appellants with the two bicycles. Mr. Muiruri did not have the benefit of seeing and hearing that witness. In our view, the failure by Mr.***

***Muiruri to inform the appellants of their rights under Section 200 (3) of the Code, was in the circumstances of the case, fatal and on that ground we must allow the two appeals."***

In all these pronouncements, this Court was restating and reaffirming as good and authoritative law what it had declared to be the logic, rationale, and philosophy behind **Section 200** of the **CPC** more than thirty years ago in **NDEGWA –VS- REPUBLIC** [1985] 534 where it held that;

***"1. The provision of Section 200 of the Criminal Procedure Code (Cap 75) ought to be used very sparingly; and only in cases where the exigencies of the circumstances are not only likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor.***

***(2) The provisions of Section 200 should not be invoked where the part heard trial is a short one and could be conveniently started*** *de novo.* ***Furthermore, it should not be invoked where witnesses are still available locally and the passage of time was short so as not to cause or produce any accountable loss of memory on their part, whether actual or presumed to prejudice the prosecution.***

***(3) No rule of natural justice, statutory protection, evidence or of common sense should be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject since he is the most sacrosanct individual in the system of our legal administration.***

***(4) The statutory and time honoured formula that the magistrate making the judgment should himself see, hear and assess and gauge the demeanour and credibility of witnesses should always be maintained.***

***(5) A magistrate who did not observe the evidence is not in a position to assess the position, credibility and personal demeanour of all the witnesses."***

See also **KARIUKI –VS- REPUBLIC** [1985] KLR 504; **EDWARD MAKWA MAGORI 7 OTHERS –VS- REPUBLIC** (NAKURU CR.APPEAL NO. 297 OF 2007); **RICHARD CHARO MULE –VS- REPUBLIC** (NAIROBI CR. APPEAL NO. 135 OF 2004) and **JOSEPH MACHARIA MIANO & OTHERS –VS- REPUBLIC** (NAKURU CR. APPEAL NO. 178 OF 2006).

All of these decisions declare that the provisions of **Section 200(3**) are mandatory and a succeeding Judge or Magistrate must inform the accused person directly and personally of his right to recall witnesses. It is a right exercisable 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 an accused person. Further, failure to comply by the court always renders the trial a nullity.

It follows that the trial of the appellant herein was a nullity and his conviction cannot stand, which is a most unfortunate consequence as it means that there has been a wastage of judicial time in addition to the inconvenience occasioned to all parties - the appellant, the state, the witnesses, - all due to the court's failure to follow a simple and clear yet critically important step in the trial process.

We have considered the consequence of declaring the trial a nullity and have to agree with **Miss Gathecha** that a retrial would be the most appropriate order as the charge herein requires full judicial interrogation for the ends of justice to be met. No hardship will be occasioned thereby.

In the result, we allow this appeal, quash the conviction of the appellant, set aside the sentence imposed on him and order that he be presented before a Judge of the High Court in Nakuru (other than **Emukule,J**) within fourteen (14) days of the date hereof for plea and subsequent retrial.

***Dated and delivered at Nakuru this 12th day of November, 2015.***

**P. N. WAKI**

**……**

**JUDGE OF APPEAL**

**R. N. NAMBUYE**

**……..…….**

**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**