



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: P. KIHARA KARIUKI (PCA), GATEMBU & MURGOR JJ,A)

CRIMINAL APPEAL NO. 186 OF 2012

BETWEEN

WILFRED JACK OUMA ALIAS JAAAPPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of Sitati, J. at the High Court at Kisii dated 29th February 2012 in Criminal Case No. 33 of 2009)

JUDGMENT OF THE COURT

The *appellant, Wilfred Jack Ouma alias JAA*, was charged with the offence of murder contrary to *section 203* as read with *section 204* of the *Penal Code*. The particulars of the offence are that on the 11th of May 2009 at Roo village in Rang'wa West Sub-Location, Kakisingir Location of Suba District within the then Nyanza Province, he murdered *Okech Wandigi Otieno (the deceased)*. The appellant pleaded not guilty to the charge.

The prosecution case was that on the material day, between 7.30 pm and 8.00 pm, while the deceased was walking home, the appellant attacked the deceased. Armed with a knife, he stabbed the deceased in the abdomen, and ran away. The deceased later succumbed to his injuries and died in the early hours of the next morning. By this time, the appellant had allegedly run away from his home, and was not seen for about 2 weeks. When he returned, he was subsequently charged with this offence.

The appellant was convicted and sentenced to suffer death as by law prescribed.

Being aggrieved by the decision of the High Court, the appellant has lodged this appeal which is before us. The main ground of appeal is that the High Court fell into error when it failed to adhere to the requirements of *section 200* of the *Criminal Procedure Code (extended to the High Court under section 201 (2))* and inform the appellant of his rights at the time the case was taken over from Musinga, J. (as he then was) by Sitati, J.

During the submissions, learned counsel, *Mr. Gichaba* for the appellant submitted that on account of this omission, a miscarriage of justice had been occasioned against the appellant. Citing the decision of this Court in *Bob Ayub "alias" Edward Gabriel Mbwana "alias" Robert Mandiga vs Republic Criminal*

Appeal 106 of 2009, counsel further submitted that, as a result of the failure, the judgment was a nullity, and the appellant should be set at liberty.

On his part **Mr. Ketoo**, learned Principal Prosecution Counsel conceded that **section 200** of the **Criminal Procedure Code** had not been adhered to, and that the prosecution had not occasioned the omission, but that the appellant's counsel at the time, had expressed an intention to proceed with the hearing from the point where Musinga, J. had left off. Counsel was of the view that, in the event the court should find that there had been a lapse, the court should order a retrial instead of an acquittal.

We have considered the record, the submissions and the law. The appellant's main contention is whether **section 200** of the **Criminal Procedure Code** was complied with, and if not what would be the fate of the appeal?

Section 200 (3) of the **Criminal Procedure Code** stipulates;

“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 of that right.”

From the record, there is no doubt that Sitati, J. took over the hearing of the case on 22nd February 2011 from Musinga, J. At that point learned counsel for the appellant, who was Mr. Momanyi at the time, informed the court that he would be ready to proceed from where Musinga, J. had left off hearing the case. On 24th February 2011 when the hearing commenced, the next prosecution witness was sworn, and proceeded with his testimony, without the court alerting the appellant of his right to recall or resummon any of the witnesses who had previously testified. Clearly, Sitati, J. did not comply with the requirements of **section 200 (3)** of the **Criminal Procedure Code** which applied in the same way by virtue of **section 201 (2)** of the same Act to the circumstances of this case. This was a mandatory requirement that the court was compelled to adhere to, and without such compliance, an ensuing judgment is considered a nullity.

Having reached this finding, as we hereby do, the question that would arise as a consequence, is whether to order a retrial, or to set the appellant at liberty as enjoined by counsel for the appellant.

The general powers of this Court are set out in **rule 31** of the **Court of Appeal Rules** which stipulate;

“On any appeal the Court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings of the superior court with such directions as is appropriate, or to order a new trial, and to make any incidental or necessary orders, including orders as to costs.”

In our view, whether to confirm or vary the decision of the trial court or to order a retrial would be dependent upon the facts, and circumstances of each case.

From the facts, the appellant was charged in 2009 with the murder of the deceased. The trial was concluded in February 2012, and the judgment rendered on 29th February of the same year. In view of the judgment having been rendered a nullity, we consider that the ends of justice are yet to be served, and a decision pronounced in respect of this matter one way or the other.

In the result, and having regard to the circumstances of the case, we must allow the appeal, quash the conviction and set aside the sentence imposed by Sitati, J. We order that the case be returned to the High Court for retrial, and we direct that it be heard on a priority basis by any judge of that Court other than Sitati, J. Meanwhile, the appellant shall remain in custody pending retrial. Orders accordingly.

Dated and delivered at Kisumu this 17th day of December, 2015.

P. KIHARA KARIUKI, PCA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR