



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MWERA, MAKHANDIA & SICHALE, JJ.A)

CRIMINAL APPEAL NO.5 OF 2011

BETWEEN

1. SAMWEL NGARE KAYAA alias KURIA WANJOHI alias MAPUA

2. PETER KURIA WANJOHI alias MORIO.....APPELLANTS

AND

REPUBLICRESPONDENT

(Appeal from the High Court of Kenya at Mombasa (Ibrahim & Ojwang, J.J) dated 1st

March, 2011 in H.C.Cr.A. No. 230 of 2006)

JUDGMENT OF THE COURT

The appellants, *Samwel Ngare Kayaa* alias *Kuria Wanjohi* alias *Mapua* and *Peter Kuria Wanjohi* alias *Morio* were charged with 4 counts. In count I- they were charged with the offence of robbery contrary to *section 296(2)* of the Penal Code. The particulars were:

"On the 20th day of September, 2003 at Shika Adabu area Likoni in Mombasa District of the Coast Province, jointly with others not before court, while armed with dangerous weapons namely pistols robbed No. 97071911 Administration Corporal Faki Ali Malevi of a motor vehicle registration number KAR 983B Toyota Land cruiser, a ceska pistol serial number G 0130 loaded with fifteen rounds of ammunition, a pair of handcuffs, a Sony J 70 mobile phone, a Seiko five wrist watch, a pair of shoes and an umbrella, four CD casseUes, a half jacket, a wallet containing official and civilian identity cards plus personale ffects and cash Kshs.41,000/= all valued at Kshs.15,000,000/= and at or immediately before or immediately afte the time of such robbery threatened to use actual violence to the said Administration Corporal No. 97071911 Faki Ali Malevi."

In count II, the 1st appellant, Samwel Ngare Kayaa alias Mapua was charged with the offence of being in possession of a firearm without a firearm certificate contrary to section 4(2)(a) of the Firearms Act Cap. 114 Laws of Kenya. The particulars were:

"On the 29th day of September, 2003 at Mwavumbo Location in Kilifi District of the Coast

Province was found in possession of a firearm make Ceska pistol serial number G-130 without a firearm certificate."

In count III, the 1st appellant, Samwel Ngare Kayaa alias Mapua was charged with the offence of being in possession of ammunition without a Firearm Certificate contrary to section 4(2)(a) of the Firearm Act Cap. 114 Laws of Kenya. The particulars were:

"On the 29th day of September, 2003 at Mwavumbo Location in Kilifi District of the Coast Province was found in possession of eleven rounds of ammunition 9mm calibre without a certificate."

In count IV, the 2nd appellant, Peter Kuria Wanjohi alias Morio was charged with the offence of being in possession of Government stores contrary to section 324(3) of the Penal Code. The particulars were:

"On the 2nd day of October, 2003 at Kona ya Samani Likoni in Mombasa District of the Coast Province was found in possession of Government stores namely a pair of handcuffs which may reasonably be suspected of having been stolen or unlawfully obtained."

On 16th February, 2004 the trial commenced before **H. Njiru**, the then Senior Resident Magistrate Mombasa and later proceeded before **U. P. Kidula** the then Chief Magistrate Mombasa. The hearing then proceeded before **S. N. Wahome**, Senior Resident Magistrate and finally before **T. Mwangi**, Senior Resident Magistrate who on 16th August, 2006 found the appellants guilty of all the charges. The learned magistrate sentenced the appellants to death as prescribed by law and proceeded to 'suspend' sentences in counts II, III and IV albeit not pronouncing the sentences meted out.

The appellants were dissatisfied with the convictions and the sentence meted out and they preferred an appeal in the High Court.

On 1st March, 2011 **M. Ibrahim & J. B. Ojwang, JJ.** (as they then were) dismissed the appellants' appeal. Undeterred by this turn of events, the appellants filed this appeal.

During the hearing of the appeal before us **Mr. Ngumbau** for the appellants argued 3 out of the 18 grounds of appeal filed by each of the appellants. The 3 grounds argued before us were:

"i) Failure by the first appellate court to arrive at a conclusion that section 200 of the Criminal Procedure Code was not complied with.

ii) Failure by the first appellate court to sufficiently re-analyze and re-evaluate the evidence.

iii) Failure to consider the defences raised by the two appellants."

Mr. Oyiembo, learned Assistant Director of Public Prosecutions for the State opposed the appeal. On the issue of non-compliance with **section 200** of the Criminal Procedure Code, Mr. Oyiembo was of the view that there had been compliance. He however, urged us to order a re-trial in the event that we were to find that there had been non-compliance with **section 200** of the Criminal Procedure Code.

As stated above, the trial commenced before **H. Njiru** on 16th February, 2004 - who recorded the evidence of six witnesses that is **PW1 Cpl. Faki Ali Makeri; PW2 Abdalla Mwinyi Majio; PW3 Pc. Evans Mwaura; PW4 Pascal Mweu; PW5 Highton Nduva Kyeti** and **PW6 Pc. David Matheka**. On 17th June, 2004 the conduct of the case was taken over by **U. P. Kidula**, the then Chief Magistrate, Mombasa. The learned magistrate complied with the provisions of **section 200(3)** of the Criminal Procedure Code by informing the appellants of their right to recall witnesses. The 1st appellant applied to have **PW1 Cpl. Faki Ali Makeri** and **PW3 Pc. Evans Mwaura** recalled. The duo were duly recalled

and were cross-examined by the 1st appellant on 12th August, 2004.

On 25th January, 2005 the trial was taken over by S. N. Wahome, Senior Resident Magistrate, U. P. Kidula having been transferred. S. N. Wahome informed the appellants of their right to recall the witnesses and the two informed the court that they did not wish to recall the witnesses. S. N. Wahome proceeded to record the evidence of PW7 - **Lindsay Kipkemoi**, PW8 **Stanley Wambua**, PW9 **C.IP. Peter Omamo**, PW 10 Pc. **Jonathan Shirengo** and PW11 Pc. **Eliud Njuki**. He thereafter delivered a ruling on 29th July, 2005 and found that the appellants had a case to answer. Then, S. N. Wahome was transferred before recording the appellants' defences.

On 1st August, 2005 **Boaz Olao**, the then Chief Magistrate made the following order:

"The trial Magistrate (Wahome, SRM) has now been transferred before finalizing this case. The matter shall now be heard by Mwangi (SRM) on 9.9.2003 in accordance with section 200 of CPC ..."

Accordingly, T. Mwangi the then Senior Resident Magistrate took over the matter on 31st October, 2005 and on that day recorded the 1st appellant's defence. On 15th February, 2006 the 2nd appellant asked for the case to commence de novo and in a ruling delivered on the same day the court declined on the basis that it was a delaying tactic. In the ruling the court observed that:

"On 22nd September, 2005, the accused persons were explained their rights in regard to the matter and in response they both decided to have the matter proceed from where it had reached."

Accordingly, the 2nd appellant made his unsworn statement of defence on 19th July, 2006 and T. Mwangi delivered the judgment on 16th August, 2006 wherein he found the appellants guilty of all the charges.

What is the position in law when a new magistrate takes over the conduct of a case previously conducted by another? The answer to this lies in **Section 200(3)** which provides 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 that right."

From the record, although T. Mwangi indicated that the appellants had been informed of their right under **section 200(3)** on 22nd September, 2005, the proceedings of 22nd September, 2005 do not reflect that that is what transpired in court. The appellants are therefore right in raising the issue of non-compliance with **section 200(3)** of the Criminal Procedure Code. Failure to comply with the mandatory provisions above meant that the subsequent proceedings were a nullity and we so hold.

What next? This is a case where the complainant PW1 Cpl. **Faki Ali Makeri** and PW2 **Ahdala Mwinyi Majio** were robbed at gunpoint and several items including a gun was taken from PW1. The experience under the hands of the thugs was harrowing for PW1 who was threatened with death. He too deserves justice. On the other hand, the appellants have been in confinement for about ten (10) years now. Balancing the two interests, we believe that the justice of the case demands that the case be re-heard in the subordinate court. In the case of **Muiruri v R [2000] KLR 552** the court ordered a retrial in the subordinate court after observing that:

"3. Generally whether a retrial should be conducted or not must depend on the circumstances of the case."

4. It will only be made where the interest of justice required it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to quashing of the conviction were entirely the prosecution making or not ..."

As explained above, to our mind this is a proper case for the re-hearing and the ends of justice demand it. In the premises, we allow the appeal and set aside both convictions and sentences. The appellants will nonetheless stand a re-trial in the Chief Magistrate's Court at Mombasa before a different magistrate other than T. Mwangi, the then Senior Resident Magistrate who presided over the initial trial. In the meantime, the appellants shall remain in custody until presented before the subordinate court within 14 days from the date hereof, so that a hearing date for the trial is set. The hearing of the trial should be expedited considering that the appellants have been in custody since 20th September, 2003.

Dated and delivered at Malindi this 28th day of March, 2014

J.MWERA

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR