IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KARANJA & J. MOHAMMED, JJ.A)

CRIMINAL APPEAL NO. 106 OF 2013

BETWEEN

JONES MAKAU NDOLO ……APPELLANT

AND

REPUBLIC ….....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Kihara Kariuki & Kimaru, JJ.) delivered 8th June, 2012

in

H.C. Cr. A. NO. 12 OF 2009)

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JUDGMENT OF THE COURT

The appellant was convicted by ***F.M. Nyakundi*** the Ag. Principal Magistrate Makueni, for attempted robbery contrary to ***section 297(2)*** of the Penal Code, and sentenced to death. This is a second appeal, the appellant's first appeal having been dismissed by the High Court.

The particulars of the offence alleged that on the night of 1st March 2006, the appellant jointly with others not before the court and being armed with rungus and bow and arrows attempted to rob ***Teresia Ndinda Kiio*** of cash money and at the time of such robbery threatened to use violence to her.

The complainant (***Teresia)*** had at the material time a shop at Kiteei market but was living at her home about one kilometer away. ***Mutinda Kilonzo (Mutinda***) was the watchman at her shop while ***Daniel Mutisya Mutio*** (***Mutio***) was the watchman at her home.

On the night of 1st March 2006 Teresia was asleep in her house together with her children. At about 1.00 a.m. two people went to the shop. Mutinda identified one of them as the appellant. The appellant threw a stick at him and Mutinda hit him and he fell down, after which Mutinda ran away.

Thereafter three people went to the home of Teresia. They beat the watchman (Mutio), tied him to the seat and took his bow and arrows. Mutio recognized the appellant. The robber proceeded to the home and broke three windows. They called her saying that they wanted money and threatened to shoot. She

went to the window which had grills and a curtain and saw three people outside. She recognised the appellant who was a neighbor through moonlight. She and her watchman screamed and the robbers escaped.

In the morning, neighbours followed shoe prints to Mbuvo about eight (8) kilometers from the home of Teresia where they recovered bow and arrows in a farm.

At about 10.00 a.m. neighbours reported to ***AP. Sgt. Simon Nzioki at Mbuvo*** market that they had seen the appellant in the market. The appellant was traced and arrested.

The defence for the appellant was an alibi. He gave sworn testimony at the trial that on the material day he had arrived at Mbuvo market from Nairobi at 11.00 a.m. when he was arrested and searched and his Shs. 2000 taken by the arresting officer.

The trial magistrate convicted the appellant solely on the ground that he was identified through recognition by Teresia and her watchman, Mutio at the time of the attempted robbery. The main ground of appeal in the High Court was that the trial magistrate erred in failing to find that the circumstances were not conducive for proper identification. The High Court made a finding that there was cogent evidence that established that the appellant robbed the complainant and that the defence of the appellant did not dent the prosecution evidence.

In this appeal, ***Betty Rashid*** the appellant's counsel relied mainly on two grounds namely, failure by trial magistrate to comply with ***section 200(3)*** of the Criminal Procedure Code (**Code**) and failure by the High Court to adequately evaluate the evidence relating to the identification of the appellant.

The prosecution called seven witnesses to prove the charge. The evidence of six witnesses including the evidence of Teresia, Mutinda, and Mutio was heard by S.R. Rotich, a Senior Resident Magistrate who was transferred before the completion of the trial. The succeeding magistrate F. M. Nyakundi informed the appellant that the previous magistrate would not return to complete the trial and explained the provisions of section 200 of the Code to the appellant. The appellant applied that the case starts afresh as he wanted to cross-examine some witnesses. The application was opposed by the prosecution on the ground that the appellant was using delaying tactics and that witnesses may not be traced without undue difficulties. The new magistrate rejected the appellant's application saying that the appellant had been given full opportunity to cross-examine the witnesses and the application was not made in good faith. The magistrate proceeded to receive the evidence of ***Sgt. Simon Nzioki***, the arresting officer who was the last witness and the evidence of the appellant.

Section 200 as read with section 200(3) of the Criminal Procedure Code authorises a succeeding magistrate to complete a trial commenced by a magistrate who has ceased to exercise jurisdiction subject to the right of an accused person to demand that any witnesses be re-summoned and reheard. Section 200(4) provides:

> ***"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 High Court did not consider the provisions of section 200(4) of the Code. Had it done so, it would have appreciated that the conviction was dependent on the credibility of Teresia and Mutio which the succeeding magistrate had no opportunity of assessing having not testified before him, and the fact that failure by the succeeding magistrate to accede to the appellant's application may have materially prejudiced the appellant. Whilst it was not illegal for the succeeding magistrate to complete the trial without re-hearing the witnesses as demanded by the appellant, the failure by the High Court to consider the provisions of section 200(4) was in the circumstances of the case a serious error of law.

The complaint that the High Court did not adequately evaluate the evidence of the material witnesses is supported by the judgment. The High Court merely said that the evidence was cogent without at all re-

evaluating or reconsidering the evidence of Teresia, Mutinda, Mutio or the defence of alibi. Had the High Court performed its legal duty, it would have appreciated that the circumstances obtaining at the time of attempted robbery were not conducive to proper identification of the appellant by Teresia and Mutio. Further, the High Court could have doubted the veracity of the evidence of recognition of appellant by Teresia and Mutio for if they had recognized him, the neighbours would have gone in search of the appellant in his house instead of tracking shoe prints for eight (8) kilometres. Lastly, had the court re-evaluated the evidence it could have appreciated that the tracing of shoe prints did not lead to the arrest of the appellant but rather that the appellant was arrested in a market place upon being seen there.

For the foregoing reasons, we are satisfied that had the High Court re-evaluated the evidence and in addition taken into account the provisions of section 200(4) of the Code, it would have reached a different decision.

Accordingly, we allow the appeal, quash the conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 23rd day of May, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

/hg.