IN THE COURT OF APPEAL

AT MOMBASA

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

CRIMINAL APPEAL NO. 43 OF 2011

BETWEEN

JOANES OKETCH ONGORO …….APPELLANT

AND

REPUBLIC ……...……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Malindi (Omondi & Odero, JJ.) dated 14th March, 2011

in H.C.Cr.A. No. 114 of 2008)

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JUDGMENT OF THE COURT

The appellant, ***Joanes Oketch Ongoro*** was charged with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The particulars of the charge were that:

> ***"On the 30th day of July 2003 at SHELLA Village in Malindi location, within Malindi District of Coast Province, while being armed with dangerous weapons namely knives, jointly with another not before court robbed PAUL ODUOR of 22 sachets of blue omo, 8 cowboy cooking oil, 2 packets of mosquito coils, 2 tins of tomato pasts*** *(sic)* ***all valued at Kshs.972 and at or immediately before or after the time of such robbery, used actual violence to the said PAUL ODUOR."***

There was a second count of assault causing actual bodily harm contrary to ***section 251*** of the Penal Code. The particulars were that:

> ***"On the 30th day of July, 2003 at SHELLA Village in Malindi location, within Malindi District of Coast Province, unlawfully assaulted OMAR ALI SUDAN thereby occasioning him actual bodily harm."***

The appellant pleaded not guilty to both counts and the matter proceeded to trial before ***D. Ogembo,*** the then Senior Principal Magistrate Malindi who commenced the hearing on 30th March,

2004. The learned Senior Principal Magistrate recorded the evidence of PW1 ***Paul Oduor***, PW2 ***Omar Ali Sudan***, PW3 ***Dr. Bwire Kizito Vitalis***, and PW4 ***Pc. Jeckoniah Onyango***. Following a protracted trial that included the recall of witnesses, the court found that the appellant had a case to answer on 26th October, 2006.

On 11th July, 2007 the trial was taken over by ***D. Ochenja***, the then Senior Resident Magistrate, Malindi who rightly informed the appellant of his rights under ***section 200(3)*** of the Criminal Procedure Code. The appellant did not wish to have the matter heard *de novo* and opted to have it proceed from where the previous magistrate had reached. Accordingly, ***D. Ochenja*** proceeded to record the appellant's defence on 29th August, 2007.

On 4th June, 2008 the trial was once again taken over by ***D.W. Nyambu***, the then Senior Resident Magistrate, Malindi who recorded the appellant's submissions, the State proffering not to make any submissions. On 24th September, 2008 the learned Senior Resident Magistrate convicted and sentenced the appellant to suffer death in respect of count I. Count II was however, held in abeyance and rightly so in our view.

The appellant was dissatisfied with the conviction and sentence and filed an appeal to the High Court. On 14th March, 2011 ***Omondi & Odero, JJ.*** dismissed the appellant's appeal thus provoking this appeal.

The appellant in his home-made grounds of appeal complains:-

> ***"1. That the learned High Court Judges misdirected themselves by upholding my conviction and sentence without evaluating that the charges of robbery with violence contrary to section 296(2 of the penal code cannot stand in law for the facts and evidence in the records*** *(sic)* ***disclosed the offence of BURGLARY and stealing contrary to sec 304 of the penal code.***
>
> ***2. That the learned High Court Judges erred in law and fact by failing to see that sec 134 of the criminal procedure code was not complied with.***
>
> ***3. That the learned High Court Judges erred in law and fact by upholding the evidence of PW2 without considering that PW2 was not a straight forward witness. For he elucidated a contradicted*** *(sic)* ***statements.***
>
> ***4. That the High Court Judges failed in the rule of law by NOT considering that the prosecution ease*** *(sic)* ***was not proved to the standard required by law hence sec 109 of the evidence act was not considered.***
>
> ***5. That the learned High Court Judges erred in failing to consider my defence statement."***

The above grounds of appeal were urged before us on 11th June, 2004. The issue that ***Mr. Ogembo,*** learned counsel for the appellant pressed home was non-compliance by the Magistrate who last handled the trial with the mandatory provisions of ***section 200(3)*** of the Criminal Procedure Code.

That being the case, Mr. Ogembo invited us to order a retrial on the basis that the appellant's rights as provided under ***section 200(3)*** of the Criminal Procedure Code had been violated by that failure on the part of the learned Magistrate. ***Mr. Oyiembo***, the Assistant Director of Public Prosecutions conceded that learned Senior Resident Magistrate, ***D. W. Nyambu*** failed to comply with ***section 200(3)*** of the Criminal Procedure Code and was willing to concede the appeal on that ground as well as for the order of re-trial. The section complained of provides *inter alia*:-

> ***"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."

It is clear from the record that ***D.W. Nyambu*** failed to notify the appellant of his rights under ***section 200(3)*** of the Criminal Procedure Code. It is not difficult to see the *raison d'etre* for the provisions of ***section 200(3)*** of the Criminal Procedure Code. A trial court unlike an appellate court, is seized of an opportunity to assess the demeanour of witnesses and come to the conclusion of their trustworthiness or otherwise. A Magistrate who takes over a trial mid-way, has clearly not had the benefit of seeing the witnesses. The law imposes an obligation on the trial court to inform an accused person of his right to recall witnesses in respect of a Magistrate who takes over a trial. That right however, may be waived by an appellant but unless and until an accused is advised accordingly, the court cannot presume that an accused has waived his right to recall witnesses. The learned Senior Resident Magistrate **(*D.W. Nyambu*)** erred in not notifying the appellant of his right under ***section 200(3)*** of the Criminal Procedure Code. In our view this occasioned a miscarriage of justice.

It is also noteworthy to point out that the issue before us was not raised before the trial Magistrate or before the learned Judges of the High Court. However, this is a point of law which we are properly seized of as it can be raised at any stage of proceedings and in any court. Accordingly, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. What next? Should we order a retrial or not?

In ***Muiruri v Republic [2003] KLR 552***, this Court (*differently constituted*) held that an order for 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 v 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."***

In this case the appellant was arraigned in court for plea on 16th October, 2003, a period of now over eleven (11) years. Looking at the record, it would also appear that there were two separate and distinct offences that is of ***burglary*** and ***assault***. PW1's testimony was that he was asleep in his bedroom where he was in a vantage position to see the events in his shop. At about 4.30 a.m he saw someone stuffing things in a basket. He tried to get out only to discover that he had been locked in. He yelled for help and got assistance from a neighbour, namely Omari. On coming out the thieves had fled. PW1 and Omari began to look for the culprits and went upto a road where they found policemen who said that none had gone that direction. On their return leg, a man grabbed him and cut him on the left ear and head. Omari was also cut. Unfortunately for the thief, he was arrested and found with items allegedly stolen from PW1's shop.

From the above, it is clear that there were two incidents which were separate and distinct. Firstly, there was the burglary and then the assault. The thief who stole from PW1's shop did not at any time go to where PW1 was. If anything, the thief locked PW1 in his house. When PW1 was finally let out by Omari, the thief had taken off. PW1 began a search and after making frantic efforts but to no avail while on his return, he encountered the appellant who then inflicted injury on him, this was a separate and distinct commission of an offence of assault. Given the above, it was wrong to have charged the appellant with the offence of robbery with violence contrary to ***section 296(2)*** of the Penal Code as the facts pointed to the commission of an offence of burglary as well as an offence of assault causing actual bodily harm. Offences of burglary contrary to ***section 304(2)*** of the Penal Code and assault contrary to ***section 251*** of the Penal Code attract less punitive sentences *vis-à-vis* offences of robbery with violence under ***section 296(2)*** of the Penal Code.

It may well be that the evidence against the appellant was water-tight, but we take into account that

he has been in custody since 2003. We also take into consideration that the items he allegedly stole that is 22 sachets of blue omo, 8 cowboy cooking oil, 2 packets of mosquito coils, 2 tins of tomato pasts *(sic)* all valued at Kshs.972/= are items which are easily disposable and chances are they are no longer available.

There is also the issue of passage of time which no doubt has taken its toll. Some of the witnesses may or may not be found. The prosecution has not given any reassurance on that. Those found may not remember in detail the circumstances of the offence. It would appear to us that there may be no meaningful trial, given the fact that it is now over eleven years since the commission of the offence. Accordingly, we decline to order a retrial and direct that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated and delivered at Mombasa this 25th day of September, 2014

P. N. WAKI

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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