IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 135 OF 2004

RICHARD CHARO MOLE..APPELLANT

AND

REPUBLIC...RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Nairobi (Mbaluto & Onyancha, JJ.) dated 9th October, 2003 in H.C.CR.A. NO. 274 OF 1998)

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JUDGMENT OF THE COURT

This is a second appeal which raises two issues of law, each one of which is capable fordisposing of it. The grounds raised by learned counsel for the appellant, Mr. Kenyariri, andconceded by PrincipalState Counsel Mr. Kaigai, state as follows:

"1. THAT the first appellate court Judges erred in Law by failing to declare the whole trial a nullity as it was held in contravention of section 85 (2) and section 88 of the Criminal Procedure Code.

2. THAT the learned High Court Judges erred in law by failing to find that the provisions of section 200 of the Criminal Procedure Code were not complied with."

Simply put, ground (1) attacks the entire trial on the basis that part of the prosecution of the case was conducted by an unqualified person. ***Section 85 (2)*** of the Criminal Procedure Code which was applicable at the time of the trial of the appellant provided for appointment of public prosecutors by the Attorney General and specified categories of such appointments as *"an advocate of the High Court or* a *person employed in the public service not being a police officer below the rank of assistant Inspector of Police"*.

That section was however amended by **Act No. 7 of 2007** which removed the requirement that the public officer legible for appointment as a public prosecutor should not be below the rank of assistant Inspector of Police. The second ground of appeal relates to the failure by the succeeding trial magistrate to explain to the appellant his rights under ***section 200*** of the Criminal Procedure Code before proceeding with the trial. In view of the order we propose to make upon examination of those grounds, we refrain from any detailed exploration of the facts of the case.

About 17 years ago, in 1993, the appellant was allegedly involved in a grisly heist of a huge cash-in-transit belonging to the Kenya Commercial Bank, which ended up with the death of two police officers escorting the cash and the wounding of another person. He was charged with two counts of robbery with violence contrary to ***section 296 (2)*** of the Penal Code in that he:

"On the 14th day of May, 1993 at Makhokho village in Idakho Location of Kakamega District within the Western Province, robbed Cosmas Opiyo Ogutu of one cash box valued Kshs,5,000/=, money order Kshs. 122,400/=, uncollected money order Kshs.960,298/= and cash Kshs.502,492 all to the total value of Kshs.1,590,190/20, the property of the Kenya Commercial Bank Limited Kakamega and immediately before or immediately after the time of such robbery used personal violence and shot dead No. 47804 Police constable ELIJAH NDAMBUKI, NYAKUNDI NYAMONGO and wounded one LAWRENCE MUHEMBERE."

On the second count it was alleged that on the same day, time and place, he robbed ***Pc. Elijah Ndambuki*** of his rifle No. 0822 and at or immediately before or immediately after the time of such robbery used personal violence and shot dead the two officers and wounded the third person. Two other counts in the same charge sheet related to his co-accused who faced charges of being accessory to the fact of commission of a felony contrary to ***section 396 (1)*** as read with ***section 397*** of the Penal Code and Handling stolen goods contrary to ***section 322 (2)*** of the Penal Code. The co-accused was eventually sentenced to serve prison terms which he has already done.

The trial of the appellant commenced before Kakamega Principal Magistrate's Court on 3rd June, 1997 after several preliminary matters were disposed of since the plea was taken in May 1993. The presiding magistrate was G.A. Ndeda, Senior Principal Magistrate and the prosecutor was Chief Inspector Mwangi. By 25th October, 1995, ten (10) prosecution witnesses had been called and testified. It would then appear that thereafter the trial magistrate disappeared from the scene, probably on transfer, and after several adjournments, another Magistrate W.A. Juma, Senior Resident Magistrate, took over the trial on 28th July, 1997. Prosecuting the case before the Senior Resident Magistrate was Senior Sergeant Okumu, who without any preliminaries said he had two witnesses to call and proceeded to call them. He also participated in the defence case put forward by the appellant and his co-accused. The judgment was thereafter written and delivered by W.A. Juma SRM, convicting the appellant and sentencing him to death. His first appeal to the superior court was dismissed.

There can be no doubt that the events of 28th July, 1997 totally vitiated the entire trial. In the first place, the succeeding Magistrate W.A. Juma SRM, made no reference to the provisions of ***section 200*** of the Criminal Procedure Code which governs the procedure where the trial magistrate ceases to exercise jurisdiction in the matter. ***Sections 200 (3)*** and ***(4)*** are particularly relevant to this matter and they provide 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 resummoned and reheard and the succeeding magistrate shall inform the accused person of the right.

(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 construction of those provisions has been made previously by this Court and it is surprising that some trial courts appear to be oblivious about them. We need only refer to **Ndegwa v Republic [1985] KLR 534** where this Court held as follows:

"1. The provisions 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 times 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."

The trial in this case was not a short one as the first trial magistrate had heard ten prosecution witnesses whose credibility and personal demeanour she had observed. ***Section 200 (3)*** (supra) requires in mandatory tone that the succeeding magistrate shall inform the accused person of the right to demand a recall of any or all witnesses to be reheard by the succeeding magistrate. The duty is reposed on the court and there is no requirement that an application be made by the accused person. The failure to comply with that requirement would in an appropriate case render the trial a nullity. In the case before us, we agree with both Mr. Kenyariri and Mr. Kaigai that the omission to comply with the section was grossly prejudicial to the appellant and the trial was thus vitiated.

The trial was also vitiated by the subsequent participation of Senior Sergeant Okumu as the prosecuting officer. As this Court has stated since **<u>Elirema & Another v Republic</u> [2003] KLR 537** and in subsequent decisions, the Attorney General had no power to appoint a police officer below the rank of Assistant Inspector as a public prosecutor and therefore Senior Sergeant Okumu was an unqualified person to prosecute part of the trial. The trial was a nullity and we so declare.

The only issue to determine is whether we should order a retrial. Mr. Kenyariri called for the release of the appellant arguing that he had no part to play in the debacle and in any event he has been in custody for 17 years now. A retrial would in those circumstances be prejudicial to him. On his part Mr. Kaigai observed that the allegations made against the appellant are grave since two innocent lives were lost and the victims or their families are also entitled to justice. He was optimistic that a conviction would ensue on the basis of the evidence on record or other potentially admissible evidence and the State was ready and capable of marshalling witnesses, who are basically police officers and bank officials, at short notice if the court so directs.

We have anxiously considered the matter particularly in view of the lengthy period which has elapsed since the arrest and incarceration of the appellant. As we have stated before:

"Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not. See <u>Muiruri vs. Republic</u> [2003] KLR 552. It is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial – see <u>Mwangi vs. Republic</u> [1983] KLR 522."

That was in the case of **<u>Rwaru Mwangi v Republic</u> Criminal Appeal No. 18/2006 (ur).**

We have considered those principles and we think it is in the interests of justice that a retrial should

be ordered in this matter. In the result we allow the appeal, and set aside the conviction and sentence imposed on the appellant. We order that the appellant shall be retried before a magistrate of competent jurisdiction other than G.A. Ndeda and W.A. Juma. In order to obviate further delay in the conclusion of the trial, we direct that the appellant be remanded in custody and he produced before the trial magistrate within 14 days of this judgment for expeditious retrial.

Those shall be our orders.

Dated and delivered at Nairobi this 5th day of March, 2010.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR