IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 297 of 2008

EDWARD MAKWA MAISORI)

ALFRED MOHERE RIOBA)……………………..…. APPELLANTS

GEORGE BIKERI NYAKUNDI)

AND

REPUBLIC ……………………......…………...………..…… RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Koome & Maraga, JJ.)

dated 11th December, 2008

in

H. C. CR. A. NO. 86, 87 & 89 OF 2005

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JUDGMENT OF THE COURT

Learned State Counsel, Mr. Mugambi, concedes this appeal on the main ground raised by the appellants that there was no compliance with ***section 200*** of the **Criminal Procedure Code** (*section 200*), and we think he was right to do so. ***Section 200***, with added emphasis, states as follows: -

*"**200. (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may**-*

(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or

*(b) **where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.** (emphasis added.)*

(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.

(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 that right. *(emphasis added.)*

(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 record before us shows that the three appellants appeared before Nakuru Senior Resident Magistrate, R. Kirui (probably sitting in Molo) on 23rd January, 2003 for plea on allegation that they had jointly committed the offence of robbery with violence contrary to ***section 296 (2)*** on 30th October, 2002, in Molo, Nakuru District. There was a further charge against one of them, ***George Bikeri Nyakundi***, that he had in his possession a firearm contrary to ***section 4 (1)***, as read with ***section 4 (3)*** of the **Firearms Act**. They denied the offence and their trial commenced before the same magistrate and continued until 9th April, 2003 when the prosecution closed its case after calling 8 witnesses. The learned magistrate made a finding that all three appellants here had a case to answer and set down the defence hearing on 9th May, 2003. The hearing did not take place on that day and on 27 other occasions subsequent thereto when the case was variously mentioned before different magistrates and adjourned for varying reasons; including the absence of the appellants who had other cases going on before other courts; awaiting copies of proceedings applied for by the appellants; lack of police vehicles to transport the appellants to court; and the absence of the trial magistrate who was at one time on leave. Eventually on 31st May, 2004, the case was placed before Mrs. T. Wekulo SRM, who made the following record which we reproduce:

"**4.5 (sic) p.m.**

Court: File just brought up.

Court prosecutor: Molo has also not brought me police file.

T. WEKULO

SRM

Accused 1: We have agreed that the matter should proceed from where it stopped. If the prosecutor would have their file then we could then know how to go on.

T. WEKULO

SRM

Court Prosecutor: I pray for an adjournment and summons to the DCIO Molo to produce the file.

T. WEKULO

SRM

Order: Summons to issue to DCIO Molo to appear on 9.6.2004 and produce the police file. Mention on 9/6/2004.

T. WEKULO

SRM"

It will be noted at once that the original magistrate was no longer seized of the trial but there is nothing in the record to show why that was so. It will also be noted that, although all three appellants

were before the court, only one of them (Accused 1) addressed the court. We shall revert to the consequences of that record shortly.

When the matter resumed on 9th June, 2004, the following altercation took place and was recorded:

"**Before T. Wekulo, SRM**

CP/IP Muhavi

Court Clerk Wanjiku

Accused present

<u>Accused 1</u>: We would like to make submissions for no case to answer.

<u>Court Prosecutor</u>: The court had already made a ruling that the accused persons had a case to answer.

T. WEKULO

SRM

<u>Accused 1</u>: Our lawyer's would have made submissions. However the court had many cases of ours. We wish to make our submissions. We ask this court to give us a chance to enable us make our submissions so that this court can also have a chance to get to know the case better.

T. WEKULO

SRM

<u>Accused 2</u>: It is clear that our advocate would have made submissions. We asked for order of treatment and proceedings so that we can do our reference since this case was brought here.

T. WEKULO

SRM

Accused 3: I agree with my colleagues.

T. WEKULO

SRM

<u>Order</u>: Mention on 18/6/2004 for the court to go through the proceedings and make a decision.

T. WEKULO

SRM

<u>RULING</u>

I have carefully perused the proceedings. The accused persons have applied to make submission for no case to answer. However, when the case was heard in Molo court, accused persons were represented by counsel. When the defence closed its case. The counsel on record told the court he had no submission to make at that stage and case was fixed for defence hearing. He even told the court that they have 5 witnesses. Since 9/4/2003, the case has been pending for defence hearing.

Accused persons agreed to proceed with the case from where it had stopped. The record speaks for itself. Counsel opted not to make submissions. Thus the court cannot revise/review that order as the record does not indicate there having been any clause at all that would allow for that. The accused persons application is therefore denied.

T. WEKULO

SRM"

The matter then proceeded to hearing and the succeeding trial magistrate, Mrs. Wekulo, heard seven witnesses and submissions before delivering a considered judgment on 31st March, 2005. The appellants were all found guilty as charged, convicted, and sentenced to death.

In their first appeal to the superior court, the appellants did not specifically raise the issue of ***section 200*** and the superior court (Koome and Maraga, JJ.) in the course of re-evaluating and analyzing the evidence, said nothing about the procedure followed in the trial. The appeal was dismissed.

The three appellants drew up in person their Memorandums of appeal and subsequently filed what they called "*supplementary grounds of appeal"* and lengthy submissions on each of the grounds. Among them was the common ground that the trial magistrate erred in law in failing to comply with ***section 200***, the consequence of which, according to Mr. Ombati, learned counsel who argued the appeal, is the acquittal of all the appellants. The reason, according to him, is because they have been incarcerated for seven years and any retrial would take even longer thus causing an injustice. For his part, Mr. Mugambi found no reason to surmise that a retrial would take a long time or that it was not feasible. According to him, there was credible evidence on record and the majority of the witnesses were policemen who could easily be marshalled to mount a fast and successful retrial.

As stated earlier this appeal was conceded on the one issue and we have refrained from considering the other issues raised in the appeal or analysing the evidence on record for reasons that will become apparent shortly.

We agree with both counsel that the provisions of ***section 200 (3)*** were not complied with by the second trial magistrate in this matter. As the record reproduced above shows, the learned trial magistrate allowed only one appellant, who was the 1st accused person, to address her on the manner of continuation of proceedings. The other two appellants said nothing in the matter. None of them could purport to represent any other in those proceedings. Their rights under the law are individual and specific to them. In the ruling reproduced above, the learned trial magistrate stated that the "*accused persons agreed to proceed with the case from where it had stopped. The record speaks for itself."* With respect, that was not so. The record before us shows that it was only the appellant, **Edward Maisori Marwa**, the 1st accused who said anything when the second trial magistrate took over the case. More importantly, none of the appellants was addressed by the trial magistrate, as required under ***section 200(3)***, on their right to demand the resummoning and rehearing of any witness.

The consequence of breach of ***section 200*** has been examined by the courts before and we need only refer to two of them: firstly; **Kariuki v Republic** **[1985] KLR 504** where it was held by the High Court on first appeal that:

"*1. Under section 200(3) of the Criminal Procedure Code (Cap 75), an accused person is entitled to demand that any witness be resummoned and reheard and a duty is imposed on a succeeding magistrate to inform the accused person of that right.*

2. The record of this case showed that the appellant was not informed of his right to demand that any witness be resummoned or reheard.

3. The assumption of jurisdiction by the succeeding magistrate without informing the appellant of his right was wrong and the trial by the succeeding magistrate was a nullity."

Secondly **<u>Ndegwa v Republic</u> [1985] KLR 534** where this Court spelt out the rationale for compliance with the section, the application of it, and the consequence of breach, thus:

"*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 asses 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."

We agree with those decisions with the consequence that the conviction of the three appellants should be and is hereby set aside and the sentence of death on each of them set aside. Should we make an order for re-trial?

The guiding principle is that each case must depend on its own particular facts and circumstances but an order for retrial should only be made where the interests of justice require – see for example **<u>Benard Lolimo Ekimat</u> Criminal Appeal No. 151/04 (UR)**. Some relevant factors to consider in exploring the justice of the matter would include illegalities or defects in the original trial; the length of time elapsed since the arrest and arraignment of the appellants; whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; and whether on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial – see **<u>Muiruri v Republic</u> [2003] KLR 552** and **<u>Mwangi v Repulic</u> [1983] KLR 522**.

We have taken all these principles into consideration and in our view an order for retrial in this case would meet the ends of justice.

In the result we allow the appeal, set aside the conviction and the sentence of death imposed on each of them. The appellants and each of them shall be tried before any court of competent jurisdiction excluding R. Kirui, SRM, and T. Wekulo SRM. In view of the time elapsed since their arrest, the retrial shall be conducted expeditiously. In the meantime the appellants shall remain in custody awaiting the trial, and shall be presented before the Chief Magistrate's Court at Nakuru forthwith for directions as to the hearing of their case.

Dated and delivered at Nakuru this 2nd day of October, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.