



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Criminal Appeal 178 of 2006

JOSEPH MACHARIA MIANO 1ST APPELLANT
ELIUD WANGAI GIKONYO 2ND APPELLANT
DANIEL MBUGUA WANJIRU 3RD APPELLANT
IBRAHIM NJENGA NYAGA 4TH APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at

Nakuru (Koome & Kimaru, JJ.)

dated 31st March, 2006

in

H. C. CR. A. NO. 38 OF 2000)

JUDGMENT OF THE COURT

Section 200 of the Criminal Procedure Code (hereinafter“the section”) provides 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 section is the basis of the legal issue raised in the appeal before us and we have emphasized the relevant parts of it. We shall shortly revert to the submissions made in that regard. Several other grounds were raised and argued by learned counsel for the appellant, Mr Ombati, and we may quickly dispose of them.

The first was a complaint that the fundamental rights of the appellants were violated as they stayed in police custody beyond 14 days allowable in law, before being brought to court. Mr Ombati, however, quickly abandoned that ground after it was pointed out to him that the appellants, according to the record, were arrested on 17th January, 2001 and they first appeared in court on 31st January, 2001, which was in compliance with the law. In the second ground, Mr Ombati asserted that the charge sheet was defective, firstly, in that the registration number of the motor vehicle mentioned in the charge sheet was different from the vehicle referred to in evidence. That contention would, of course, even if it was valid, not reflect a defect in the charge sheet but variance between the charge sheet and the evidence on record. As readily conceded by Mr Ombati, however, it was curable under **section 382** of the **Criminal Procedure Code**. After comparison of the typed record with the original record, it turned out after all, that the registration number of the motor vehicle was mis-typed and nothing therefore turns on the issue. The second reason why Mr Ombati contended that the charge sheet was defective was that it had three counts, two of which jointly charged the four appellants with two separate offences while the third count jointly charged only three of the appellants. We do not appreciate the import of that submission, but it is clear to us that there was nothing in law which prohibits the manner in which the charges were framed. There were three different complainants who were allegedly robbed of different items albeit on the same day and those offences were correctly reflected in the charge sheet. Another complaint raised by Mr. Ombati was that the identification parade conducted in respect of one of the appellants contained more than 8 people and was therefore irregular. No authority was cited for that contention but the wording of **Order 6 (iv) (d)** of the **Force Standing Orders, Chapter 46 Laws of Kenya** provides for a minimum of 8 persons in the parade. There is no basis for complaint if more persons are enlisted in the parade so long as they conform to the order. That complaint has no legal basis. Finally, Mr Ombati contended that the proceedings, on three occasions, were conducted by a Senior Sergeant of Police who had no powers to do so contrary to **section 85 (2)** of the **Criminal Procedure Code**. The proceedings referred to by Mr Ombati were “mentions” of the case for the purpose of fixing hearing dates. All the three “mentions” were before another Magistrate who was not seized of the trial and no witnesses were called to testify. It is obvious to us that Mr Ombati misunderstood this Court’s previous decisions relating to the conduct of proceedings by unauthorized persons. Despite what Mr Ombati contended before us, “proceedings” in the context of those decisions does not include the “mention” of a case for the purpose of fixing a hearing date. All those grounds would not have availed the appellants and we reject them.

Reverting now to **section 200** aforesaid, the trial of the appellants was conducted between 31st January, 2001 and 2nd November, 2001 before W. N. Nyarima (SRM). By 2nd November, 2001, the prosecution had called all their evidence from 8 witnesses and closed their case. The Magistrate had also delivered his ruling that the appellants here had a case to answer and put them on their defence.

It is not clear from the record what then became of the trial Magistrate. The record shows that the appellants appeared before G.J.C. Ombito (RM) on 6th December, 2001 and the following order was recorded:

“The ruling is read. Case to come for mention on 21/1/02 to take date for defence hearing”.

It was “mentioned” twice before 21st January, 2002 when on that day it was placed before the Principal Magistrate, Mr. D. Kathoka Ngomo. For some reason, the learned Principal Magistrate thought the matter was coming up for “Ruling” which he adjourned to 13th February, 2002 and subsequently to 15th February, 2002. The record on that day simply shows:

“Court – Case for Ruling.

Order – Defence hearing 1/3/02”

Come the 1st of March, 2002, the case was once again adjourned with the order that the defence hearing would be on 5th March, 2002. We reproduce the full record made on that day: -

“5/3/02: Before Kathoka Ngomo – P M

IP Muriuki for prosecution.

Court clerk – Tabitha

Accused present.

Court: - Case for defence hearing.

Court: - Section 211 of the C.P.C. is complied with.

D.K. NGOMO

P.M

Accused 1: I will give a sworn defence. I have no witness to call.

D.K. NGOMO

P.M

Accused 2: I will give a sworn defence. No witnesses to call.

D. K. NGOMO

P.M

Accused 3: I will give a sworn defence. No witness to call.

D.K. NGOMO

P. M

Accused 4: I will give a sworn defence. I have no witnesses to call.

D.K. NGOMO

P.M.

Order: Defence hearing 8/3/02.”

The case was then adjourned on two other occasions before the appellants gave their defence in sworn testimony on 12th March, 2002. After conclusion of the case, the learned Principal Magistrate delivered a fairly lengthy and considered judgment in which he convicted all four appellants and sentenced them to suffer death as by law provided.

In their first appeal to the superior court, the appellants raised, among other issues, the non-compliance with the section. Surprisingly, the superior court (Koome and Kimaru, JJ.) made no mention of the issue in their judgment and therefore the issue remained at large. The appeal was dismissed on other grounds, hence the second appeal before us, understandably emphasizing the issue of non-compliance with **section 200**.

Mr. Ombati submitted before us, and the submission is well supported by the record, that the prosecution case was heard by one magistrate while the defence case was heard by another magistrate who then wrote and delivered the judgment without any recourse to **section 200**. There was thus an incurable error of law which called for acquittal of the appellants, Mr. Ombati asserted. The error of law was readily conceded by Senior State Counsel, Mr. Njogu, who submitted that there was overwhelming evidence to sustain a conviction and therefore a retrial, not an acquittal, was the appropriate order.

We agree with both counsel that the trial of the appellants was conducted by two different magistrates and that the succeeding magistrate did not at any time inform the appellants of their rights under the section. The net effect of the failure to comply with that section was stated in the **Tanzanian Case of Raphael v Republic [1969] EA 544** where the first appellate court held:

“It is a prerequisite to the second magistrate’s exercising jurisdiction that he should apprise the accused of his right “to demand that the witnesses or any of them be resummoned and reheard” under s. 196 of the Criminal Procedure Code;

(ii) if the second magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction, and the trial is a nullity.”

Section 196 referred to in that decision is identical to **section 200** of the Kenyan Criminal Procedure Code. That decision was applied in **Kariuki v Republic [1985] KLR 504** where the first appellate court held that under **section 200 (3)**, 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. The learned Judges stated:

“.....the appellant having a right to resummon and rehear the witnesses, of which right he was not informed, though a duty was imposed on the succeeding magistrate to inform the appellant of such right, we think that the assumption of jurisdiction by the said succeeding magistrate without informing the appellant of his right, was clearly wrong and the trial by the succeeding magistrate was a nullity.”

The stamp of authority on the construction of the section in issue was spelt out by this Court in **Ndegwa v Republic [1985] KLR 534** where it was held:

“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 time 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 the rationale and the construction made in the previous decisions in respect of the section.

In all those previous cases, the convictions were quashed and the sentences were set aside. Whether or not a retrial would ensue was however considered separately. In the *Kariuki case* (supra) it was declined because the appellant had already served the sentence imposed on him, while in the *Ndegwa case*, (supra) the prosecution evidence was tenuous.

We have no doubt ourselves that the conviction in this case as well as the sentence ought to be set aside, and we now do so. As for the consequential orders, this Court has stated before, that:

“There are many decisions on the question of what appropriate case could attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require.”

- See **Benard Lolimo Ekimat v R Criminal Appeal NO. 151/2004 (UR)**.

The trial in the matter before us was not a short one. As we have seen the prosecution called 8 witnesses who were heard before the first magistrate while the succeeding magistrate heard all four appellants and their submissions. We have studiously avoided the evaluation of the evidence on record, which is fairly substantial, but we think on a proper consideration of the admissible or potentially admissible evidence, a conviction might result from a retrial. This is one of the principles for consideration as stated in **Mwangi v Republic [1985] KLR 522**. We have also considered the length of the time elapsed since the arrest and arraignment of the appellants, which in this case is about 8 years; and whether the mistakes leading to the quashing of the conviction were entirely the prosecutions or not, as stated in **Muiruri v Republic [2005] KLR 552**. The mistakes were clearly by the two courts below since the law imposes a duty on the court to comply with the fundamental procedures now successfully challenged. The prosecution says it is capable of re-summoning all the witnesses to mount a successful retrial. We think in all the circumstances of this case, an opportunity ought to be given to the prosecution for the re-trial of the serious crimes alleged against the appellants. In all, there are three counts of robbery with violence contrary to section 296 (2) of the Penal Code and one alternative count of handling stolen property contrary to section 322 (2) of the Penal Code.

In the result, we allow the appeal, set aside the conviction and the sentence of death imposed on each of them. We order that the appellants and each of them be tried before any court of competent jurisdiction excluding W.N. Nyarima (SRM) and D.K. Ngomo (PM). The appellants will in the meantime be remanded in custody to await their trial which, in view of the time elapsed so far, ought to be conducted expeditiously.

Those shall be our orders in the appeal.

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

R. S. C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.