REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CRIMINAL APPEAL 15 OF 2007REPUBLIC OF KENYA

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Criminal Appeal 15 of 2007

ERICK OMONDI alias GOR…….....APPELLANT

AND

REPUBLIC……..….....……RESPONDENT

(Appeal from a judgment of the High Court of Kenya

sumu (Mwera & Mugo JJ) dated 27th March, 2007

in

H.C.CR.A. NO. 49 OF 2005

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JUDGMENT OF THE COURT

Erick Omondi alias Gor, was charged jointly with one Michael Oyuga Yaya, who has since died, with the offence of robbery with violence contrary to section 296(2) of the Penal Code, particulars of which read:

"On the night of 2/1/2004 at North Ramba Sub Location, Central Asembo in Bondo District within Nyanza Province, jointly with others not before court, while armed with pangas and clubs robbed Dorsila Achieng of cash Kshs. 300/- and immediately before or immediately after the time of the said robbery, used actual violence to the said Dorsila Achieng."

He was tried by a magistrate who heard all but one prosecution witness after which the said magistrate ceased to exercise jurisdiction over the case. A succeeding magistrate took over the conduct of the case, and at the time of doing so the record read as follows:

"**Pros:**

The case is partly heard by S.R.M Osodo. We can proceed from where the other trial Magistrate reached.

COURT:

The matter to proceed from where the other Magistrate left. Provisions of section 200 of the Criminal Procedure Code complied with. The accused cautioned is(sic) pleading to a capital offence. The charge read to the accused again in dholuo language which he understands and says not true."

Thereafter, the succeeding magistrate received evidence from one prosecution witness before the prosecution closed its case. He then put the appellant on his defence, heard and recorded his statutory statement under **section 211** of the Criminal Procedure Code, after which he drafted his judgment in which he found the appellant guilty as charged, convicted him and later sentenced him to the mandatory death sentence for the offence.

The main complaint in this appeal is that the succeeding magistrate did not sufficiently comply with the provisions of **section 200** of the Criminal Procedure Code, and as such the trial by the succeeding magistrate was thus rendered null and void.

In his first appeal to the superior court the appellant was unrepresented, and the issue was neither raised by him before that court, nor did the court itself raise it. It has therefore been raised before us for the first time. There is nothing objectionable to raising it here and now. It is, however, more prudent to raise it at the earliest stage. We appreciate that the appellant is a lay person and was unrepresented both at his trial and on first appeal. He was unlikely to know the existence of and the requirements of that particular section.

In the appeal before us, Mrs Asunah, appeared for the appellant. In her submission she stated that the requirements of **section 200** Criminal Procedure Code, are mandatory in nature and need to be complied with specifically, more so because the appellant faced a capital charge. In her view it is not sufficient merely for the trial magistrate to indicate that he or she had complied with the section.

Mr Musau, Senior Principal State Counsel, submitted that the succeeding magistrate did comply with **section 200** Criminal Procedure Code, but it would have been more prudent to demonstratively show such compliance. That notwithstanding, he said, the omission is curable under **section 382** Criminal Procedure Code.

Section 200 Criminal Procedure Code, as material provides as follows:-

"**200(1) Subject to sub section (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) ……

(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

(2) …….

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, <u>the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right</u> (Emphasis supplied)

While we agree that the succeeding magistrate in the case before us was aware and did to some degree

comply with the provisions of **section 200,** above, the wording of **sub-section (3)** thereof demands of the succeeding magistrate that he scrupulously observe and comply with its requirements. The highlighted part of that **sub-section** is couched in mandatory terms. It states "shall inform the accused person of that right." Which right? The right to resummon and examine witnesses who had previously testified. There is wisdom in that provision as the succeeding magistrate neither heard nor saw those witnesses testify. If the accused person is informed of this right, he might wish the succeeding magistrate to form his own impression about their demeanor. **Subsection (4)** of that section is instructive. It provides that on first appeal, if the High Court is of the opinion that the accused person was materially prejudiced by the non-compliance with the section it may set aside, the conviction " and may order a retrial" Prejudice may be discerned from the nature and circumstances of the case.

Our perusal of the lower court record shows that the trial magistrate did not specifically inform the appellant of his right to demand the recall of witnesses who had already testified.

In **Raphael v R [1969] E A. 544,** a Tanzanian case, Bramble J, held that it is the compliance by the succeeding magistrate, of the requirement of a section equivalent to **section 200**, above, which gives him the jurisdiction to commence the hearing of the matter from where his predecessor left. In his view, proceedings not conducted in compliance with that section are a nullity.

The reasoning in the above case is quite persuasive and we are of the considered view that as the record does not show that the appellant was explained of his right to demand the recall of witnesses who had already testified we cannot say there was full compliance with the requirements of **section 200** Criminal Procedure Code. That provision was enacted to safeguard the right of an accused person to a fair hearing. The section, in our view, sets out the conditions which a succeeding magistrate has to comply with as a prerequisite to taking over the conduct of the case. He has to demonstratively show he has done so and a failure to comply denies him the jurisdiction to handle the case, and whatever he does in breach, renders those proceedings a nullity. **Section 382** Criminal Procedure Code cannot be properly invoked to cure that irregularity, which in our view is of a fundamental nature.

In the result, we think that the succeeding magistrate in this case did not sufficiently comply with **section 200**, Criminal Procedure Code. The appellant's conviction was therefore a nullity. It is quashed; the sentence of death imposed on him is set aside, and we direct that the appellant be retried by a magistrate with competent jurisdiction other than S.N. Mbungi Senior Resident Magistrate. It is so ordered.

Dated and delivered at Kisumu this 22nd day of June, 2007.

S.E.O BOSIRE

…….……..

JUDGE OF APPEAL

E.O. O'KUBASU

……..

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR