



**Matacho v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 3052 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3052 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E022 OF 2023**

JN NJAGI, J

MARCH 20, 2024

BETWEEN

AYEGO MATACHO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by S.K.Arome, PM,
in Marsabit CM's Court Criminal Case No.172 of 2020 delivered on 9/8/2023)*

JUDGMENT

1. The Appellant was convicted for the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code and was sentenced to serve 20 years imprisonment. The particulars of the offence were that on the 12th day of April 2020 at a Bank Quarters area in Marsabit Central Sub- County within Marsabit County jointly with others not before court they robbed Fatuma Godana (herein referred to as the Complainant) of cash Ksh.60,000/= and one mobile phone and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Complainant.
2. The Appellant was aggrieved by the conviction and lodged the instant appeal. The grounds of appeal are that the conditions under which the offence was committed did not favour a positive identification, that the appellant was convicted on contradictory evidence of prosecution witnesses and that the appellant was convicted without any other corroborative evidence.

Case for Prosecution

3. The prosecution called 3 witnesses in the case – the complainant who was PW1 in the case, her husband who was PW2 in the case and the officer who visited the scene, PC Jackson Mauso PW3 of Marsabit Police Station.



4. The evidence of the complainant and her husband was that on the material day at around 1800 hours they were heading home from Marsabit town. They were riding on a motor cycle that was being ridden by PW2, the husband. That on reaching Bank Quarters area within Marsabit forest, four people emerged from the bush. Two of them were armed with guns. The first person to emerge from the bush pointed a gun at them. They stopped them. The complainant had a wallet containing Ksh.60,000/= and a mobile phone. The people took them from her. The complainant noticed that one of the robbers had a squinted right eye. That on the 21st April 2021, the person with the squinted eye approached her at her miraa stall at Marsabit market. She recognized him as one of the people who robbed her. She alerted her husband PW2 who went and identified the appellant as one of the people who had robbed them. PW2 alerted the police. The complainant and her husband followed the person to Karare stage in Marsabit town. He boarded a public service vehicle plying on Karare/Hulahula route. The policeman PW2 had alerted, PC Mauso, arrived. They pointed at the person, the appellant, and he was arrested. PC Mauso took him to the police station. Another officer who did not testify in the case investigated the case and charged the appellant with the offence.

Defence Case

5. When placed to his defence, the appellant stated in a sworn statement that he is a herder and lives at Hulahula. That on the day of his arrest he was travelling to Hulahula from Marsabit town. That when the vehicle arrived at Hulahula, it was searched. A lady pointed at him and said that he had a small defect on his right eye and that his left ear was cut. He was arrested.

Submissions

6. The advocate for the Appellant, Mr. Nyenyire, submitted that the appellant was not identified as the perpetrator of the offence. That the trial court convicted the appellant on contradictory evidence of the prosecution witnesses thereby leading to a miscarriage of justice.
7. The Prosecution Counsel on his part conceded to the appeal on the ground that the case was initially handled by Hon. Mbayaki Wafula who heard the evidence of the complainant and her husband. That thereafter the case was taken over by Hon. King'ori who upon complying with section 200 (3) of the *Criminal Procedure Code* heard the evidence of the police officer PW3. That the case was later taken over by Hon. S.K. Arome who however did not comply with the provisions of section 200 (3) of the *CPC* but proceeded to have the case for the prosecution closed, heard the appellant's defence, wrote the judgment and convicted the appellant.
8. The prosecution Counsel submitted that the appellant was prejudiced in his trial by failure by the magistrate who convicted him complying with the provisions of Section 200 of the *CPC*.

Analysis and Determination

9. Section 200 of the *CPC* provides as follows:

200. Conviction on evidence partly recorded by one magistrate and partly by another

(1)

(2)

(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 re-summoned and reheard and the succeeding magistrate shall inform the accused person of that 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.

10. In the case of *Office of Director of Public Prosecutions v Peter Onyango Odongo & 2 others* [2015] eKLR, Justice Makau (as he then was) stated as follows on the section:

It should be noted Section 200(3) of *C.P.C.* gives an accused person an opportunity to demand to have any witnesses recalled. This Section makes it mandatory for succeeding Magistrate to inform the accused person of his right to have any of the witness recalled for cross-examination or to testify again. It should be noted it is not mandatory to recall the witnesses for either cross-examination or to give evidence as far as this section is concerned with but it is mandatory to explain the accused his rights, the failure to inform the accused of his rights under that Section renders the subsequent proceedings a nullity.

11. The magistrate who convicted the appellant of the offence did not inform the appellant of the mandatory right to re-summon witnesses. The conviction was based on credibility of the prosecution witnesses. The magistrate reached a decision on credibility of the prosecution witnesses without hearing them and without explaining to the appellant his right to have the said witnesses re-summoned or being re-heard. In failing to do so, the magistrate denied the appellant his right to a fair trial as stipulated in Article 50 of the *Constitution*. I am thereby in agreement with the prosecution counsel that the trial was prejudicial to the appellant. The same was a mistrial and a nullity. The trial is thereby set aside.

12. The question whether I should order a retrial.

13. The principles upon which a court may order a re-trial are well settled. A re-trial should only be ordered where the interests of justice require and would not occasion prejudice to the appellant. In the case of *Fatehali Manji v Republic* [1966] EA 343 the predecessor of the Court of Appeal when dealing with the issue held that:-

“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it.”

14. In *Opicho v Republic* [2009] KLR, 369, the Court of Appeal stated that:-

“In general, a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case



must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice required it.”

15. The Advocate for the appellant Mr. Nyenyire asked the court to acquit the accused since the prosecution was conceding to the appeal.
16. The appellant was charged with a serious offence of robbery with violence. I find that he will not suffer any prejudicial if he is re-tried of the offence. I order that the appellant be retried of the offence before another magistrate of competent jurisdiction other than Hon. S.K. Arome.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 20TH MARCH, 2024.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ngigi for state

Appellant – present

Mr. Nyenyire for Appellant

Court Asstistant - Jarso

14 days Right of Appeal.

