REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANGA

CRIMINAL APPEAL NO. 418 OF 2013

(From Original Conviction and Sentence in Thika Magistrates Court Criminal Case No. 1385 of 2010)

CHARLES KURIA MACHARIA.....APPELANT

v

REPUBLIC.....RESPONDENT

JUDGMENT

1. Charles Kuria Macharia (Appellant) was charged on 6 April 2010 before the Thika Magistrates Court with 3 counts of robbery with violence contrary to section 296(2) of the Penal Code.
2. On 3 May 2012 the trial Magistrate, D.A. Orimba convicted the Appellant on all the 3 counts as charged under section 215 of the Criminal Procedure Code and proceeded to sentence him to death.
3. On 10 May 2012 the Appellant filed a Petition of Appeal/Memorandum of Appeal and listed some 6 grounds.
4. The appeal came up for hearing on 15 October 2013 and the Appellant informed the Court that he was ready to proceed.
5. The Court of its own motion had noted that the trial of the Appellant had proceeded partly before L. M. Wachira, Senior Resident Magistrate and D. A. Orimba, Principal Magistrate and therefore it invited the Appellant and the Respondent to address it on whether the Appellant was informed of his rights under section 200(3) of the Criminal Procedure Code.
6. The record bears that on 8 December 2012**,** (this date appears erroneous because the judgment was delivered and dated 3 May 2012) the trial Magistrate informed the parties and recorded that she was on transfer and set further hearing for 14 March 2012.
7. On 14 March 2012 the Prosecutor informed the Court that he was ready to proceed with the case from where it was left and the Court recorded that ***Provision of Section 200 is complied with.*** Immediately thereafter Prosecution witness 7 was sworn and gave his testimony.
8. Mr. Solomon Naulikha, State Counsel for the Republic submitted that the record bore out that the Appellant was present in Court but it was not clear whether the question was put to the Appellant about his right. This, the State Counsel submitted did not prejudice the Appellant and that the nature of the offences the Appellant faced should not be ignored and further that the failure to

comply with section 200 of the Criminal Procedure Code was not from the accused or the prosecution. The counsel prayed that should the Court allow the appeal then a retrial should be ordered.

9. In determining an appeal such as this one, the Appellant, the Republic and the Court ought to rely primarily on the record. Submissions made by parties should also be faithful to the record unless it is argued proper and correct record of proceedings was not taken. That is not the case here.
10. The legal significance of failure to comply with the provisions of section 200 of the Criminal Procedure Code has been the subject of decisions by both the High Court and the Court of Appeal.
11. In *Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga v Republic,* Criminal Appeal No. 106 of 2009, the Court of Appeal stated that the right under section 200 of the Criminal Procedure Code was owed to the accused and not his/her advocate and that the duty to explain to the accused the right to opt to have witnesses recalled or trial start afresh was mandatory.
12. In *Ndegwa v Republic* (1985) eKLR the Court of Appeal stated that the provisions of section 200 of the Criminal Procedure Code ought to be used sparingly and in circumstances where the ends of justice are not likely to be defeated and especially where the part heard trial is a short one and could be started afresh, witnesses are easily available and not much time has elapsed. The legal principles, as we understand them are that a trial Magistrate should personally see, hear and assess and gauge the demeanor and credibility of witnesses because of liberty of an accused person is at stake.
13. The Court of Appeal held in *Richard Charo Mole v Republic*, Criminal Appeal No. 135 of 2004 that failure to comply with the provisions of section 200 of the Criminal Procedure Code would in appropriate cases render the trial a nullity.
14. But the Court of Appeal has not spoken in one voice regarding the legal significance or impact of failure to comply with section 200 of the Criminal Procedure Code or failure to record correctly and succinctly that the section was complied with and the decision in *Willis Ochieng Odero v Republic,* Criminal Appeal No. 80 of 2004 is such an example.
15. Msagha J reviewed the different decisions in *Rebecca Mwikali Nabutola v Republic* (2012) eKLR and came to the conclusion that the requirement to comply with section 200(3) of the Criminal Procedure Code is mandatory and that the succeeding Magistrate must record that the Magistrate has informed the accused of the accused person's rights and options under the section and that the record should also capture the reply of the accused.
16. The record in the instant case does not bear whether the Appellant was informed of his rights and options under section 200 of the Criminal Procedure Code and what his reply was. The decision appealed against was delivered on 12 April 2012 and it is true that the nature of the offence faced by the Appellant was serious but in the circumstances of this appeal we see no reasons to depart from the position in the *Nabutola* case.
17. Considering the foregoing it is our considered view that the appeal be allowed and the conviction and sentence of the Appellant be reversed. We have considered whether to order a retrial or not bearing in mind that such an order does not mean that the Appellant was not properly found guilty.
18. In our view an order for retrial would not be prejudicial to either the Appellant or Republic and we therefore order that the Appellant be retried before any competent Magistrate within Thika Law Courts.
19. Orders accordingly.

Delivered and dated in Muranga in open Court on this 17th day of October 2013.

A. Mbogholi Msagha

Judge

Radido Stephen

Judge

Appearances

Appellant in person

Mr. Solomon Naulikha, State Counsel for Respondent