



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 232 of 2007

JAMES WACHIRA KAIRU ALIAS KARABOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the original conviction and sentence in the Chief Magistrate's Court Nyeri in Criminal Case No.3159 of 2005 dated 27th July 2007 by E. J. Osoro, Senior Resident Magistrate)
JUDGMENT

JAMES WACHIRA KAIRU alias KARABOI, the appellant herein, with PATRICK GICHOHI KANYI alias CHOHI or PETER WANJOHI and ELIJAH WAITHAKA MUNDIA alias ELIJAH MUMBI were jointly tried on a charge of two counts of robbery with violence contrary to *Section 296 (2)* of the Penal Code. The particulars of the offence in the first count are that on the 1st day of February 2005 at Othaya Township in Nyeri District of Central Province, jointly with others not before the court, while armed with dangerous weapons namely pistols, robbed DICKSON MAINA

WACHIRA of cash Ksh.75,700/= and at or immediately before or immediately after the time of such robbery used personal violence to

the said Dickson Maina Wachira. The particulars in respect of the second count are that on the 1st day of February 2005 at Othaya Township in Nyeri District of the Central Province, jointly with others not before the court, while armed with dangerous weapons namely pistols, robbed Esther Wamuyu Maina of cash Ksh.110,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said Esther Wamuyu Maina.

After undergoing a full trial, Patrick Gichohi Kanyi alias Chohi or Peter Wanjohi and Elijah Waithaka alias Elijah Mumbi were acquitted. The Appellant was convicted and sentenced to suffer death. Being dissatisfied, he

preferred this appeal. On appeal the Appellant put forward a total of nine grounds (9) in his Petition of Appeal. When the appeal came up for hearing before us, Mr. Makwa, learned State Counsel, conceded the appeal on the basis that the trial court did not comply with *Section 200* of the Criminal Procedure Code.

We have carefully examined the record and we note that three magistrates heard the Appellant's case before the trial court.

M. R. Gitonga, learned Senior Principal Magistrate heard seven (7) prosecution witnesses before proceeding on transfer. On 13th March 2007, the record shows that J. K. Ng'eno, learned Senior Principal Magistrate took over the matter without complying with the provisions of *Section 200* of the Criminal Procedure Code. The learned Senior Principal Magistrate disqualified himself almost immediately. On 27th March 2007, E. J. Osoro learned Senior Resident Magistrate, took over the matter. She indicated that *Section 200* Criminal Procedure Code was complied with after it is shown that the Appellant and his co-accuseds each stated that they would proceed from where M. R. Gitonga, the learned Senior Principal Magistrate had left. The prosecution closed its case soon thereafter. E. J. Osoro, in her ruling of 17th April 2007, placed the Appellant and his co-accuseds on their defence. She, however, noted that the order to recall P. W. 1 for cross-examination had not been complied with. The learned Senior Resident Magistrate heard the entire defence case. After a careful consideration of the matter we think E. J. Osoro, learned Senior Resident Magistrate, did not fully comply with the provisions of *Section 200* of the Criminal Procedure Code. The record does not show that the learned Senior Resident Magistrate had explained to the Appellant his rights to recall witnesses for cross-examination under *Section 200* of the Criminal Procedure Code. Furthermore, the learned Senior Resident Magistrate noted in her ruling while placing the Appellant on his defence that the order to recall P. W. 1 for cross-examination was not complied with. We have been urged to order for a retrial by the learned State Counsel. The Appellant urged us not to order for retrial because he has been in custody for too long. We have carefully considered the two competing arguments. There is no doubt that the Appellant was arrested on 19th September 2005. The offence being a non-bailable offence, the Appellant has since then been in custody. We think it will be prejudicial to the Appellant to be ordered to undergo a retrial. In the end, we are satisfied that Mr. Makura rightly conceded the appeal. Consequently the appeal is allowed with a consequential order that the conviction is quashed and the sentence of death is set aside. The Appellant is set free forthwith unless lawfully held.

Dated and delivered this 13th day of January 2010.

J. K SERGON
JUDGE

M. S. A. MAKHANDIA

JUDGE

in open court in the presence of the Appellant and Mr. Makura for the State.

J. K. SERGON

JUDGE

M. S. A. MAKHANDIA

JUDGE