

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 343 of 2004

PETER KANGETHE MAKARI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

PETER KANGETHE MAKARI, the Appellant was in Nakuru CM Criminal Case No.2009 of 2003, charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge against him were that on the night of 20th and 21st day of November 1997 at Milimani Estate Nakuru Township in the Nakuru District of Rift Valley Province jointly with others not before court, while armed with dangerous weapons, namely iron bars, simis, bolted runqus and swords they robbed Mary Wanjiru Mwangi of 47 items including cash all valued at Kshs.1,500,000/- and at or immediately before or immediately after the time of such robbery wounded Mary Wanjiru Mwangi. He pleaded not guilty but upon trial he was convicted and handed down the mandatory death sentence. He has now appealed to this court against both that conviction and sentence.

At the hearing of the appeal Mr. Mugambi learned state counsel conceded the appeal on the ground that the trial magistrate who took over the hearing of the case after the original magistrate had been transferred did not comply with **Section 200(3)** of the **Criminal Procedure Code**.

Section 200(1) of the **Criminal Procedure Code** states that 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 proceed with the case from where it had reached and determine it. **Subsection (3)** of that section provides that:-

“Where a succeeding magistrate commences that hearing of proceedings and part of the evidence had been recorded by his predecessor, the accused person may demand that any witness be resummoned and re-heard and the succeeding magistrate shall inform the Accused person of that right.”

There is no doubting that this is a mandatory provision and failure to comply with it may cause prejudice to the Accused person. We have ourselves perused the lower court record and noted that that provision was not complied with as correctly pointed out by Mr. Mugambi. In such a situation where an Accused person is convicted subsection (4) authorises the appellate court to set aside the conviction and order a re-trial. In this case Mr. Mugambi did not ask for a re-trial. As the offence was alleged to have been committed way back on the 20th November 1997, over ten years ago, even if Mr. Mugambi had sought a re-trial we could not have allowed it. After such a long period it would have been impossible for the prosecution to marshal its witnesses and conduct a re-trial. In the circumstances we allow this appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

DATED and delivered at Nakuru this 17th day of December 2008.

M. KOOME

JUDGE

D. K. MARAGA

JUDGE