MOSES CHARAGU KARANJA…….....…….....APPELLANT

VERSUS

REPUBLIC…….....…….....RESPONDENT

JUDGMENT OF THE COURT

The appellant, Moses Charagu Karanja was charged with the offence of **robbery with violence contrary to Section 296(2) of the Penal Code**. The particulars of the offence were that on the night of the 4th and 5th of July 2003 at Githioro Village Nyandarua District, the appellant with others not before court while armed with dangerous weapons namely pangas and rungus robbed John Muhuha Kiarie of two wrist watches, a panga, a lady's cardigan and cash Kshs 14,800/= and at or immediately before or immediately after the time of the said robbery used actual violence on the said John Muhuha Kiarie. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge and after a full trial was found guilty. He was duly convicted and sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

We wish to state at the beginning of this judgment that during the trial of the appellant at the magistrate's court, the magistrate who took the evidence of all the witnesses was J. S. Kaburu, Senior Principal Magistrate while the magistrate who wrote and delivered the judgment was J. Kiarie, Principal Magistrate. There is no evidence that prior to the magistrate who wrote the judgment delivering the said judgment he had complied with the provisions of **Section 200 of the Criminal Procedure Code**. The proceedings do not reveal whether the appellant was given the option to have some witnesses recalled or whether he had any objection to the second magistrate taking over the proceedings and writing the judgment.

During the hearing of the appeal Mr Gumo, Assistant Deputy Public Prosecutor conceded to the appeal on the fact that **Section 200 of the Criminal Procedure Code** had not been complied with before the second magistrate delivered the judgment. He however submitted that in view of the overwhelming evidence which was adduced by the prosecution witnesses against him, the appellant should be retried. Mr Njuguna, Learned Counsel for the appellant welcomed the conceding of the appeal. He however submitted that the ends of justice would not be served if the appellant is retried. He submitted that the evidence adduced by the prosecution witnesses did not establish a strong case against the appellant. He further submitted that the appellant had been in custody since July 2003 when he was arrested and arraigned before the subordinate court for trial. He urged this court to order the appellant to be discharged.

We have carefully considered the facts of this case. **Section 200 of the Criminal Procedure Code** requires that an accused person be given an opportunity to indicate whether he would require the witnesses who had testified to be recalled to enable the magistrate taking over the proceedings to assess their demeanour before delivering the judgment. Specifically **Section 200(3) of the Criminal Procedure Code** provides that:

"***Where a succeeding magistrate commences the hearing of the proceedings and part of the evidence had been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right".***

In this case there is no evidence that the magistrate who convicted the appellant informed him of this right. The appellant was thus denied an opportunity of having the crucial witnesses recalled so that their demeanour could be tested by the magistrate who convicted him. As was held in **Kariuki –vs- Republic [1985] KLR 504** at page 505, by ***Abdullah and Aluoch, JJ***

"***Under Section 200 (3) of the Criminal Procedure Code, an accused person is entitled to demand that any witness be resummoned and reheard and a duty is imposed on the succeeding magistrate to inform the accused person of such a right. In the instant case the appellant was not, according to the records, informed of his right to demand that any witness be resummoned or reheard. It may be observed that our Section 200 is similar to Section 196 of the Tanzanian Criminal Procedure Code where in Raphael –vs- Republic [1969] EA 544 a Tanzanian Case it was held that:***

"*(1) It is a prerequisite to the second magistrate's exercising jurisdiction that he should appraise the accused of his right "to demand that the witnesses of any of them be resummoned and reheard" Under Section 196 of the Criminal Procedure Code:*

(2) If the second magistrate has not complied with this prerequisite it is fatal he has no jurisdiction and the trial is a nullity."

In **Ndegwa –vs- Republic [1985] KLR 534**, at page 537, the Court of Appeal held that:

"***It could be also argued that the statutory and time honoured formula that the trial magistrate being the best person to do so, he should himself see, hear, assess and gauge the demeanour and credibility of the witnesses. It has been and will be so in the other cases that will follow. In this case however the second magistrate did not himself see or hear all the prosecution witnesses even though he said that he carefully "observed" the evidence given by the prosecution witnesses. He therefore was not in a position to assess the personal credibility and demeanour of all the witnesses in the case. A fatal vacuum in this case in our opinion. The succeeding magistrate was as helpful as he could possibly make himself. He acted in an attempt to dispatch justice speedily. We appreciate his motive very much. The sweetness of justice lies in the sweet completion of litigation. For the reasons we have stated in our view the trial was unsatisfactory".***

In the instant appeal it is clear that the succeeding magistrate did not comply with the provisions of **Section 200 (3) of the Criminal Procedure Code**. In the circumstances therefore the subsequent conviction of the appellant by the succeeding magistrate was a nullity. We therefore declare the said conviction to be a nullity as a result of which we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant.

Mr Gumo has submitted that the appellant should be retried in view of the overwhelming evidence which was adduced by the prosecution witnesses. On the other hand, Mr Njuguna has submitted that the prosecution evidence was not sufficient to sustain a conviction. He also submitted that it would be unjust to submit the appellant to a retrial while he has spent $2^1/_2$ years in lawful custody. The principles to be applied by this court in considering whether or not to order a retrial are well settled. The Court of Appeal held in the case of **Ekimat –vs- Republic CA Criminal Appeal No. 151 of 2004 (Eldoret)** (*unreported*) where it held that:

"***In the case of** Ahmed Sumar v Republic **[1964] EA 481, at page 483, the predecessor to this court stated as follows:***

"***It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a***

mistake of the trial court for which the prosecution is not to blame it does not i our view follow that a retrial should be ordered".

The court continued at the same page paragraph H and stated:

"***We are also referred to the judgment in*** *Pascal Clement Braganza v. R [1957] EA 152****. In this judgment the Court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".***

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

In the instant appeal the crucial evidence that was adduced by the prosecution against the appellant was that of the complainant who said that he had recognized the appellant as being among the people who robbed him on the material night. Although the complainant had not known the name of the appellant prior to the robbery incident, he testified that he was able to recognize him as being someone he had seen at the local trading centre. Immediately after the robbery he informed the neighbours and also the police that he had recognized one of the robbers. He also told the police that the robbers had robbed him of his cap which he could be able to identify if it was recovered. When the appellant was arrested on the following day in the morning, the police undertook a search in his house and were able to recover a cap which the complainant identified as his. The appellant however disputed this. He testified that the cap belonged to him. He further denied that he had been involved in the robbery.

Having re-evaluated the evidence, it is clear that the evidence of the complainant was that of a single identifying witness in difficult circumstances. As was held by the Court of Appeal in the case of **Maitanyi –vs- Republic [1986] KLR 198** the court should warn itself of the dangers of convicting an accused person based on the evidence of a single identifying witness especially when the said identification was made in difficult circumstances. In such cases the court should consider any other evidence that would corroborate the evidence of the single identifying witness. In this case, it is doubtful whether the complainant properly identified the appellant as being one of the people who robbed him. From his evidence it is clear that he was not certain as to the identity of the person whom he alleged that he could be able to identify. He did not give the description of the person he claimed to have identified either to his neighbours or to the police.

Upon re-evaluation of the evidence, it is clear that the complainant could have been mistaken as to his identification of the appellant. In the circumstances of the robbery it was possible that the complainant could have thought that he had identified the appellant. The complainant could be honest but mistaken in his belief that he had identified the appellant. The possibility that the appellant was mistakenly identified as one of the robbers cannot therefore be ruled out. Further the evidence of the recovered cap is not conclusive. Both the appellant and the complainant claimed that they owned the cap.

In the circumstances of this case, reasonable doubt was raised as to the guilt of the appellant. We would not therefore order a retrial. To do so would enable the prosecution fill up the gaps in its case. It would also not serve the ends of justice to subject the appellant to a retrial where the evidence against him in the vitiated trial does not stand up to legal scrutiny.

We therefore order that the appellant be discharged. He is acquitted of the charge of murder. He is ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 1st day of March 2006.

D. MUSINGA

JUDGE

L. KIMARU

JUDGE