



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 977 OF 2003**

**(From original conviction(s) and Sentence(s) in Traffic case No. 2404 of 2001 of the Chief Magistrate's Court at Makadara (C.O. Kanyangi – S.P.M.)**

**SAMUEL KABIRU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

The Appellant, **SAMUEL KABIRU** was convicted in three counts of offences under the Traffic Act. In count 1, he was convicted of **CAUSING DEATH BY DANGEROUS DRIVING** contrary to **Section 46** of the **Traffic Act**. In Count 2 and 3, he was convicted of **FAILING TO STOP AFTER AN ACCIDENT** contrary to **Section 73(1)** of the **Act** and **FAILING TO REPORT AN ACCIDENT TO A POLICE STATION OR A POLICE OFFICER** contrary to **Section 73(3)** of the **Act**. He was sentenced to two years imprisonment in count 1 and to a fine of 1,000 in default 30 days imprisonment in each of the other two counts. He was aggrieved by the conviction and so lodged this Appeal.

The Appellant raises seven grounds of Appeal which rotate around two key points as follows: -

- 1. That the learned trial magistrate erred in law by contravening the mandatory provisions of Section 200 of the Criminal Procedure Code.***
- 2. That the learned trial magistrate in law and fact by convicting the Appellant on insufficient evidence.***

**MISS NYAMOSI**, learned counsel for the State conceded the Appeal on grounds that **Section 200** of the **Criminal Procedure Code** was contravened. She asked that a retrial be ordered in the case.

On the first ground raised, I have perused the entire record of the trial court. I confirmed that indeed **MUGA APONDI**, Chief Magistrate then commenced the hearing of the case on the 23rd November 2001. He heard five witnesses. However, he did not finalize it. One **KANYANGI, SPM**, as he then was, took over the case on 11th April 2003 and heard one more prosecution witness and the defence case before delivering the judgment of the court. From the record of the trial court, **Section 200 (3)** of the **Criminal Procedure Code** was not complied with.

Section 200 (3) of Criminal Procedure Code provides as follows: -

***“(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.”***

The Provision of Section 200 (3) of Criminal Procedure Code are mandatory. The provision imposes a duty upon the Court to inform the accused person of his right to re-call witnesses who had already given evidence before his predecessor. From the record of the Court, **MR. KANYANGI** did not inform the Appellant of his right to re-call the witnesses who had testified earlier. That rendered the entire trial defective and a nullity, notwithstanding the fact that the Appellant was represented by counsel who did not apply to recall witnesses. Accordingly I quash the conviction and set aside the sentence.

The next question this Court has to decide is whether or not to order a retrial. A retrial should not be ordered where the interests of the case does not require it and where the order may cause injustice or prejudice to the accused person. I have considered the circumstances of this case. It involves a life that was lost in an accident. I am satisfied that the interest of justice requires that a retrial be ordered. I am also satisfied that the Appellant will not be prejudiced if such order were made. Both the Respondent and Appellant were not opposed to the order being made.

Accordingly I order that a retrial be held in this case. In that regard I direct that the Appellant presents himself before **MAKADARA SPM's Court** for Plea in this case on the **10th December 2004**. Between that day and today, the Appellant will continue on the bail granted by this Court. After plea, the Court at Makadara should grant the Appellant bail on reasonable terms to be assessed by the said Court. I further direct that the Appellant will get a refund of fines paid if any, and cash bail and securities deposited with this Court, if any, upon proof that he has taken plea before Makadara Court. Orders accordingly.

Dated at Nairobi this 6th day of December 2004.

**LESIIT**

**JUDGE**