REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 574 of 2006.

BETWEEN

IBRAHIM EKITELLA LOKORI...……...…….APPELLANT.

AND

REPUBLIC ……..…….……RESPONDENT.

(An appeal from the original conviction and sentence in the

Chief Magistrate's Court at Kibera Cr. Case No. 2567 of 2006

delivered by Hon. Maundu, SRM on 26th September 2006).

JUDGMENT.

Background.

Ibrahim Ekitella Lokori, herein the Appellant, was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on 10th April, 2006 at Dagoretti market within Nairobi area province, jointly with others not before the court, while armed with dangerous weapons; namely a knife, robbed Evanson Ndungu Muga of Kshs. 300/- in cash and at or immediately before or immediately after the time of such robbery wounded the said Evanson Ndungu Muga.

The Appellant was found guilty and sentenced to death as provided by the law. He was dissatisfied with both the conviction and sentence as a result of which he has preferred the instant appeal. He filed an amended memorandum of appeal on 25th July, 2017 in which he laid out his grounds of appeal. They were that the learned trial magistrate erred when he convicted the Appellant while relying on the identification/ recognition evidence of a single witness whereas the circumstances of the identification were not favourable to a positive identification, that the learned trial magistrate erred when he relied on contradictory evidence to found a conviction, that the learned trial magistrate failed to comply with the provisions of section 198 of the Criminal Procedure Code, that the learned magistrate misdirected himself when he shifted the onus of proof to the Appellant, that crucial witnesses were never called, that the trial magistrate misapprehended the facts and applied the wrong legal principles leading him to draw erroneous conclusions and that the Appellant's alibi defence was not considered.

Submissions.

The Appellant represented himself during the trial in question and Ms. Sigei represented the respondent. The Appellant chose to canvass the appeal by way of written submissions which he filed on 25th July 2017. Ms. Sigei chose to canvass it via oral submissions during the hearing carried out on 25th July 2017.

The Appellant argued all his grounds cumulatively. He argued that his identification by PW2 and PW3 was not safe and could therefore not support a conviction. He submitted that this was because the witnesses testified that they were robbed at midnight while walking from a bar and as such, the conditions for identification were not conducive. Further that although the complaints testified that there was lighting at the scene, it was never attested how far the light was from the scene. In addition, the nature and strength of the light was never confirmed. He relied on the cases of **Maitanyi v. Republic[1986] KLR and Francis Kariuki Njiru & others v. Republic [2014] eKLR** to buttress this submission.

He submitted that the evidence of PW2 and PW3 was not consistent given that PW2 was unable to identify the robbers' clothing yet he stated he could recognize Appellant. He also testified that PW3 never identified him at the scene, as he fled from the scene, a fact the trial magistrate did not direct his mind to. He submitted that PW3 only identified him due to suspicion. He raised questions over the fact that the witnesses described him to the manager but did not set out his description in the initial report. He submitted that this identification evidence was not sufficient to support a conviction.

He then submitted that it was trite law that the onus of proof lies on the prosecution and that the accused has no obligation of proving his innocence. In this regard, he submitted that the trial magistrate dismissed his defence on very remote reasons which occasioned a great miscarriage of justice.

He submitted that his constitutional right to a fair trial was violated because several witnesses gave evidence in English and Kiswahili but nowhere in the record was it indicated that that an interpreter was present in court. He submitted that the language used during the taking of plea was also not indicated. He submitted that this was in contravention of section 198(1)(4) of the Criminal Procedure Code. And as such, the entire trial was rendered a nullity. He also took issue with the fact that he was not furnished with the prosecution statements prior to the trial commencing which vitiated his right to prepare a defence in the case

Ms. Sigei in opposing the appeal submitted that there was no need for an identification parade as PW2 and PW3 recognised the Appellant. She submitted that the Appellant was arrested at Heshima bar and that he had merely denied committing the offence. He failed to account for his whereabouts on the day in question. With regard to non-compliance with Section 198 of the Criminal Procedure Code, counsel submitted that the trial was conducted in a fair manner as the Appellant understood the language of the court. She submitted that this could be discerned from the fact that he never asked for an interpreter. Further, that the Appellant was supplied with witness statements to enable him to prepare his defence. She concluded her case by submitting that the offence was proved beyond reasonable doubt and urged the court to dismiss the appeal.

Determination.

The Appellant contended that he was not supplied with witness statements which made it impossible to mount a defence. The record shows that on 10th July, 2006 the Appellant applied to the court to have the witness statements supplied. The court granted an order. The matter next came up for hearing on 8th August, 2006 and the prosecution tendered evidence of PW1, PW2 and PW3. On this date, the Appellant did not query the failure to be supplied with the statements, leading to the logical conclusion that he was supplied with the statements in question. This submission then fails.

The next issue relates to Section 198(1) of the Criminal Procedure Code. The Appellant submitted that he could not follow the proceedings before the trial court because they were conducted in English and no interpretation was done into a language he understood. He submitted that the language of the court during plea and throughout the trial was never indicated. Section 198(1) reads that:

"Whenever any evidence is given in a language not understood by the accused, and he is present

in person, it shall be interpreted to him in open court in a language which he understands."

From the record it is clear that PW1,PW2 and PW3 all testified on 8th August 2006 and they all used Kiswahili language. On 29th August, 2006 PW4 and PW5 testified. It is indicated that PW4 used Kiswahili in his testimony but the language used on the part of PW5 is not set out simply stating "duly sworn states". It is therefore clear that the language the Appellant understood during the proceedings could not be ascertained. This gives credence to the Appellant's submission that he never understood the proceedings, thus violating his right to a fair trial. May I add that the language of the trial court is either English or Kiswahili. See Section 198(4). The proceedings must therefore indicate that interpretation of the proceedings was done into a familiar language if the accused does not understand either language. If he understands any of the two languages, then it must be shown on the record. It is not sufficient merely to record that either English or Kiswahili language was used by the witnesses. The mandatory requirement is that it must be shown that the accused understood the language the court uses. Effectively, I find and hold that due to the non- compliance with Section 198(1), the entire trial was rendered a nullity. This calls for the court to order a retrial. But several factors must be considered as laid down by the Court of Appeal in **Mwangi vs Republic [1983] KLR 522,** viz:

"That a retrial should not be considered unless the appellate court is of the opinion that, on a proper consideration of the admissible evidence, or potentially admissible evidence a conviction might result; Braganza vs Republic[1957] E.A 152(CA) 469; Pyarwa Bussam vs Republic[1960] E.A 854

Several factors have therefore to be considered. These include:

When the original trial was illegal or defective a retrial will be ordered.

A retrial will not be ordered if the conviction was set aside because of insufficient evidence.

A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.

A retrial should not be ordered where it is likely to cause an injustice to the accused person.

A retrial should be ordered where the interest of justice so demand.

Each case should be decided on its own merits.

Whether there is evidence to support the conviction."

In the instant case, the Appellant is of the view that the identification evidence could not found a conviction. On reevaluating the evidence, I have come to the conclusion that the identification occurred in difficult circumstances as it was at night. Although both PW2 and 3 testified that there was electric lighting at the scene and that they were therefore able to clearly see the Appellant, the nature of the lighting and distance from the scene was not described. The witnesses subsequently reported at the police station that amongst the attackers was a slim, short and dark Turkana man. This is a description that could fit very many people. As such, the only thing that could erase doubt that indeed the Turkana man being referred to was the Appellant was through an identification parade. This was never done casting doubts as to whether the Appellant was the actual attacker. Even if an identification parade was conducted the same could have been bungled. This is in view of the fact that one of the identifying witnesses, PW3, was present at the arrest of the Appellant. He was a close relative of PW2, being a cousin. He would have told PW2 the person who had been arrested. In that case, the credibility of the parade would have been questioned. I therefore conclude that the identification of the Appellant was not fool proof to warrant a conviction. As such, even if a retrial is ordered the same may not result in a conviction. This being the main consideration before a retrial is ordered, I am of the view that this appeal must end the case. After all, the case began eleven years ago and subjecting the Appellant to a retrial which holds a negligible possibility of resulting in a conviction is an injustice to him and the criminal justice system.

In the result, I quash the conviction, set aside the sentence and order that the Appellant be forthwith set free unless otherwise lawfully held. It is so ordered.

Dated and Delivered at Nairobi This 24th October, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. M/s Sigei for the Respondent.