



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 114 OF 2013**

**JOHN LESHORNAI .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(Appeal from the judgment of the Principal Magistrate's Court, Maralal (C.N. Ndegwa, Ag SPM) dated the 25th June, 2013 in Criminal Case No. 343 of 2013)

**JUDGMENT**

1. The Appellant, **John Leshornai**, was charged with the offence of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. The particulars of the charge were that on the 9th day of May 2013 at Loikas village within Samburu County being armed with a dangerous weapon namely a club, robbed Sammy Ereng of Kshs. 5000/- and at or immediately before the time of such robbery wounded the said Sammy Ereng using the club.
2. The facts of the case as recorded by the trial court are that on 9th day of May, 2013 at about 2pm **Sammy Ereng (PW1)**, **Lucy Etenteng (PW2)** and one **Halima Lepuchirit** were harvesting sand near Loika Primary School. They were approached by a gang of approximately twenty people who demanded for payment of Kshs. 300/- for each lorry they had filled with the sand. **PW1** recognized the Appellant who was once a friend and they had fallen apart when the Appellant started claiming ownership of the land where they were harvesting the sand. The Appellant was armed with a rungu. **PW2** had informed the Appellant that she did not have the change demanded and as the exchanges heated up **PW1** sought to intervene. He was struck by the Appellant with a rungu and he fell to the ground. The Appellant ransacked his pocket and stole Kshs. 5,000/-.
3. **Hezron Emoni (PW3)**, the father to **PW1** heard screams from pupils of Loikas Primary School. He rushed to the scene and saw the Appellant holding a rungu and his son bleeding on the ground. The Appellant was accompanied by a gang of "warriors".
4. Police Constable **Jude Awour (PW5)** attached to Maralal Police Station was on the material day on duty when she received a report from **PW1**. She subsequently arrested the Appellant and charged him with the present charges.
5. **Daniel Lekii (PW4)** a clinical officer at Maralal District Hospital examined **PW1** four days after the incident. He observed that that he sustained injuries to the head. He treated him with painkillers and antibiotics. He assessed the degree of injury as harm.
6. On considering the evidence, the trial court being satisfied that the prosecution had made out a prima facie case against the Appellant, the Appellant was placed on his defence. He elected to remain silent and for the court to deliver its verdict. The trial court convicted him and he was sentenced to suffer death.
7. Being dissatisfied by the judgment of the trial court, the Appellant filed a Petition of Appeal dated

9th July 2013 which raises the following three grounds:

- a) **That the learned senior principal magistrate erred in law by conducting a large part of the trial in a language not understood by the Appellant;**
  - b) **That the learned senior principal magistrate erred in law by failing to resolve the glaring and inherent contradictions exhibited in the evidence adduced by the prosecution;**
  - c) **That the learned senior principal magistrate erred in fact in finding and holding that other prosecution witnesses apart from the complainant (PW1) knew the Appellant before the incident.**
8. The appeal was heard on 4th June, 2014 with the learned counsel **Mr. Chebii**, appearing for the State and **Mr. Okeke** for the Appellant.
  9. **Mr. Okeke** intimated to court that he wished to abandon ground (b) and (c) above and therefore only submitted in respect to ground (a). It was his submission that the Appellant was conversant in Samburu language. That the plea was taken in Samburu language but subsequent hearings were conducted in Kiswahili. Counsel submitted that this was in violation of **Article 50 (2) and (3) of the Constitution** and **Section 198 of the Criminal Procedure Code**. He further relied on the case of **Bishar Abdi v Republic, Criminal Appeal no 57 of 2008 (2010)eKLR** where the Court of Appeal held that the accused must understand what he is hearing and whether he is also been understood. Counsel urged the court to allow the appeal.
  10. In opposing the appeal, **Mr. Chebii** learned Prosecuting Counsel for the State submitted that the trial was conducted in English, Swahili and Samburu languages; that the Appellant did claim not to understand Kiswahili entirely. He urged the court to disallow the appeal as there was no illegality.

#### **ISSUES FOR DETERMINATION**

11. Whether the trial was fully conducted in a language that the Appellant understood leading to a violation of his right to a fair trial;
12. Whether to order for a retrial?

#### **ANALYSIS**

13. This court being the first appellate court it is incumbent upon us to re-evaluate and re-assess the evidence on record and arrive at our own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses as they testified. Refer to the case of **Okeno V. Republic [1972] EA 32**.
14. On our perusal of the court record we note that the plea was taken in the Samburu language. On the 5/06/2013 the trial commenced and the language the trial was conducted in Samburu and **PW1, PW2 and PW3** adduced evidence and we note that these prosecution witnesses were subjected to cross-examination by the Appellant in the Samburu language.
15. The trial was adjourned and resumed on the 25/06/2013 and it is noted that the language used was Kiswahili. The prosecution closed its case after taking evidence from **PW4 and PW5**. The cross-examination is said to have been conducted by the Appellant in Kiswahili. His rights under Section 211 were read out to him in Kiswahili and he opted to remain silent.
16. Counsel for the State when opposing the appeal contends that the Appellant did not state that he did not understand Kiswahili at all but had a limited understanding.
17. To the above submission we make reference to the authority **Bishar Abdi V. R, CA 57 of 2008 [2010] eKLR** relied upon by the Appellant which deals with this point very aptly. The following observation was made and we are guided by it;

**‘... The importance of the requirements for suitable language interpretation is that they enable an accused person to hear and be heard, as part of the trial process. This court**

**must set its sights practically on that practical angle to communication in court, as it is this that empowers or disempowers an accused during a criminal trial.....’**

18. The Appellant may have chosen to remain silent as a result of being unable to communicate properly in Kiswahili. This notwithstanding it is clearly apparent that by not conducting the latter part of the trial in Samburu the Appellant's right to a fair trial was violated rendering the proceedings a nullity.
19. On the issue as to whether to order for re-trial we note from the court record that the incident occurred in broad daylight and that identification was visual and by recognition. The injuries to the head sustained from the robbery incident were confirmed by the clinical officer (PW4). The trial in the lower court proceeded expeditiously and the Appellant has only been incarcerated for a period of approximately one year. The only factor this court is unable to determine is whether the prosecution witnesses are readily available. We find that there is sufficient evidence to support a conviction and that it will be in the best interest of justice to order for a retrial and this single factor should not deter us from making such an order.

### **FINDINGS**

20. We find that the trial magistrate failed to ensure that the full trial was conducted in a language that the Appellant understood thereby infringing upon his right to a fair trial, thereby rendering the proceedings a nullity.
21. We find that there is sufficient evidence to support a conviction and find that a re-trial would be in the best interest of justice.

### **DETERMINATION**

22. The appeal is found to have merit and it is hereby allowed.
23. The conviction is hereby quashed and sentence set aside.
24. The matter to go for a retrial in a subordinate court with competent jurisdiction.
25. The Appellant to remain in custody and to be escorted for mention before the Chief Magistrate, Nakuru on the 4th day of August, 2014.

**Dated, Signed and Delivered at Nakuru this 31st day of July, 2014.**

**ANYARA EMUKULE**

**JUDGE**

**A. MSHILA**

**JUDGE**