REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 190 of 2006

DAVID MWAURA NJARAMBA.....APPELLANT

Versus

REPUBLIC.....RESPONDENT
(Appeal from the original conviction and sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No. 1470 of 2005 by M.R. Gitonga - PM)

J U D G M E N T

The appellant together with three others who were subsequently acquitted after trial, were charged with two counts of robbery with violence contrary to *section 296(2)* of the penal code. The appellant too faced two alternative counts of handling stolen property contrary *section 322(2)* of the penal code.

Particulars in respect of all the counts were stated in the charge sheet. **Charles Kingathia** (PW 1) the 1st complainant testified that on the night of 20th - 21st January, 2005 he heard his dogs barking at around midnight and woke up. He heard people cutting the metal grills of his window. Those people subsequently gained entry into the house and demanded for money whilst threatening to kill someone. His wife and children who were in the house too started screaming. They were ordered to shut up. The robbers stayed for 30 minutes. PW 1 realized that the robbers had discovered where he was hiding and so he sneaked out and went and hid in the farm. Later the robbers left having stolen Kshs.39,000/= from his jacket and a Nokia mobile phone 3310. He reported the incident to Karatina police station. On 24.1.2005 police called him and he identified his Nokia mobile phone.

The 2nd complainant, one **Stanley Karami Githinji** (PW 2) testified that on the night of 20th January, 2005 he was asleep in his house at around 12.30a.m. He heard noises in the compound. Robbers were breaking into his cousin's compound whilst demanding money and car keys. The robbers then went to his house and hit the window. He opened for them. About six men entered. One had an axe while the others had pangas. They asked for money and he gave them. They also took a TV make National star, video deck, make LG and a wall clock plus a tape. They then left PW 2 later also reported the incident to the police at Karatina. On 24/1/05 the police summoned him to identify some recovered goods. He was able to identify his national star TV, wall clock and video deck with a tape (cassette).

PW 3 **Jane Wamuyu Kangatia** was PW 1's wife. She testified that on 20th January, 2005 at about 12.30a.m.they were asleep. She saw people enter the bedroom. Her husband hid. Those people switched the lights on then off. They uncovered her and asked where her husband was. One slapped her. They asked her for money and the car keys. She told them to get the car keys from the door though they were wrong keys. They had pangas, axes and bright torches. The children woke up and started screaming. They ordered them to stop screaming and wanted to cut her with an axe but were prevailed upon not to. They took money from her husband's jacket being Kshs.39,000/- and left. They also took her husband's Nokia mobile phone, 3310. Later she together with PW 1 reported the incident at Karatina police station. Subsequently she was called to the police station and identified her husband's Nokia.

PW 4 one **Monica Njeri** was PW 2's wife. She stated that on 20th January, 2005 she heard robbers strike at PW 1's house. They then came to their window and knocked at it. Her husband opened. They asked for money and he gave it to them. She did not see them as she was in the bed room. They took a

video deck and a tape, wall clock and TV. Later police called them and they identified their TV, wall clock and the video.

PW 5 **Daudi Kamero**, an employee of PW 1 said that he was in his house when he heard noise and woke up. He opened the door and saw people running. He closed the door and hid under the bed. Those people however broke the door and then entered the house armed with pangas, axes and with bright torches. They said it was not the person they were looking for and then left.

PC **Joseph Kariuki** was attached to Karatina flying squad at the material time. On 22nd January, 2005 he was in Karatina town when he received information that there were suspected robbers who had rented houses at Saigon near Karatina. He informed his colleagues. On 23rd January, 2005 at around 6.30a.m. he and his colleagues went to Saigon estate condoned the houses and conducted a search house to house. They recovered assorted items suspected to have been stolen or illegally obtained from suspects. They took them to Karatina police station. The complainants were summoned. PW 1 identified one mobile phone make Nokia red in colour to be his. The Nokia phone was recovered from the house of the appellant. Also the TV and the wall clock. The appellant and his co-accused were subsequently arrested and charged.

Put on his defence, the appellant in a sworn statement stated that on 22nd January, 2005 he left his car wash business and went to have a drink. He met a lady and they agreed to spend a night together in her house. He did not know her before. In the morning at around 9.00a.m. police came and she opened for them. They searched and recovered a TV, mobile phone, wall clock and other items. He was then arrested and taken to Karatina police station. Though he told the police that he was just a visitor, they insisted that the house was his and they charged him.

The learned magistrate having considered carefully the evidence tendered by the prosecution and that of defence, found the appellant guilty of the alternative counts of handling stolen goods. She however acquitted him of the main counts. Upon conviction she sentenced the appellant to seven years imprisonment on each count plus hard labour. She also directed that the two sentenced run consecutively.

Aggrieved by the conviction and sentence, the appellant lodged the instant appeal. He complained that his conviction was unjustified because possession was not adequately established as the ownership of the house where the items were recovered was in doubt, that his defence was not adequately considered and finally that the burden of prove was shifted to him by the trial magistrate.

At the hearing of the appeal, the appellant orally submitted that the landlord was not called to confirm whether he was a tenant in the premises. He also raised the issue of language. That the language of the count was not indicated in the record. On sentence, he submitted that the sentence ought to have been ordered to run concurrently and not consecutively.

Mr. Makura, learned senior state counsel did not oppose the appeal on sentence. To **Mr. Makura** the trial magistrate in ordering the sentence to run consecutively did not exercise her discretion properly. The offences were committed in a series of transactions and were related. Accordingly the sentence should have been ordered to run concurrently.

On conviction, **Mr. Makura** submitted that there was overwhelming evidence on record to support the conviction of the appellant on the alternative counts. The items were recovered from the appellant's house 3 days after the robbery. The items were positively identified by PW 1, PW 2 and PW 4. The appellant offered no explanation as to how he came by the said items. With regard to language, counsel submitted that the appellant did not raise the issue during the trial. In raising it now, it was clearly an afterthought.

This appeal shall either succeed or fail on the issue of language. Way back in 1985, the court of appeal in the case of **Diba Wako Kiyato V Republic (1982 – 1988) 1KAR 1974** held that;-

"…….it is a fundamental right in Kenya,

Whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands……."

The court of appeal was of course making reference to the provisions of sections 77(2) of the Constitution of Kenya and section 198(1) of the criminal procedure code. The court went on to observe that;

"……The practice of recordings (sic), if not the name of the interpreter, at least the nature of the interpretation, has been the standard practice in these courts for many years. For example that which is described as the "plea form", form criminal 133, containing under all the other details of the case and of the accused, a space against the word 'interpretation'. There was no compliance

with either of these two statutory provisions or with the standard practice in the instant case. The magistrate made no note of the language into which the evidence of the witness many of whom spoke in English or Swahili was being translated..."

In this appeal there is absolutely no record as to what language the proceedings were conducted or indeed the language the appellant spoke. Though on the day of the plea it is shown that there was an interpreter and that the interpretation was English/Kikuyu, there was no such indication when the hearing of the case commenced subsequently before a different court from that which entertained the plea. As the proceedings are recorded, the assumption must be that the witnesses and the appellant must have spoken to the magistrate either in English or Swahili which are the official languages in the subordinate courts. It is not however shown anywhere in the record what languages the witnesses gave their evidence in and if the appellant understood such language or whether it was being interpreted to them. It is not even shown what language the appellant himself addressed the magistrate in. This was a serious omission on the part of the learned magistrate. It is a matter of law that can be raised at any stage of the proceedings contrary to the submission by Mr. Makura, that it is an afterthought as it was not raised during the trial. The failure by the trial magistrate to keep a record of interpretation was a serious defect in the trial and must render the conviction of the appellant unsafe and unsustainable. This appeal must therefore be allowed on that ground alone.

Should I order a retrial? The charges against the appellant were alleged to have been committed on the night of 20th and 21st January, 2005, some four or so years ago. Accordingly, it would be an exercise in futility to order a retrial in the circumstances. I am not even sure whether the items recovered are still intact. The appellant in any event has been in custody since the date of his arrest, which in my view is sufficient punishment.

Accordingly I allow the appeal, quash all the convictions recorded against him and set aside the sentences imposed. The appellant should be released from prison forthwith unless held for some other lawful cause.

Dated and delivered at Nyeri this 25th day of January, 2010.

M.S.A. MAKHANDIA
JUDGE