

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Criminal Appeal 165 of 2008

GEOFFREY MUTUKU MBUTA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

[Being an appeal from the original conviction and sentence in Makueni SRM's Court

Criminal Case No. 528/2005 by S.Rotich, SRM on 12.8..08]

JUDGMENT

1. Isaac Mukula Mwei and Geoffrey Mutuku Mbuta were the accused persons in Makueni SRM's Court Criminal Case No. 528/2005. They were charged with five counts of the offence of robbery with violence and Isaac Mukula Mwei also faced one count of the offence of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars in the robbery with violence charges were that on 7.7.2005 with others not before the court, being armed with crude weapons namely pangas, rungus, and iron bars they committed a series of robberies at Makueni Girls Secondary School and at or immediately before or after the time of such robbery threatened to use actual violence on Mwenda Muoki (*count I*), Joyce Mueni Mutiso (*count II*), Serah Kimenyie (*count III*), Justice Mutuma Kyambi (*count iv*), and Masoni Juma (*count v*). In the charge of handling stolen goods that Isaac Mukula Mwei was allegedly found with a mobile phone make Alcatel belonging to Masoni Juma. They denied all the charges but while Mbuta was eventually found guilty of the robbery with violence charges Mwei was acquitted of all charges. The appeal herein is against the conviction and the resultant sentence.
2. When the appeal came for hearing, learned State Counsel, Mr Wang'ondy conceded to it because in his view the trial court contravened section 77 (2) (b) and (f) of the Constitution because the language used when taking the plea was never indicated and that was contrary to section 198(1) of the Criminal Procedure Code. We deem that is an important issue to be addressed at this early stage.
3. We have read the record and the plea was said to have been taken on 8.8.2005 but we only have a poor imprint of a stamp to guide us. It is completely unclear in what language the plea was taken and worse there is no plea entered, whether that of "**guilty**" or "**not guilty**". Once the suspects denied the charge, the court proceeded to fix the case for hearing and it cannot

be said that a plea was recorded. Aside therefore from the issue of language, the more fundamental issue of the plea entered is also amiss. In Adan vs Republic ,it was held as follows on the issue of plea taking;

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients to the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.”

4. We adopt the above holding and in respect of language, it is instructive that later in the trial, Kiswahili and English were used in the evidence of all the witnesses and the appellant is said to have cross-examined them. His preferred language at plea was not indicated and it is also wholly unclear whether there was interpretation of the evidence during the trial. The submissions by learned State Counsel are therefore agreeable to us in substance as the law also supports him- **see** Degow Dagane Nunow vs Republic Cr. Appeal 223/2005 (unreported) and David Katutu & another vs Republic Cr. Appeal NO. 107/2004(unreported) for a discussion by the Court of Appeal on the issue of language.
5. The Appeal is allowed for the above reasons and the conviction quashed and sentence set aside. Should we order a retrial?
6. The offences subject of the Appeal were said to have been committed on 7.7.2005 and the trial was concluded on 12.8.2008. All the victims of the alleged robbery were residing at

Makueni Girls Secondary School and learned State Counsel states that they are available to testify again. We have considered the circumstances of the case and the evidence tendered and without pre-empting the retrial this is a fit case for an order of retrial to be made.

7. In the event, while allowing the Appeal, the Appellant shall be retried at the Makueni Principal Magistrate's Court by any magistrate other than Hon. Rotich, SRM. In the meantime, he shall remain in custody.
8. Orders accordingly.

Dated and delivered at **Machakos** this **23RD** day of **JULY .2010.**

Isaac Lenaola

M. Warsame

Judge

Judge