



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 177 OF 2007

CHARLES MITHIKA MUINDI APPELLANT

VERSUS

REPUBLIC RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL NO. 176 OF 2007

PATRICK RATANYA MUINDI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal against the judgment of W.K. Korir Ag P.M. in Meru CMCC No. 1852 of 2006 delivered on 13th September 2007)

JUDGMENT

Both appellants were charged before the Chief Magistrate Court Meru with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. After trial, they were convicted as charged and were sentenced to the mandatory sentence of death. Being dissatisfied with the conviction and sentence, they have filed the present appeal. Both appellants when they appeared before us to urge their appeals presented us with their written submissions. We shall not for reasons that will become obvious go into details of those written submissions. The only issue we shall deal with raised in those submissions is that the lower court at some point failed to indicate the language of the court as required by section 198 (1) of the Criminal Procedure Code. That section provides as follows:-

“198 (1) 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 he understands.”

The appellant's trial begun before J. Omburah SRM on 10th January 2007. On that day, the evidence of PW1 and part evidence of PW2 was received. The trial after those two witnesses adduced their evidence was conducted before Mr. W. K. Korir, PM. In respect of those two witnesses, that is, PW1 and 2, J. Omburah SRM failed to indicate the language they used in adducing evidence. That being so, it is not possible to determine if the appellants obtained interpretation as required under section 198 (1) and as per Article 50 (M) of the Constitution. Article 50 (M) provides that every person has a right to a fair trial which includes the right.

“50. (M) To have assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

The Court of Appeal in the case **Antony Njeru Kathiari & Ano. V. Republic** Criminal appeal Case No. 21 & 23 of 2004 in respect of that right stated:-

“Way back in 1985 this court, in the case of Diba Wako Kiyato Vs. Republic [1982 – 1988] 1 KAR 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 in that case was relying on the provisions of section 77(2) (f) of the Constitution of Kenya (the old constitution) and section 198 (1) of the Criminal Procedure Code. The court said:-

The practice of recordings (sic), if not the name of the interpreter, at least the nature of the interpretation, has been standard practice in these courts for many years. For example, that which is described as the “plea form,” From Criminal 133, contains 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 witnesses, many of whom spoke in English or Swahili was being translated.”

Failure of the learned magistrate to record the language used by the witnesses renders the lower court’s trial a nullity and we so declare. In view of our declaration, the issue for us to now consider is whether we should order the appellants to undergo a retrial. When a trial is declared a nullity, it does not always follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances. An order of retrial should only be ordered where the interests of justice require it. It should be ordered if it will cause injustice to the appellant. In the case **Mwangi Vs. Republic [1983] EA 522** the Court of Appeal in respect of retrial had this to say:-

“We are aware that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result, Braganza Vs. Republic [1957] EA 469, Pyarala Bassan Vs. Republic [1960] EA 854.”

We need to state that it was not until we sat to consider our present judgment that we found that the learned magistrate J. Omburah SRM had failed to indicate the language of the court. We therefore did not inquire from the learned state counsel Mr. Kimathi whether he supported the retrial of the appellant. We however need to state that when the trial was taken over by W.K. Korir PM the language in which each of the subsequent witnesses gave evidence was indicated. The offence with which the appellants were charged took place on 5th October 2006. That is 4 years ago. Although the learned state counsel Mr. Kimathi did not address us on whether a retrial should be ordered, we are of the view that four years is not too long a period to justify us not to order a retrial. We have also re-examined the evidence adduced before the lower court and we are of the view that the prosecution will not require at the retrial to fill gaps in the evidence. The robbery that the complainant suffered was very vicious and we find the best interest of justice will be served by a retrial. We therefore find that for the reasons stated above, the appeal does succeed and we hereby quash the appellant’s conviction before the lower court and set aside their sentence. We order both the appellants to be retried. before the Chief magistrate’s Court Meru and for that reason, the appellants will appear before the Chief

Magistrate’s Court Meru on 6th November 2010. In the meanwhile, both appellants will be detained in custody.

Dated and delivered at Meru this 29th day of October 2010.

LESIT, J.

JUDGE

KASANGO, M.

JUDGE

Read, signed and delivered at Meru this 29th day of October, 2010.

In The Presence Of:

Kirimi/Mwonjaru Court Clerks

Both Appellants Present

Mr. Kimathi For the State

LESIT, J.

JUDGE

KASANGO, M.

JUDGE