CRIMINAL

Ø The trial court should indicate the language used by witnesses

Ø It is essential for coram of the court to be recorded

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 224 OF 2005

ISAAC KITHINJI NYAMU ..... 1ST APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

CONSOLIDATED WITH CRIMINAL APPEAL CASE NO. 225 OF 2005

PETER KIRIMI NTHENGE ..... 1ST APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of Mr. A.N Kimani in Criminal Case No. 52 of 2005 delivered on 7th December 2005)

JUDGMENT

The two appellants were charged before Principal magistrate Court at Marimanti with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. Both were convicted as charged and sentenced to death. They now appeal against conviction and sentence. The learned state counsel Mr. Kimathi did not oppose their appeal for two reasons. Firstly, because of the failure of the trial magistrate to record the coram of the court when the trial commenced. This unfortunately occurred when the complainant gave evidence. It is essential to show the coram of the court so that it is clear that the prosecution of the criminal trial was conducted by a qualified prosecutor as per section 85 of the Criminal Procedure Code. The appellant's case before the Marimanti court was conducted in April 2005. By then, section 85 required where prosecution was by a police officer it be done by a police officer not below the rank of assistant inspector of police. That requirement was deleted by Act 7 of 2007. The appellant's case was fixed for mention on 29th march 2005. On that day, the full coram was shown. The court prosecutor was an inspector of police. The court clerk was also present and the learned magistrate A.N. Kimani, PM was shown. The case was thereafter mentioned on 12th and 18th April 2005. On those two dates, the court proceedings indicate as follows:-

"Coram as before."

On 18th April 2005, the case was fixed for hearing on 19th April 2005. When the case came up for hearing on 19th April 2005, the court record shows:-

"Coram as before."

The effect of stating that the coram was as before was that not only was the prosecutor not known whether he was present and if present what his rank was but most importantly the record did not show whether the appellants were present before court. We do note that the appellants extensively cross examined the complainant on that day but it is not clear if they were there when PW1 gave evidence in chief. The Court of Appeal in the case **Julius Matheka & 2 others vs. Republic** Criminal Appeal Case No. 183 of 2002 considered a case where a magistrate had failed to record the coram and had this to say:-

"Although no authority was referred to us on the submission, we are aware of this court's decision in Bernard Lolimo Ekimat Vs. Republic Cr. Appeal Case No. 151 of 2004 (ur) where the trial was declared a nullity on account of the failure by the trial magistrate to record the coram the one day the trial commenced and was concluded. The only record visible on that day was, "order: hearing to proceed." The preceding record made 12 days earlier was simply, "coram as before," while a week earlier the case was for mention only had no full coram was recorded. The full record of the coram appears to have been made only at the time of taking the plea in the case. With respect, the appeal before us is distinguishable on the facts and we are not inclined to apply our earlier decision to this appeal.

This court has nonetheless had occasion to stress, and it bears repeating, the need to keep clear records of proceedings and has, in particular, deprecated the use of such abbreviations as are complained about in this matter. They betray unacceptable levels of indolence even when it is appreciated that trial magistrates work under pressure from the numerous trials and mentions of cases that come before them daily.

We find that the learned magistrate's failure to record the coram was fatal and leads us to find that the appellant's trial was a nullity. The 2nd ground which led the learned state counsel to concede to the appeal was the trial court's failure to record the language used when all the prosecution witnesses gave evidence and even when the appellants gave their defence. Failure to record the language of the court can only lead to a conclusion that contrary to the provisions of the constitution and of the Criminal Procedure Code, the appellants were not provided with an interpreter. Article 50 (M) of the Constitution of Kenya whose provisions are similar to the provisions of section 77 (2) of the old constitution and to the provisions of section 198 of the Criminal Procedure Code provides that an accused person is entitled to have the proceedings of the trial interpreted in a language they understand. Failure to indicate the language of the court as in this case can lead to the court's finding that the appellant's rights to have an interpreter were violated. That indeed was the finding in the case **Kiyato Vs. Republic** [1982 – 88] KAR 418, the Court of Appeal held as follows:-

"(1) It is fundamental right, under the Constitution of Kenya Section 77 (2) (the old constitution) that an accused person is entitled without payment, to the services of an interpreter who can translate the evidence to him and through whom he can put questions to the witnesses, make statutory statement, or give his evidence. Moreover, the Criminal Procedure Code (Cap 75) section 198 (1) also requires that evidence should be interpreted to an accused person in a language that he understands.

(2) It is the standard practice in the courts to record the nature of the interpretation used or the name of the interpreter. The trial magistrate in this case made no note of the language into which the evidence of the witnesses was being interpreted.

(3) There had been no compliance with the Constitution of Kenya section 77(2) and the Criminal Procedure Code (Cap 75) section 198 (1) in this case....."

In view of the short comings clearly shown in this judgment of the trial court, we find that there is a basis for the state to conceed to the appellant's appeal. The learned state counsel however requested us to order for retrial of the appellants. The learned state counsel submitted that the evidence against the appellant was overwhelming and that if the same was adduced in a new trial a conviction would follow. We beg to disagree. The evidence of PW1 was very contradictory in regard to the identification of the appellants. The offence occurred at around 9pm. At one time, PW1 said that there was no moonlight but only stars. Later, he stated that there was moonlight. There was no evidence in our view, bearing in mind the difficult circumstances under which PW1 identified the appellant, of how long he had the opportunity to view the appellants, and how far the appellants were from him, and by what means he was able to see them. We are of the view that the evidence of identification did not meet the threshold of identification under difficult circumstances. The Court of Appeal in the case **Peter Kamau Vs. Republic** Criminal Appeal No. 331 of 2008 had this to say on identification:-

"As was put by this court in the case of Huka and others Vs. Republic – [2004] (2) E.A. 266, it is incumbent upon the first appellate court to examine afresh the evidence of visual identification of the accused to ensure that any possibility of error is eliminated.

The court must act with caution in accepting evidence of identification where it is the main basis of the case against the accused."

The complainant further gave evidence that the 2nd appellant left his cap at the scene. There was however no attempt by the

prosecution to show that that cap had distinguishable marks which assisted the complainant to identify it as belonging to the 2nd appellant. Having examined the lower court's evidence, even though we were informed that witnesses would be available, we find that to mount a retrial would be prejudicial to the appellants. To allow the appellants to be retried would undoubtedly give an opportunity to the prosecution to fill the gaps in its evidence. For those reasons, the appellant's appeal does succeed and we order the lower court's conviction to be quashed and the sentence to be set aside. The appellants should be set free unless otherwise lawfully held.

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

LESIIT, 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

LESIIT, J.

JUDGE

KASANGO, M.

JUDGE