



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL CASE NO. 136 OF 2009

LESIIT & KASANGO, J.J

JOHN MURITHI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(An appeal against the judgment of Hon. M. R. GITONGA S.P.M in Isiolo Criminal Case No. 43 of 2009 delivered on 1st July 2009)

JUDGMENT

The accused person was charged with one count of robbery with violence contrary to section 296(2) and one alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. He was found guilty of the main count, convicted and sentenced to death. Being aggrieved by the conviction entered against him he filed this appeal. He has raised only two grounds for his appeal the first one is that the learned trial Magistrate denied him his Constitutional rights under section 77(2)(b) of the Constitution. He claims that the language used by the prosecution witness in their testimony was not recorded in the proceedings. The second ground raised was that the learned Trial Magistrate failed to observe the provisions of section 169(1) of the CPC.

Mr. Kimathi represented the State in this appeal. The learned State Counsel conceded the appeal on the grounds that the learned trial Magistrate did not record the language used at the trial and neither did he indicate whether there was any interpretation to the appellant. Mr. Kimathi urged the court to order a retrial of the case arguing that the evidence adduced before the court was sufficient to support a conviction, that the witnesses were available and that since the accused person was only charged last year he will not suffer any prejudice.

We have perused the record of the proceedings before the lower court. We noted that Mrs. Gitonga who conducted the trial of the appellant had a very interesting way of recording the introductory portion of the evidence of the witnesses. All the learned trial Magistrate recorded was that the witnesses were sworn and that they made a statement. Just to give a sample.

“P.W 1 Sworn States

I am Bernard Muthamia and I come from Sokoni area ...

P.W. 2 Sworn States

I am Muchangi Kaleimia”

The learned trial Magistrate did not indicate the language in which any of the witnesses who testified before her used. At the coram portion of the proceedings the learned trial Magistrate did not indicate the

language used by the court. Looking at the proceedings we are in agreement with both the accused persons and the learned State Counsel that there was a violation of section 77(2)(b) of the Constitution and section 198(1) of the CPC. Even though we noted that according to the record the appellant cross examined the witnesses and that those questions were relevant to the evidence which had been given by the witnesses, we non the less find and hold that there was no demonstration from the proceeding that the appellant had been accorded his Constitutional right to interpretation of the proceedings in a language that he understands. There is nothing to confirm to us that indeed the appellant followed the proceedings. In the circumstances we are not satisfied that the appellant was accorded a fair trial.

We have perused the record of the proceedings and are satisfied that if the evidence that was adduced before the trial court were to be presented again at a retrial a conviction is likely to result. The Appellant has been in custody only for 2 years since his first appearance in court and will not suffer any grave prejudice if a retrial is ordered. The State has also assured the court that the witnesses in this case will be availed for the retrial.

We have come to the conclusion that justice requires that a retrial be held in this case. We therefore set aside the conviction and the sentence entered against the appellant in this case. We order that a retrial be held. To facilitate, the retrial we direct that the appellant should be held in custody until the 5th of November 2010 when he should be presented before the Senior Principal Magistrate at Isiolo for the taking of a plea.

Those are the orders of the court.

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

LESIIT, J
JUDGE

KASANGO, J
JUDGE