REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 54 of 2008

JOHN KINYUA GICHUKI ……...................…… APPELLANT

versus

REPUBLIC…………………………………. RESPONDENT

(Being an appeal from the conviction and sentence of P. C. TOROREY – Senior Resident Magistrate

in the Senior Resident Magistrate's Criminal Case No. 993 of 2005 at KARATINA)

JUDGMENT

On the night of 23rd /24th August 2005 at about 1.30 a.m. while PW 1 and his family were asleep in their home they suffered an intrusion by people who demanded money from them. These people robbed them of kshs.1,600 from the husband and kshs.200 from the wife. They also robbed them of TV set, DVD Player, shoes and two mobile phones. One of those mobile phones was Nokia 1100 Serial number 355695005088297. PW 1 was injured in that incident. The robbers who entered his bedroom wore masks. He therefore was unable to identify them. He later identified his Nokia mobile phone at the police station. He said that he was able to identify it because its cover had a crack. In the lower court the appellant herein who was the second accused was charged alongside one other person. They were charged with two main counts of robbery with violence contrary to Section 296(2) of the Penal Code. Those two counts related to the theft firstly of PW1's money and Nokia phone and secondly to the theft of Motorolla phone belonging to PW 1's wife and her money. Each of the accused which included the appellant herein was charged with the alternative count of handling stolen goods. The appellant was additionally charged on his own on the 3rd count where he was charged with the offence of having or conveying suspected stolen property contrary to Section 323 of the Penal Code. The other accused person who is not the subject of this appeal pleaded guilty to the alternative count of handling stolen goods namely Nokia 1100 serial number 355695005088297. That is the phone of PW 1. After he pleaded guilty the trial then proceeded as against the appellant only. PW 4 a police officer stated that after PW 1 reported the robbery he traced the Nokia 1100 phone by using the technology of Safaricom. As a result he arrested three people who had used that phone according to the Safaricom report. That Safaricom report was not produced in evidence. The appellant was one of the persons that were arrested. The police officer's stated that according to Safaricom report the appellant had used PW 1's mobile phone on 27th – 29th July and 3rd August. This witness then stated:-

"***The fact that you had the phone from 27th - 31st August showed you were part of the syndicate.***"

That was the evidence which led the learned trial magistrate to convict. But in convicting the learned magistrate failed to state upon which count the appellant was convicted. The appellant was sentenced to suffer death as provided under the law. The evidence we have analyzed here should be considered in the background that the proceedings do not show the language used by any of the prosecution witnesses. From PW 1 to 5 the record of the lower court show each witness was sworn but no indication was there as regards what language those witnesses used in court. Section 77(2) (b) and (f) of the Constitution makes provisions that every person charged with a criminal offence ought to be informed in a language he understands the nature of the offence he faces. That section provides:-

"***77 (2) Every person who is charged with a criminal offence –***

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in details, of the nature of the offence with which he is charged.

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge ………"

Similarly section 198 of the Criminal Procedure Code requires that there be interpretation for the accused in a language he understands. That section also provides:-

"***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 which he understands.***

(2) If he appears by an advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English."

It is clear from the provisions set out in the Constitution and the Criminal Procedure Code that in a criminal trial the language of the trial must be understood by the accused. To that extent the trial court ought to state the language used when the evidence is adduced to demonstrate compliance with those provisions. This indeed was the holding in the case of ***KIYATO VS REPUBLIC (1982 – 88) KLR 418***. In that case it was held;

"***(1) It is fundamental right, under the Constitution of Kenya Section 77(2) 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 his 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."

The failure to record the language of the court leads us to make a finding that the appellant's appeal does succeed. The learned Principal State Counsel Mr. Orinda did not address us on retrial. However in view of what is stated above the evidence tendered in the lower court cannot justify an order of retrial. There was no evidence which was tendered in the lower court connecting the appellant to the charges he faced. PW 1's wife did not give evidence yet the trial court convicted the appellant of the robbery she suffered. The evidence on the whole leads us to find that there was doubt whether the appellant committed the offence. We are of the view that if we were to order a retrial the prosecution would do its best to present clear evidence against the appellant. It would in all probability summon a witness from the Safaricom Company amongst others. In the light of the fore going it will be prejudicial to order the appellant to undergo retrial. In the end the appellant's appeal succeeds and the conviction against him is quashed and the sentence is hereby set aside. We order the appellant to be set free unless he is otherwise lawfully held.

Dated and delivered this 11th day of May 2009

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE