



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU Criminal Appeal 51 of 2008**

**ANTHONY NJINE MUTHIKA.....APPELLANT**

*Versus*

**REPUBLIC.....RESPONDENT**

***(Appeal from original conviction and sentence in Criminal Case No.1809 of 2006 of the***

***Senior Resident Magistrate's Court at Kerugoya by P.T. NDITIKA - SRM)***

**J U D G M E N T**

Initially there were two appellants herein; Daniel Muriuki Peter and Anthony Njine Muthike. However as their respective appeals were pending hearing Daniel Muriuki Peter passed on. This was on 3<sup>rd</sup> December, 2008. Accordingly his appeal abated and we marked it as such when it came up for hearing on 9<sup>th</sup> July, 2009. Thereafter we proceeded with the hearing of the appeal by the surviving appellant, Anthony Njine Muthike.

This appellant comes before us by way of appeal. He had been tried and convicted together with the deceased appellant on a charge of robbery with violence contrary to *section 296 (2)* of the Penal Code. Upon that conviction the Senior Resident Magistrate at Kerugoya (P.T. Nditika) sentenced him to death, the only lawful sentence provided by law for this kind of offence. It was alleged in the charge sheet before the magistrate's court that on the night of 3<sup>rd</sup> and 4<sup>th</sup> of November, 2006 at Kianyaga Township in Kirinyaga District within Central Province, jointly and armed with dangerous or offensive weapons namely, a twisted iron bar, swords and rungun, they robbed Josephat Ndwiga of cash Ksh.8000/= and a mobile phone make, Nokia 1100 valued at Ksh.8000/= and at or immediately before or immediately after the time of such robbery wounded the said Josephat Ndwiga.

Before the Magistrate, the complainant, a police officer stated that on the material day at about 2 a.m he was coming from small world bar going home. On the way he spotted 2 people dressed in security guard uniforms. On reaching his gate he found them laying in wait. As there was security light he managed to identify the deceased appellant before he was attacked. He was immediately hit with an iron bar and he screamed. His wife PW2 heard the screams and rushed to the scene only to find him bleeding. As he was hit, he was simultaneously robbed off Ksh.8000/= and his mobile phone. At the scene, the wife was able to identify the appellant as well since there was electricity and moonlight. She took the complainant to hospital. While the complainant was being attended to, police officers on patrol including (PW5) came by. PW2 narrated to them what had transpired and in particular that he had identified the robbers. Together they proceeded to Tam tam bar and found the deceased appellant. He was arrested. The appellant herein however was not on duty. Later when the appellant reported on duty he was similarly arrested. Both the deceased appellant and the appellant herein were security guards in the

township. Following their arrest, they were subjected to police identification parade and thereafter charged.

Put on his defence, the appellant in a sworn statement of defence claimed that on the material night he was on duty. At about 8 O'clock his employer came and paid him Ksh.2000/= being his salary and extra Ksh.20 for tea. At about 4.30 a.m he saw 4 people approach him carrying guns. They were police officers. Among them he identified PW5 Sgt. Kinyua who called him. He searched him and removed his wallet containing Ksh.2000/=. He took the money. He was then handcuffed and frogmarched to the police station. The following day, his employer came and confirmed having paid him Ksh.2000/= the previous night. After 2 weeks in police custody, he was subsequently charged with an offence he knew nothing about. The appellant called his employer as a witness. He corroborated the appellant's story.

In the trial court, after reviewing the entire evidence adduced, the learned Magistrate found the charge proved and accordingly convicted the appellant as already stated.

Though the appellant filed his own petition of appeal in which he impugned his conviction and sentence by the learned magistrate on five grounds, it is not necessary for us to consider them since the appeal was conceded to by the state. Before us, Mr. Omwenga, learned Senior State Counsel conceded to the appeal on the technical ground that the language of the court was not indicated in the court record. He did not seek a retrial though on the grounds that the evidence of identification was not watertight.

The issue of "*language*" in criminal trials has been severally examined by the court of appeal and strong expressions made about compliance with requirements of the law. See for instance Degow Dagane Nunow V Republic, Criminal Appeal No.223 of 2005 (UR). *Section 77 (2)* of the Constitution is unambiguous. It is therein provided inter alia that:

"Every person who is charged with a criminal offence:

(a) .....

(b) Shall be informed as soon as reasonably practicable, in a language that he understands and in detail, 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."

Again the need for interpretation in criminal trials is reinforced by *Section 198* of the Criminal Procedure Code which provides:-

"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."

We have perused the record of the trial magistrate with these provisions in mind and noted that when the trial commenced before P.T. Nditika, SRM on 13<sup>th</sup> March, 2007, the Coram for the day was as follows:-

"13.3.07

BEFORE P.T. NDITIKA SRM

CP IP KARIUKI

CC KABURI

ACCUSED PRESENT

COURT FOR HEARING

PW1 SWORN AND STATES”

That quorum was maintained throughout the proceedings and in respect of all the witnesses. It would appear therefore that the proceedings in the subordinate court were conducted in a language the appellant may not have understood. This is a constitutional issue which questions the validity of the entire trial owing to transgression of *section 77 (2) (b) and (f)* of the Constitution of Kenya. It is the duty of the court to confirm that the appellant understands the language used therein. It matters not that the appellant fully participated in the trial and cross-examined the witnesses.

It is not however, every case where language is not shown that will make an appellant to successfully raise the issue of language. Each case has to be considered in the light of its peculiar facts and circumstances. For instance the scenario would dramatically change if during the trial, the appellant was represented by counsel. However this was not the case here! The appellant acted in person and could not possibly know his rights as to interpretation.

Given the record, we are satisfied that the relevant provisions of the law as regards court language were breached in respect of the appellant and the learned Senior State Counsel complaint was not therefore far fetched but supported by the record. He was thus right in conceding the appeal on that ground.

Should we order a retrial? Mr. Omwenga thinks not. We agree. The appellant was convicted on the alleged evidence of identification by PW2 and PW3. However the appellant was a stranger. No enquiry was made by the court as to the source of light, its intensity and its location vis a vis the appellant as required. See Maitanyi V Republic (1986) KLR. Further much as the appellant was subjected to police identification parade and was picked out by PW2 and 3, the said witnesses had not given a description of the appellant in their initial report to the police. In any event such description and indeed the entire identification parade was unnecessary as PW2 had accompanied the police as they went about arresting the appellants.

In the end we allow the appeal, quash the conviction and set aside the sentence imposed. The appellant should be set at liberty forthwith unless otherwise lawfully held.

*Dated and delivered at Embu this 29<sup>th</sup> day of October, 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**

**WANJIRU KARANJA**

**JUDGE**