JAMES NDIANG'UI MWEIGA …… APPELLANT

VERSUS

REPUBLIC …….....……. RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 90 OF 2006

JOSEPH NGARI MWEIGA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No. 261 of 2003 dated 27th April 2006 by R.A.A. Otieno – S.R.M.)

J U D G M E N T

The appellants **James Ndiangui Mweiga** and **Joseph Ngare Mweiga** whose appeals I consolidated for ease of hearing and as they arose from the same trial in the subordinate court were jointly charged with the offence of Rape Contrary to Section 140 of the Penal Code. The particulars were that on diverse dates between 24th and 26th January 2003 in Nyeri District, they jointly with another not before court had carnal knowledge of **RWM** without her consent. They entered a plea of not guilty to the charge and their trial ensued.

The prosecution's case was that on 24th January 2003 the appellants in the company of another person took the complainant whom they had picked as a passenger from the Nyeri town lower stage while on her way home to K into a house where they detained and raped her in turns before transferring her to a different house the following day where they again repeatedly raped her in turns. It was further prosecution case that the complainant finally escaped on the 3rd day and a report thereof was made to the police. She was referred for treatment and a P3 Form filled where upon the appellants were arrested and charged with the offence.

The first appellant in his defence claimed that the complainant was his girlfriend and that she had been to his house previously. He denied having raped the complainant but admitted having slept with her on the same bed between 24th and 26th January 2003. The 2nd appellant denied having committed the offence claiming that he only knew the complainant through his brother the 1st appellant who had introduced the to him as a girl friend.

The learned magistrate evaluated the evidence tendered by the prosecution as well as the defence and came to the conclusion that the prosecution case was sufficiently proved. Accordingly, she convicted the appellants and sentenced them to 10 years imprisonment each. Aggrieved by the conviction and sentence the appellants lodged the two appeals through **Messrs Wahome Gikonyo & Company Advocates** and which as I have already stated were consolidated. The grounds of appeal were that:-

1. The learned trial magistrate erred in law and fact in not (sic) holding that the appellant had raped the complainant when the charge had not been proved beyond any reasonable doubt. A miscarriage of justice was thereby occasioned.

2. In so far as there was no medical evidence and the Clinical Officer (PW 1) ruled out any injuries in the external and internal genitalia or any other sign of sexual intercourse, the Learned Trial Magistrate erred in law and fact in failing to find and hold that there was sufficient doubt which doubt ought to have been resolved in favour of the Appellant. A miscarriage of justice was thereby occasioned.

3. The learned magistrate erred in law and fact in not holding and finding that there was sufficient doubt in prosecution evidence, which doubt ought to have been resolved in favour of the Appellant. A miscarriage of justice was thereby occasioned.

4. The learned trial magistrate erred in law and fact in shifting the burden of prove from the prosecution to the Appellant to prove his innocence by holding that "*there is no plausible explanation why the accused 2 would run away from the police without justification....*". A miscarriage of justice was thereby occasioned.

5. The learned trial magistrate erred in law and fact in failing to consider and find out whether the Complainant's evidence is credible and corroborated. A miscarriage of justice was thereby occasioned.

6. Considering all the circumstances of the case, the sentence meted out is manifestly harsh, excessive and against the weight of the evidence adduced.

When the appeal came up for hearing, **Mr. Orinda**, learned Senior Principal State Counsel conceded to the same on the grounds that the language of the trial court was not indicated and section 200 of the criminal procedure code too was violated when the incoming magistrate did not inform the appellants of their rights under that section of the law. **Mr. Wahome**, learned counsel for the appellants agreed with the position taken by **Mr. Orinda** and indeed associated himself fully with his submissions on the issues.

I think that issue of language is sufficient to dispose of this appeal. Failure to indicate the language of the court has severally been held by the court of appeal and indeed this court to amount to a violation of an accused person's rights under the constitution. See for instance **Swahibu Simbauni & Another v/s Republic, C.A. Cr. Appeal No. 243 of 2005 (UR), Cisse Djibrilla v/s Republic C.A. Cr. Appal No. 221 of 2006 (UR), Francis Macharia Muchai v/s Republic C.A. Cr. Appeal No. 11 of 2004 (UR), Albanus Mwasia Mutua v/s Republic C.A. Cr. Appeal No. 120 of 2004 (UR), Harun Kinyua Nyamu v/s Republic NYR HCCC No. 297 of 2004 (UR)**.

The trial court did not record anywhere that the appellants understood the language in which the proceedings were undertaken. I find that, that omission constituted a violation of the Appellant's constitutional rights as enshrined in Section 77(2) (b) and (f) of the Constitution. That section provides as follows:-

"77(2) 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 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....."

It also ought to be noted that Section 198 of the Criminal Procedure Code 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 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.

In the case of **Swahibu Simbauni Simiyu & Another (supra)** the Court of Appeal had the following to say in respect of the language of the court:

"It is abundantly clear from these provisions set out from the Constitution and the Criminal Procedure Code that in a criminal trial the language of the trial must be understood by the accused person and that right extends to an advocate representing an accused person if the advocate does not understand the language of the trial; even if the accused himself understands the language of the trial but his advocate does not understand the language, the language must be interpreted to he advocate into English".

The trial court having failed to indicate the language that was understood by the appellants or at least indicating that the testimony of the various witnesses was interpreted to them renders the trial that took place before the lower court a nullity. I do therefore accordingly find that the trial was a nullity and hereby set aside the conviction and sentence entered against them.

Having so found should I then order that the appellants be retried? I find that such an order would be very prejudicial to the appellants. Why do I say so? Because apart from this omission, the charge sheet was even defective. The particulars of the charge sheet were that the appellants jointly had carnal knowledge of the complainant. It is not possible for two or more people to jointly rape a complainant at the same time. In other words rape can never be joint. It is singular. The court of appeal has held so in several authorities. Further even the learned Senior Principal State Counsel did not ask for a retrial. Accordingly there will be no basis for me to consider that possibility in view of the settled law as to when a retrial should be ordered by court. See for instance **Pascal Clement Braganza v/s Republic (1957) E.A. 152**, **Charo Katana Kitsa v/s Republic (2007) EKLR** and **Benard Lolimo Ekimat v/s Republic C.A. Cr. Appeal No. 151 of 2004**.

I am therefore of the considered view that the appellants should not be retried and accordingly I do hereby order that they be set free forthwith unless otherwise legally held.

Dated and delivered at Nyeri this 30th day of November 2009

M. S. A. MAKHANDIA

JUDGE