REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 180 of 2007

NATHAN MWETERI M'IKIAO …… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(An appeal against the judgment of M.R. Gitonga Ag. S.P.M. Criminal Case No. 2042 of 2006 delivered on 17th December 2009)

JUDGEMENT

The appellant was charged in the lower court with 3 counts of robbery with violence contrary to section 296 (2) of the Penal Code and of one count of possession of fire arm to which he pleaded not guilty. After trial before the lower court, he was sentenced to death on the first count whilst the other counts' sentence was held in abeyance. The appellant has brought this present appeal against sentence. His appeal was vigorously opposed by the learned counsel on the ground that the appellant was identified by PWI and III. Further, the learned state counsel submitted that the appellant was arrested after an ambush was laid by the Police on the pretext that there were ammunitions available for sale.

When we sat to consider this appeal, we noted that the learned trial magistrate had failed throughout the prosecution's case to indicate the language of the court. The prosecution called 6 witnesses and after they were sworn there is no indication in what language their evidence was given. Even in the case of the defence case, there was no indication of the language used by the appellant. The law relating to the requirement of the court indicating the language used in a trial was well discussed in the case of **John Irungu Vrs. Republic** Criminal Appeal No. 303 of 2005.

"Section 77 of the Constitution deals with provisions to secure protection of law. The pertinent provision in section 77(2) (b) states as follows:-

(2) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(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 detail, of the nature of the offence with which he is charged;

(c) *……..*

(d) *…….*

(e) *…….*

(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."

"***And section 198(1) of the Criminal Procedure Code states:-***

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."

That is the law. At the trial of an accused person, the court must ensure not only that the charge is explained to the accused in a language the accused understands but the court is further enjoined to ensure that the evidence given during the trial is interpreted to the accused in a language the accused understands. These are legal requirements. They are constitutional rights of an accused person and cannot, in our view, be waived on belief that the accused understands the language of the court particularly when the accused has stated, like the appellant did state in the case before us, that he was "not good in English or Kiswahili."

On the basis that lower court's proceedings were not interpreted to the appellant in a language he understands, the appeal must succeed. The mistake or the failure to provide interpretation cannot be attributed to the prosecution. What we need to consider is whether to order a retrial. In the case of Amos Gituma Kinyua Vrs. Republic HCC Criminal Appeal No. 89 of 2001 the Court of appeal had this to say on a retrial:-

'***In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Where a conviction is vitiated by a mistake of the trial court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person. All those are familiar guidelines and we repeat them from Fatehali Manji Vrs Republic (1966) EA 343. It was also stated by this court in Mwangi Vrs. Republic [1983] EA 522 that:- "We are aware that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result; Barganza Vrs. Republic [1957] EA 469 Pyarala Bassan Vrs. Republic [1960] EA. 854.***

In our view, this is a case where the prosecution may if a retrial is ordered try to fill in gaps which could lead to the prejudice of the appellant. The reason we say so is because the prosecution presented the weakest kind of evidence on identification of the appellant. The offence occurred at 4pm on 11th December 2006. The appellant was said to have robbed PWI, II and III. They were traveling in a lorry. The appellant was said to have had a gun and was not disguised during the robbery. After the robbery, the complainants reported the matter to the Police. On the following day, the appellant together with his co-accused were taken to the Police Station at the same time as the complainants were recording their statements. PWI stated,

"No identification parade was done though I identified accused 1 (appellant) when I saw him."

On being cross examined by the appellant PWI responded:-

"I saw you and another having being arrested. I was then at the Police Station. I saw you as you alighted from the police vehicle……..I saw you at the police station. I said it was you."

PWIII on his part stated:-

"Later they told us to go the next day to record statements. We did, as we were at the police, a white land rover came with two people and I identified one of them who was first accused (appellant)."

The evidence of identification of the appellant by PWI and III was doubtful in credibility. Evidentially, that evidence was worthless. We say so because it is fact that for one to see a person under arrest they more than likely to identify them as the robbers. For the police to allow those witnesses to see the appellant whilst under arrest rather than at an identification parade was definitely prejudicial to the appellant. The Court of Appeal in the case of **Paul Mwaniki Kitilu Vrs. Republic** (Criminal Appeal No. 270 of 2002), (unreported) stated:-

"……. It is very likely and very natural that if a police confront a complainant with an individual arrested soon after a robbery on them the witness would say, the persons who are arrested was amongst those who robbed us……."

The evidence of that identification of the appellant becomes even more unreliable when one considers the evidence of PWII who was robbed alongside with PWI and III. This is what he stated in evidence:-

"I was not able to identify the robbers as I was forced to lie down."

Further in cross examination, he stated that he was unable to identify those who robbed him. Taking into consideration that all the complainants were robbed at the same time, then how is it that two identified appellant whilst PW2 did not? It could be because they saw the appellant under arrest. In the case of **Cleaphas Otieno Wamunga Vrs. Republic** 1989 KLR 424, the Court of Appeal stated (which reinforces our finding) as follows:-

"The evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined. "

Further, in respect of the charge of being in possession of a fire arm contrary to Section 4(2) of Firearms Act, we note that no evidence was adduced by the Ballistic Expert. PWVI stated in evidence that the rifle and ammunition were sent for analysis. No evidence was given on the outcome of such analysis. The trial court could not therefore know whether the firearm was one fitting the definition of firearms in section 2 of the Firearms Act Cap 411. That definition is as follows:-

"Firearm" means a lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any shot, bullet or other missile and includes....."

The evidence of the expert would have assisted the court to determine if the rifle was one that could shoot missiles or bullets. Similarly, it would have assisted the court to confirm if the bullets were capable of being fired. On the whole, we are of the view that to order a retrial would be prejudicial to the appellant. In the end the appellant's appeal succeeds and his conviction on all counts is hereby quashed and the sentence is set aside. We order the appellant to be set free unless he is otherwise lawfully held.

Dated and delivered at Meru this 20th November 2009.

MARY KASANGO

JUDGE

M.J.A. EMUKULE

JUDGE