REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 161 of 2006

STEPHEN MWANGI WARUNDU ……..……. APPELLANT

versus

REPUBLIC……..……. RESPONDENT

(Being an appeal from the conviction and sentence of C. D. NYAMWEYA,

Senior Resident Magistrate in the Senior Resident Magistrate's Criminal Case No. 7 of 2003 at NYERI)

JUDGMENT

The appellant was charged in counts 1 to 4 with *Robbery with violence contrary to Section 296(2) of the Penal Code.* In respect of count No. 5 the charge was *Burglary stealing contrary to Section 304(1) and 279 (b)* of the Penal Code. He was convicted on all 5 counts. In respect of count no. 5 he was sentenced to 3 years imprisonment on each limb with one stroke of the cane. That sentence was ordered to be concurrent. On counts

1-4 he was sentenced to death as prescribed under the law. He has appealed against conviction and sentence. Everything that can possibly go wrong with a criminal trial went wrong in this case. The case was heard by C. D. Nyamweya SRM. The lower court's record shows that at the plea stage the language that was used was English/Kikuyu. After the appellant pleaded guilty and trial commenced, the record does not indicate what language each of the seven prosecution witnesses used. The record does not also show what language the appellant used in his defence. The record also shows that none of the prosecution witnesses were sworn when they gave their evidence. *Section 151* of the Criminal Procedure Code sets out the legal requirement for witnesses in a criminal trial to give evidence under oath.

Sections 198 of the Criminal Procedure Code and *Section 77(2)* reinforces the need to have proceedings conducted in the language understood by an accused person. This was clearly stated in the case of *DEGOW DAGANE NUNOW VS REPUBLIC NYR, Criminal Appeal No. 223 of 2005 (Unreported)*

"…..*It is the responsibility of trial courts to ensure compliance with these provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place…..*"

It is required that the trial court would inquire from the accused the language he wishes to use and that

inquiry and the choice made should be borne out on the court record. As the Court of Appeal in the case SAMWEL MURIITHI MWANGI vs REPUBLIC Criminal Appeal No. 39 of 2005 (unreported) said:-

"*The usual practice of all the courts in Kenya is, of course, to show in the record that a witness has taken an oath before testifying. In the record before us, there is no way in which we can determine, one way or the other, that the witnesses were or not sworn before they gave their evidence. Most likely, they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of Section 151 of the Criminal Procedure Code and the other provisions we have set out herein. ……. To be convicted and sentenced to death on evidence which is not sworn must of necessity be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence."*

The trial court's failure to receive evidence under oath and to record the language used by each witness leads this court to find that that trial was a nullity. The learned state counsel at the hearing of the appeal sought retrial of the appellant. In the case of AHMED *SUMAR VS REPUBLIC* [1964] E.A. 481 it was stated in respect of retrial that:-

"*It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecutor is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view follow that a retrial should be ordered."*

We are however of the view that this is not a suitable case to order retrial because the appellant's constitutional right as embodied in section 72(3)(b) were in our view violated. The appellant in his defence stated that he was police custody for 28 days before being produced in court. We have calculated the number of days he was in custody and have found that they were 24 days. It is not clear to us why he was not produced to court within 14 days of arrest as provided under Section 72(3)(b). The identification parade was carried out on the 9th day of his arrest. He was picked out of that parade by PW 1. The police having held the appellant for 24 days in our view violated the appellant's constitutional rights. In view of that finding the appellant's conviction in the lower court cannot stand. It ought to be noted that the appellant was unrepresented in the lower court. The Court of Appeal in the case *Paul Mwangi Murungu v Republic Criminal Appeal No. 35 of 2006* stated;-

"*We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the lawful detention in custody of the police. The prosecuting authorities themselves know the time and date when an accused was arrested. They also know when the arrested person has been in custody for more than the twenty four hours allowed in the case of ordinary offences and fourteen days in the case of capital offences. Under Section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint. But in case the prosecution does not offer any explanation then the court, as the ultimate enforcer of the provisions of the constitution must raise the issue.*

That is what this court said way back in the case of NDEDE V REPUBLIC already cited herein. Of course the Magistrate before whom most of the accused persons first appear do not normally have the jurisdiction to deal with the matters touching on the Constitution, but that is no reason for not asking relevant questions regarding where the accused person has been since the date of arrest and then recording what explanation has been offered by the prosecution. That will help either the High Court or this court to see if the explanation offered by the prosecution was reasonable in all the circumstances of the case."

We additionally find that the learned magistrate erred on the sentence imposed on the appellant on count 1-4. He had already imposed a sentence of death on count 1. Having so done the sentencing on the other counts should have been held in abeyance. This is the finding in the case of ABDUL DEBANO BOYE &

ANOTHER vs REPUBLIC Criminal Appeal No. 19 of 2001 (unreported):-

"We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentence of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope that sentencing courts will take heed of these simple requirements and act appropriately."

In the end our finding is that the appellant's appeal does succeed and we do hereby quash his conviction, set aside his sentence. We order that the appellant be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 30TH DAY OF JANUARY 2008.

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE