REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Criminal Appeal 7 of 2006

JULIUS MURIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the conviction and sentence in Marimanti Principal Magistrate's Court Criminal Case No.222/2005 by Hon. A.N. Kimani, P.M. on 17.1.2006)

JUDGMENT

1. The appellant herein Julius Muriuki was the accused person in Mariamanti Principal Magistrate's Court Criminal Case Number 222/2005. He had been charged with 2 counts of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were as follows:-

"Count 1- On the 30th day of July 2004 at Turima Location in Tharaka District within Eastern Province with others not before court armed with pangas robbed Salome Kariuki of Kshs.5000/= and at or immediately before or immediately after the time of such robbery wounded the said Salome Kariuki."

"Count II- On the 30th day of July, 2004 at Turima Location in Tharaka District within Eastern Province with others not before court robbed Joyce Gateria of Kshs.1200/= and at or immediately before or immediately after the time of such robbery wounded the said Joyce Gateria."

2. At the conclusion of the trail, the learned trial magistrate found that the accused person was guilty on both counts and sentenced him to death. He instituted the present appeal against both the conviction and sentence on the following grounds that:-

i. The trial magistrate erred in law and in fact or misdirected himself by failing to find that the alleged recognition or identification of the appellant was not free from the possibility of error as the attack was at night.

ii. The trial magistrate erred in law and in fact or misdirected himself in failing to note that an investigation officer was a vital witness who should have been summoned for a just decision to be reached.

iii. The trial magistrate erred in law and fact by failing to put into consideration the fact that the prosecution side failed to call an independent witness other than PW1 and PW2 who were related as mother and daughter.

iv. The trial magistrate erred in law and fact by failing to note that the complainant did not make a prompt report to the Administration Police (APs) at Turima camp with the names of the assailant. (see the case of Peter Ochieng V Republic Criminal Case No.185/1984).

v. The trial magistrate erred in law and fact by convicting the appellant on insufficient evidence which was not watertight to justify a conviction. (see the case of Erase Bwato V Republic [1960] EACA page 1741).

vi. The trial magistrate erred in law and fact by failing to note that the appellant was not given a sufficient trial as he did not understand the language which was being used in court as the court clerk could not communicate to him in his native language (Kitharaka) and this is why he did not give any defence as it was not explained to him in a language that he could understand.

3. When we retired to consider this matter, it occurred to us we should deal with ground No. (vi) first because having seen the record, a determination of the issue of language alone would dispose of the Appeal in its entirety. We say so because with respect to the trial magistrate, nowhere in the entire record is there an indication whatsoever of the language used in the trial. To demonstrate that anomaly, when the plea was taken on 29.3.2005, the records read as follows:-

"29.3.2005

Before A.N. Kimani – PM

CP: I.P Kunga

CC- Kageni

Accused- present

The substance of charge(s) and every element thereof has/have been stated by the court to the accused person who on being asked whether he/she admits or denies the truth of the charge herein replies:

It is true.

A.N. Kimani, P.M

Hearing 17/5/2005

Mention 12/4/2005."

4. Clearly, the language in which the plea was taken was not recorded at all even more fundamentally no plea was properly recorded. On both issues we take guidance from the holding in Adan V Republic [1973] E.A. 445 or 446 that;

"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The Magistrate should then explain to the accused person all the essential ingredients of the offence for which he is charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts

which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded."

5. In this case, the appellant even before us stated thus:-

"I never understood the proceeding."

6. Our clear finding is that the plea was defective on account of failure to record the plea itself and also because there is no record of the language used. On the language issue we dare add that in the evidence of PW1, PW2, PW3, PW4 and PW5, the language in which the witnesses testified is not recorded at all and although the appellant is recorded as having cross-examined those witnesses, the language he used to do is not recorded. He tendered on defence and so again we cannot tell if he really understood what was going on right from the outset of his trial. When the Court of Appeal was confronted with a similar situation in Degow Dagane Nunow V Republic Cr. Appeal No.223/2005 the court expressed itself as follows:

"As to the other parts of the record, one can only presume that because the appellant cross-examined the witnesses called by the prosecution and because he also gave evidence on oath, he must have understood the language of the court. There is really no reason for making such a presumption. On this aspect of the matter, the burden is on the trial court itself to show that an accused person himself selected the language which he wishes to speak and in which proceedings are to be interpreted to him. As we have repeatedly pointed out, these there are not mere procedural technicalities. There, is first section 198 of the Criminal Procedure Code and that section 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 advocate and the evidence given in a language other than English and not understood by the advocate it shall be interpreted to the advocate in English."

The provisions shows that the question of interpretation of evidence to a language which an accused person understands is not a matter for the discretion of a trial magistrate – it must be done and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak. Section 77 of the Constitution is in relevant parts, in these terms:-

"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 detail of the nature of the offence with which he is charge;

c. .....

d. .....

e. .....

f. Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used in the trial of the charge."

It is the responsibility of trial courts to ensure compliance with these provisions. Trial courts are not only obliged to ensure compliance with the 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 complied with while it can easily be demonstrated by the record that compliance did in fact take place."

7. The appellant has insisted that he never understood the proceedings and both the record and the law seem to bear him out. Once the trial was as flawed as it was by fact then taking guidance from the Dagane Case (supra) we see no need to delve into other aspects of the trail but will ask the same question that the Court of Appeal asked itself in that case; "What do we do with the appellant?"

8. In the present case, only PW2, Salome Kariuki lives in Nakuru but is one of the Complainants and a relative of PW1, Joyce Gateria. PW3 lives in the same village as PW1 while PW4 and PW5 worked at Marimanti as a Clinical Officer and a Police Corporal respectively. These witnesses can be traced and since the trial only ended on 17.1.2006, little prejudice would be caused to the appellant. Further, we do not see any gaps that the prosecution would fill if a retrial were to be ordered.

9. In the event, while we shall quash the appellant's conviction, set aside the sentence of death imposed, we shall order that he be retried at Marimanti Senior Resident Magistrate's Court by any other magistrate than A.N. Kimani Esq. P.M but in the meantime shall remain in lawful custody.

10. Orders accordingly.

Dated and delivered at Meru this 18th day of February 2008

ISAAC LENAOLA

JUDGE

WILLIAM OUKO

JUDGE