



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL 87 OF 2007

SAMUEL WAINAINA KIBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original Judgment and sentence in Criminal Case No.94 of 2006 of Senior Resident Magistrate's Court at Kerugoya by P.T. NDITIKA SRM)

JUDGMENT

The appellant was charged tried and convicted on a charge of robbery contrary to Section 296 (2) Penal Code. He was sentenced to death as the law requires. He has now filed a petition Appeal with 8 grounds of appeal.

On the hearing this appeal State Counsel Mr. Kimathi informed the court that he was not opposing the appeal he was conceding the same. He gave grounds for doing so.

The first ground is that there was no record of the language used. A perusal of the record reveals that on the day of plea 16/1/2006 there is no indication of the language used. Again on 31/1/2006 but on 14/2/2006 language is indicated. When the evidence of PW1, PW2, PW3, PW4, PW5 and other proceedings were taken no record of what language was used. The Criminal Procedure Code does provide under Section 198, that whenever any evidence is given in a language not understood by the accused it shall be interpreted to him. This must be recorded as the court cannot be expected to presume that that Section was complied with.

The second ground put forward by the State Counsel is that there was only one identifying witness and the Trial Magistrate did not warn himself of dangers relying on evidence of single witness. This issue was raised in the grounds of Appeal by the Appellant. The complainant (PW2) said that he did not identify any of the robbers but his wife did and told him that she had identified the appellant. PW2 said his wife was called Pauline but the witness who gave evidence of wife of complainant was Grace Wangui (PW4). Grace Wangui said she knew the appellant but she did not give details of how she knew him. Also the source of light was not satisfactory a reflection of torch light on a wardrobe was not proved to be of sufficient strength to enable identification at night. From the leading of Judgment of Trial Magistrate, it is clear the Trial Magistrate failed to warn himself of the dangers of convicting on evidence of one identifying witness and there was no basis of believing the witness evidence that she had known the appellant since 1993. She just answered her statement without giving evidence of how she could have recognized the appellant. There were authorities produced in these proceedings:-

1. Court of Appeal decision Criminal Appeal No. 243 of 2005 Swambu Simbauini Simuyu and another Vs Republic in which appeal the issue of language in Criminal trials was raised. The court referred to

Section 77 (2) of the constitution and Section 198 Criminal Procedure Act. The court after a long discussion on the interpretation of the law of proceedings in criminal case. The court came to a conclusion that the rights of the appellant were violated and the appeal was allowed.

2. Court of Appeal Criminal Appeal No. 18/2006 Rweri Mwangi vs Republic which again raised the issue of language in criminal cases.

Therefore on the failure to indicate language used in the proceedings is a ground to invalid conviction. There is also another ground raised the appellant in the petition of appeal. He says that he was detained before being brought to court for a period of 30 days, a period of more than 14 days permitted under Section 72 (3) of the constitution. This is a violation of the human rights of the appellant and it entitles him to remedy.

Upon consideration of the above issues we are of the view that the State Counsel was right in conceding this appeal. We allow the appeal and quash conviction and set aside sentence. We order that the appellant be set at liberty forthwith unless otherwise lawfully detained.

Dated this 7th day of March 2008.

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J. N. KHAMINWA

JUDGE

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M.S.A MAKHANDIA

JUDGE