



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 338 of 2001

JOHN MUTHIKE WANGARU..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment of Kaburu Bauni, Chief Magistrate in Chief Magistrate's Court Criminal Case No. 1228 of 2000 at Nyeri)

JUDGMENT

The appellant was charged with 5 counts of robbery with violence contrary to section 296(2) of the penal Code. He was convicted on counts I and acquitted on other counts. He was sentenced to death on 24th August 2001. The prosecution's evidence shows an orgy of violence perpetrated by a group of people on 24th May 1997. This group of men went to various homes and business premises breaking down homes and terrorizing the occupants. Some were cut with pangas and had their properties stolen. The goods were ferried in a motor vehicle. The motor vehicle had been stolen on 23rd May 1997. It belonged to PW 7. At PW 7's house the robbers stole Kshs.4500/- and the motor vehicle. PW 8 the wife of PW 7 was injured in the attack. She was the only witness who said that she identified the appellant. That identification was made when she handed him the key to the motor vehicle. Even though she identified him at the time when the robbery was taking place it does seem that she was not invited to participate in an identification parade. Her identification of the appellant remained a dock identification. But the main problem with the Lower Court's trial is the learned magistrate's failure to indicate the language used by the witnesses. In the case of all the witnesses including the defence witnesses the court did not indicate the language used. It is pertinent to note that the accused did not cross examine most of the witnesses and where he did he seem to have asked one or two questions. Courts are courts of record and accordingly the lower court record is the only guide in this appeal of the manner in which the trial proceeded. The court was required to adhere to the provisions of section 198 of the Criminal Procedure Act. That section provides as follows;-

“..... 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.....”

The requirement of the provision of an interpreter during criminal trials in a language in which accused understands is a mandatory requirement and its compliance ought to be reflected in the record of the court proceedings. It cannot be a matter of conjecture. Section 77 of the Constitution also provides as follows:-

“(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 in the trial of the charge.....”

The need to adhere to the provisions of the criminal procedure code and the constitution as stated herein before were subject of the court of appeal decision in the case of *Degow Dagane Nanow v Republic, Criminal Appeal No. 223 of 2005 at Nyeri (unreported)*, had this telling observations;

“..... It is the responsibility of trial court 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 been complied with while it can easily be demonstrated by the record that compliance did in fact take place.....”

The court of appeal also made a similar observation in the case of *Jackson Leskei v Republic, criminal appeal No. 313 of 2005 (unreported)*.

“..... By entrenching in the constitution the right of interpretation in a criminal trial the framers of the constitution appreciated that it is fundamental for an accused person to fully appreciate not only the charge against him but the evidence in support thereof. It is then that it can be justifiably said that an accused person has been accorded a fair hearing by an independent and impartial court. It is the court’s duty to ensure that the accused’s right to interpretation is safeguarded and to demonstratively show its protection...”

Further the court of appeal on the subject in the case of *Antony C. Kibatha v Republic, Criminal Appeal No. 109 of 2005 (unreported)* has the following to say;-

“..... we do not think we could ever improve on that statement of the law concerning the fair trial provisions under section 77 of the constitution. A court can only demonstratively show that the rights of an accused person under section 77 have been protected if its record shows that that has been the case...”

The lower court’s record fails to meet the requirements set out herein before. The learned state counsel, Miss Ngalyuka quite rightly did not oppose the appeal. She further stated that she was not seeking for a retrial. A retrial will normally be ordered as has been decided in previous cases in the following circumstances;-

(i) If original trial was illegal or defective.

(ii) If it is in the interest of justice.

(iii) If it will not occasion injustice or prejudice to the appellant.

(iv) If it will not accord the prosecution opportunity to fill up gaps in its evidence at the first

trial.

(v) *If upon consideration of the admissible or potentially admissible evidence a conviction may result and finally*

(vi) *Each case must depend on its particular facts and circumstances.*

In the case of *Kahindi v Republic Criminal Appeal No. 270 of 2006* the Court of Appeal added the circumstances under which the court would consider whether to order a retrial as the period that the appellant has taken in custody. Such a period should be considered and in being so considered the court should determine whether witnesses would be traced in good time to mount a successful retrial. The appellant in our case has been in prison since 24th August 2001 but had been in custody during trial from 6th June 1997. In view of the period that the appellant had been in custody we find that to order a retrial would work prejudice to the appellant. In addition in our re-evaluation of the Lower Court's evidence we find that the identification of the appellant was not satisfactory. He was only identified by PW 8 who said that at the time of the robbery the room was dark. She identified the appellant by means of a lamp. Despite that identification the police did not mount an identification parade to enable her identify the appellant. Instead the prosecution left the identification to one of the dock identification. In the case of *Abdalla Bin Wendo v republic [1953] EACA 166*, the Court of Appeal of East Africa said;-

“...but on identification issue a witness maybe honest yet mistaken and may make erroneous assumption particularly if he believes that what he thinks is likely to be true....”

If we were to order retrial it would mean the prosecution will have opportunity to improve its evidence in regard to the identification of the appellant. That would be prejudicial to the appellant. Accordingly we do hereby allow the appeal and do quash the conviction against the appellant and set aside his sentence. The appellant is hereby set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 30th day of April 2008

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE