REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 261 of 2004

JOSEPH MAINA KARIUKI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in Chief Magistrate's Court at Nyeri in Criminal Case No. 2062 of 2004 dated 18th August 2004 by Mr. R. N. Nyakundi – C.M.)

J U D G M E N T

The appellant, **Joseph Maina Kariuki** was charged and tried before Nyeri Chief Magistrate's Court with one count of robbery with violence contrary to section 296 (2) of the Penal Code, and alternative count of handling stolen goods contrary to section 322(2) of the Penal Code. It had been alleged in the charge sheet, that he did, on the 20th day of June 2004 at Aguthi village in Nyeri District within Central Province jointly with others not before court, while armed with a knife rob one **Eunice Gathoni Gichohi**, one akai radio cassette, 4 kg tily cooking fat, one high glass wall clock, one torch, toss soap, tea leaves, 2 kgs Mumias sugar, one bag, one coat, one key soap, Nivea cream all valued at Kshs.3,930/= and immediately before or immediately after the time of such robbery used violence on the said **Eunice Gathoni Gichohi**. In the alternative count it was alleged that on the same day at Naromoru town in Nyeri District within Central Province otherwise that in the course of stealing dishonestly received and retained the same items listed in the main charge sheet knowing or having reason to believe them to be stolen goods.

The trial commenced before **R. N. Nyakundi**, Chief Magistrate on 9th August 2004 when four prosecution witnesses testified, and was concluded on the 12th August 2004 when the 5th and last prosecution witness, and the appellant testified.

Briefly the prosecution case was that on the night of 20th June 2004 at about 2 a.m., PW2 (the complainant) was asleep in her house when suddenly somebody hit her on the forehead. She was startled and woke up only to see a person armed with a knife towering over her. She had in the house a hurricane lamp which was on that enabled her to identify the person as the appellant. She also noticed two other strangers in the house. She immediately screamed and three ran away. They ran away with the household items set out in the particulars of the charge sheet. In the process of running away, one of the strangers dropped a black cap which he had been wearing. The owner of the black cap was known in the neighbourhood and was traced by the neighbours who had responded to the complainant's screams. He was **Ephantus Ngure** (PW3). He admitted that the black cap belonged to him but that he had given it out to one, **Kariuki**. The said **Kariuki** was traced and he accepted having been given the black cap by PW3. However, he had also passed it on to his brother **Wahome** who stayed at Naromoru. They proceeded to Naromoru to look for Mr. Wahome. Mr. Wahome on seeing them escaped. However they managed to arrest the appellant from Wahome's house. Upon arrest police officers from Narumoru police station

were called and they conducted a search in the house and recovered all the items set out in the charge sheet which were positively identified by the complainant. The appellant was then re-arrested by the police officers and was later charged.

For his part the appellant in his sworn statement of defence categorically denied the offence. He admitted though that the items were found in his house. However they were brought by another person and he did not know that they were stolen.

The trial magistrate believed the prosecution case and convicted the appellant for the main offence of robbery with violence in count one and sentenced him to death as required by the law. That conviction and sentence provoked this appeal.

The appellant raised six grounds of appeal before us through his counsel **Mr. Gacheru**. However since the appeal was conceded to on a technicality by **Ms Ngalyuka**, learned state counsel, it is not necessary to go into the said grounds of appeal. The state conceded to the appeal on the ground that the language of the court and in which the witnesses testified was not indicated in the court record. That being the case, the trial was a nullity. **Mr. Gacheru** shared the same sentiments as the learned state counsel.

The court of appeal and this court has repeatedly stated that the matter of language in which criminal proceedings are conducted is not a mere technicality. It has its foundation in the Constitution and in the Criminal Procedure Code, Cap 75. The burden is therefore on the trial court itself to show that an accused person has himself selected the language he wishes to speak in during the trial. Section 77 of the Constitution in relevant parts state as follows:-

"**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 details, 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....."

The mode of taking and recording evidence in trials is also provided for in Section 198 of the Criminal Procedure Code. As relates to subordinate courts, section 198 of the code 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 is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.

In our view, the only way a trial court would demonstrate compliance with those provisions is to show, on the face of the record at the beginning of the trial, the language which the accused person has chosen to speak in. On this same issue authorities by both court of appeal and this court abound. Suffice to mention but **Swahibu Simbauni Simiyu & Another v/s Republic, KSM Criminal Appeal No. 243 of**

2005 (unreported).

In the matter before us the trial as already stated commenced before **R. N. Nyakundi** on 9th August 2004. There is no indication of the language chosen by the appellant for the proceedings on that day. The language of the witnesses who testified, that is, PW1, PW2, PW3 and PW4 is not apparent on the record as the trial magistrate simply recorded:-

"**PW1, Peter Karanja sworn states as follows**:

The same case applied to all the remaining prosecution witnesses. Even for the defence it is not clear in what language the appellant gave his statutory statement.

It is clear in the above circumstances that the trial was conducted in contravention of the law and the Principal State Counsel properly, in our view, conceded the appeal.

Should we order a retrial?

Ms. Ngalyuka did ask for one on the grounds that there was overwhelming evidence linking the appellant to the crime. That the items stolen during the robbery were found in the possession of the appellant, soon after the robbery. The appellant admitted as much. **Mr. Gacheru**, opposed the request arguing that though the items were found in the possession of the appellant, they had been left there by someone else. That he did not know that they were stolen. That the appellant had been in prison since 2004 and had been in remand from time of his arrest on 20th June 2004. A retrial in the circumstances would be prejudicial to the appellant.

Ordinarily a retrial will be ordered where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not. See **Muiruri v/s Republic [2003] KLR 552**. It is also necessary to consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial – see **Mwangi v/s Republic [1983] KLR 522**. We have taken all those principles into account and we think that an order for retrial in this case would not be proper. There is no explanation why the prime suspect who ran away on seeing the neighbours approach the house in which he was staying and in which the items were recovered was never arrested and charged. After all he was well known to both the complainant and the neighbours. There is no suggestion that he went under and could not be traced. Secondly, we note that the items recovered are perishables. We doubt whether the same would still be available if we were to order a retrial. Further there is no assurance by the state that if a retrial was ordered, witnesses will be readily be made available to testify.

In the result, we decline to order a retrial. Instead we order that the appeal be allowed, and we set aside both the conviction and sentence.

The appellant shall be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 28th day of April 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE