REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 175 & 219 of 2005

JOSEPH MAINA GICHERU ……..……...……APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO.219 OF 2005

GEORGE WERU WACHIRA ……..…..…….APPELLANT

VERSUS

REPUBLIC ……...……..RESPONDENT

(Form original Conviction and Sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No.2038 of 2004 by E.J. OSORO – SRM)

J U D G M EN T

On the 21st May, 2004 there were a spade of robberies at Kiamaina area of Karatina in Nyeri District apparently masterminded by the two appellants. In total there were four robberies. The two appellants upon arrest were charged with four courts of robbery with violence contrary to *section 296 (2)* of the Penal Code. They also faced a separate charge of preparation to commit a felony contrary to *section 308 (2)* of the Penal Code. They all pleaded no guilty to the charges.

The trial of the appellants commenced on 8th October, 2004 before the learned Senior Resident Magistrate at Nyeri (**E.J. OSORO**). The prosecution called a total of 8 witnesses to testify against the appellants. The appellants were put on their defence and each of them made sworn statement in his defence and called witnesses.

The learned trial Magistrate considered all the evidence before her and came to the conclusion that the prosecution had proved its case against the 1st appellant in respect of count one. The learned Magistrate also went further and convicted both appellants on the fifth count of preparation to commit a felony contrary to *section 308 (2)* of the Penal Code.

As a result of the foregoing the 1st appellant was sentenced to death as prescribed by law in respect of

count one. In respect of count five each appellant was sentenced to a fine of Ksh.50,000/= in default 5 years imprisonment. The learned Magistrate correctly suspended the execution of this sentence in respect of the 1st appellant.

Being dissatisfied with both conviction and sentence the appellants preferred appeals to this superior court. The two appeals were consolidated and placed before us for determination.

When the appeals came up for hearing before us on 11th March, 2008 the appellants were unrepresented whereas **Mr. C.O. Orinda**, the learned Principal State Counsel, appeared for the state.

Mr. Orinda conceded the appeal on the ground that the language used by some witnesses was not stated in the court record and hence, in his view, there was a mistrial. **Mr. Orinda** went further and informed us that the state would not be asking for a retrial.

It was rather unfortunate that the learned trial Magistrate did not indicate what language was used by PW2 and PW3 when they testified before her. The trial court's record shows that the two witnesses were sworn but there was no indication as to what language was used;

Sample this:

"**PW2 Timothy Karionje Nene sworn and states: I hail from Ngania. I am salesman with A.R. Shah……."**

"**PW3 Angustine Ernest Wachira sworn and states: I work at Amichad Richard Shah……..."**

Though the foregoing pattern was not repeated in respect of the other six witnesses, nonetheless the damage had already been done. This was one trial and therefore this omission cannot be separated from the rest of the trial and treated separately. It affects equally the rest of the trial. It matters not therefore that the language in which the other witnesses testified is clearly reflected in the court record.

The record also does not show whether the evidence of these two witnesses was ever interpreted to the appellants and if so in which language.

Section 77 (2) (b) and (f) of the Constitution of Kenya provide that:-

"……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 offence with which he is charged.

(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……"

And *section 198 (1)* of the Criminal Procedure Code provides:-

"…..whenever any evidence is given in a language n**ot 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……."**

It is abundantly clear from the foregoing provisions of the law that in a criminal trial the language of the proceedings must be understood by the accused person and must be so indicated. In the case of

Kiyato V/S Republic (1982 – 88) KAR 418, the court of appeal held:-

"……**It is fundamental right, under the Constitution of Kenya *section 77 (2)* that an accused person is entitled without payment, to the services of an interpreter who can translate the evidence to him and through which he can put questions to the witnesses, make his statutory statement, or give his evidence. Moreover, the Criminal Procedure Code (Cap 75) section 198 (1) also requires that evidence should be interpreted to an accused person in a language that he understands…..***"**

It is the standard practice in the courts to record the nature of the interpretation used and the name of the interpreter. The trial magistrate in this case made no note of the language in which the evidence of the witnesses was being interpreted…. There had been no compliance with the Constitution of Kenya *section 77 (2)* and the Criminal Procedure Code (Cap 75) *section 198 (1)* in this case…….*"***

The appeal was accordingly allowed, the nature of strength of the evidence adduced by the prosecution in support of the charge notwithstanding.

With regard to failure to indicate in the record the language used during the trial, this court is aware of the now celebrated court of appeal decision in the case of ***Swahibu Simbauni Simiyu & Another V/S Republic, C.A. Criminal Appeal No.243 of 2005*** (Kisumu) (unreported) in which the court held that since *section 77 (2)* of the Constitution requires that "**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 offence with which he is charged. And since the record of the Magistrate did not show the language used by the two appellants, there was a violation of the appellants' constitutional rights under the foregoing section…….."

Accordingly the appeal was allowed. Once again the nature and strength of the evidence availed by the prosecution in support of the charge did not really count.

On the need for courts to be vigilant and enforce constitutional provisions, the court of appeal in the recent case of ***Albanus Mwasia Mutua V/S Republic, C.A. Criminal appeal No.120 of 2004*** (unreported) observed:-

"….**At the end of the day it is the duty of the courts to enforce the provisions of the constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of the evidence which may be adduced in support of the charge……"**

In the instant case and as already observed it is not clear and it is not recorded anywhere in the proceedings in what language the two witnesses testified and whether there was interpretation. These omissions were fatal to the prosecution case and led to a mistrial. There was not the slightest attempt to comply with the provisions of the law. For these reasons, the learned state counsel was right in conceding to the appeal. Accordingly, we will allow the appeal and set aside both the conviction and sentence.

On retrial we think that it will defeat the ends of justice if such an order was to be made. There were too many loopholes regarding evidence of identification. 1st appellant is supposed to have been identified by PW1. Evidence of PW1 however indicates that the incident was committed at night but in the judgment the court seems to have taken the view that the incident occurred during the day. In the premises it would appear that the court did not deal with the right facts. As for the identification parade, there was a comment that PW1 was a relative of the appellant. Accordingly the identification parade was worthless. The issue was not properly addressed by the prosecution and the trial Magistrate in her

judgment. If anything the learned Magistrate used the said evidence to convict the appellant.

As for the 2nd appellant, there is absolutely no evidence linking him to the motor vehicle number plates, the subject of the 5th count. He was only charged because he was found in the company of the 1st appellant on the day of arrest. To our mind the conviction of the appellants was unsafe and to order a retrial in the circumstances will be an exercise in futility.

Having considered the evidence tendered during the trial we are certain that if the self-same evidence was to be tendered at the retrial a conviction is not likely to result. **See Mwangi V. Republic (1983) KLR 522.**

Taking all the foregoing into account, we hold the view that this is not a proper and fit case for an order for retrial. **Mr. Orinda** was therefore right again in not asking for one. Accordingly, we decline to make such an order. Instead we direct that the appellants be set at liberty forthwith unless otherwise held for some other lawful cause.

Dated and delivered at Nyeri this 22nd day of May, 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE