REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 53 of 2006

MARY NYAMBURA MBOTE ....…… APPELLANT

VERSUS

REPUBLIC ……..…… RESPONDENT

(Appeal from original Conviction and Sentence of the Resident Magistrate's Court at Mukurweini in Criminal Case No. 662 of 2004 dated 21st July 2005 by Mrs. R. B. Mecha –R.M.)

J U D G M E N T

This appeal arises from the judgment of the subordinate court **(R. B. Mecha RM)** sitting in the Resident Magistrate's Court at Mukurweini in which she sentenced the appellant to a fine of Kshs.10,000/= in default 1 year imprisonment after convicting her for the offence of affray contrary to section 92 of the Penal Code.

From the record, the proceedings opened before the trial court on 23rd September 2004 when the plea was taken and an order was made for the hearing to commence on 12th November 2004.

The hearing did take off on that day with 3 prosecution witnesses testifying. The case was then adjourned to 8th February 2005 for further hearing. On that day the last prosecution witness testified and the prosecution then closed their case. All through these proceedings the record is silent as to the language of the court and in which the witnesses testified. Nobody can from the record therefore tell the language in which parties were communicating with the court. It is also evident that none of the prosecution witnesses were ever sworn before they commenced their testimony. It was for these reasons that **Mr. Orinda** learned principal State Counsel conceded to this appeal when it came up before me for hearing. Who can blame him in the light of several court of appeal decisions on the twin issues. Failure by the trial magistrate to indicate in her record the language of the court and in which witness used in their communication with the court renders the trial a nullity as it is an infringement of the appellant's right to a fair trial in terms of section 77(2) of the constitution as well as section 198(1) of the criminal procedure code. See **Swahibu Simbauni Simiyu & Another v/s Republic, Criminal appeal No. 243 of 2005 (unreported)** as well as **Jackson Leskei v/s Republic, Criminal appeal No. 313 of 2005** (**unreported)**. The record of the trial magistrate in this appeal case does not show demonstratively that the trial court protected the appellant's right to have the proceedings conducted in a language he understands. Neither does it show that the witnesses were sworn before being allowed to testify as required by the provisions of section 17 of the Oaths and Statutory Declarations Act.

In view of the foregoing, I think that the appellant's trial was flawed, and his conviction was therefore unsafe. The trial was a nullity and I so hold.

Should I order a retrial? **Mr. Orinda** did not think that, that would be a wise thing to do. The evidence tendered if it was to be re-tendered at the retrial according to him would not lead to a conviction.

The relevant principles to consider on the question of retrial have been stated severally by this court and the court of appeal. In **Muiruri v/s Republic [2003] KLR 552** the court of appeal held:-

"**3. Generally whether a retrial should be ordered or not must depend on the circumstances of the case**.

4. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not."

It was further held in **Mwangi v/s Republic** (1983) KLR 522:

"**A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result"**

The evidence in this matter before me as correctly observed by **Mr. Orinda** was at best tenious and contradictory. The defence advanced by the appellant was plausible. The learned magistrate did not justify why she believed the police story as opposed to the appellant's. In any event the state has not given any undertaking that it would be possible to obtain the witnesses who testified in the case in good time to mount a successful prosecution if a retrial is ordered. I have also looked at the evidence on record and in my view, it might, and I put it no further, not support the conviction of the appellant. In all the circumstances, it is not in the interest of justice that I should order a retrial of the case.

In the result, the appeal is allowed, the conviction is quashed and the sentence imposed set aside. The appellant if she paid the fine of Kshs.10,000/= imposed, the same should forthwith be released and or refunded to her.

Dated and delivered at Nyeri this 10th day of June 2008

M. S. A. MAKHANDIA

JUDGE