REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 143 OF 2007

STEPHEN GITHAIGA GICHUHI ……..…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Appeal from original Judgment and Sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No. 3039 dated 23rd August 2007 by M. R. Gitonga – SPM)

J U D G M E N T

Stephen Githaiga Gichuhi (the appellant), was charged with the offence of robbery with violence contrary to section 296(2) of the Penal code. He pleaded not guilty to the charge and his trial ensued. At the conclusion thereof, the appellant was convicted of the same. Upon conviction by the then Senior Principal Magistrate at Nyeri **(M. R. Gitonga)** the appellant was sentenced to death as is mandatorily prescribed by law. That conviction and sentence triggered the instant appeal.

When the appeal came before us for hearing, **Ms Ngalyuka,** learned State Counsel conceded to the same on the grounds that the learned Magistrate did not indicate in his record the language of the court, the language in which the witnesses testified as well as the language in which the appellant gave his statutory statement. For that reason, the learned State Counsel felt that the trial of the appellant before the learned magistrate was a nullity. He invited us to so hold with the consequence that we would allow the appeal, quash the conviction and set aside the sentence of death imposed.

As to whether a retrial should be ordered, the learned State counsel opted not to pursue the same on the grounds that the evidence of identification was not watertight. Only one witness purported to identify the appellant. The appellant for obvious reasons welcomed the gesture by the state.

We have carefully considered the record of the proceedings and the judgment of the learned Magistrate and we are in no doubt at all that the complaints raised by both the learned state counsel and the appellant are germane and are indeed reflected in the record.

The learned magistrate conducted the proceedings in a careless and casual manner. The record does not show as required the language of the court, the language in which the witnesses testified as well as the language in which the appellant gave his statutory statement of defence.

All that the learned Magistrate could do was simply record "…..**PW1 sworn and states ….**" From the foregoing it is quite clear that the learned Magistrate made no attempts at all to comply with the mandatory provisions of section 77(1) & (2) of the Constitution of Kenya. The record is totally and

wholly silent as to what language was being used by the court. Various witnesses testified on behalf of the prosecution; the language in which they did so is not shown. The appellant himself made a lengthy statutory statement and called a witness but once again the language in which he addressed the court was not shown. That was the exact position that obtained in the case of the **Jackson Leskei v/s Republic, Criminal Appeal No. 313 of 2005** (unreported). Dealing with the issue the court of appeal **(Bosire, Waki and Onyango Otieno, JJ.A.)** in the said case having set out the provisions of section 77(1) & (2) of the constitution, remarked:

"…..**By entrenching in the constitution the right to 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……"**

Commenting on this statement of the law in a later case, the same court **(Omolo, Githinji and Deverell, JJ.A.)** stated and we quote;

"……. **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 record of the Magistrate in this appeal, as was the position in Leskei's case does not show that the trial court protected appellant's right to fair trial. In view of the foregoing we think that the appellants trial was flawed, and his conviction unsafe. The learned state counsel was therefore right to concede to the appeal.

Accordingly we allow the appeal and set aside both the conviction and the sentence imposed.

We now turn to consider whether we should order a retrial. As already pointed out the learned state counsel was not inclined to ask for the same. The appellant was for obvious reasons not keen on a retrial either.

We have considered the record before us, the submissions by the learned state counsel and the appellant as well as the law. The court of appeal has in several decisions considered the question of when and when not to order a retrial. In the case of **Pascal Ouma Ogolo v/s Republic, Criminal Appeal Number 114 of 2006** (unreported), the court stated;

"…….**we have considered whether or not we should order retrial. The alleged offences were committed on 9th February, 2000 and the appellant has already been in custody for 5 years. The main critical issue amongst others at the hearing of the first appeal by the superior court were as (sic) by identification and recognition in the circumstances in which the state counsel and the court found out (sic) to be favourable for identification in respect of the other appellants who were set at liberty. It may well prove impossible to trace the witnesses and those that are traced may not have accurate memory of the details of the events. We agree with Mr. Musau that this is not a suitable case in which to order a retrial ……."**

By parity of reasoning, we would also hold that this is not a suitable case for a retrial. The alleged identification of the appellant was by one witness in difficult circumstances. It was at night and the complainant was held by the neck from behind and violently assaulted leading to the loss of a tooth. She was also stabbed with a knife on the chin and she fell down. The assailant continued to assault her with fist to the mouth and nose. It was only after she managed to scream that the assailant let her go and disappeared into darkness. In those circumstances, we doubt whether she could have had the presence of mind to be able to identify the assailant positively. See **Walter Awinyo Amolo V Repulic (1991) KLR 254 & Maitanyi V Republic (1986) KLR 198.** In our view the purported identification was basically

dock identification which is worthless **see Ajode V Republic 2004 KLR 81, Gabriel Kamau Njoroge V Republic (1982) KAR, 1134.**

In the end, much as the complainant was seriously injured during the commission of the offence and it is only proper that whoever could have been responsible be brought to book, on the record before us, it will be futile to make an order of retrial in the circumstances. We decline to make an order for retrial and instead order that the appellant be set at liberty forthwith unless otherwise lawfully held for other reasons or cause.

Dated and delivered at Nyeri this 29th October 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE