REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 235 of 2007

PETER MUTURI GACHUGO……...…… APPELLANT

VERSUS

REPUBLIC..……..…….. RESPONDENT

(Appeal from original Conviction and Sentence of the Principal Magistrate's Court at Murang'a in Criminal Case No.1639 of 2006 by A.K. NDUNG'U – P.M)

J U D G M E N T

The appellant was charged with three counts of Robbery with Violence contrary *Section 296 (2)* of the Penal Code**.** After trial he was convicted as charged and sentenced to death as required by law. He was dissatisfied with the conviction and sentence and accordingly lodged the instant appeal.

In a nutshell, the prosecution case was that on the night of 28th May, 2006 a terror gang attacked 3 homes in a series starting with PW1's, followed by PW3's and finally at PW2's house. PW1 was attacked and robbed by the gang which was armed. He was then forced to go to PW3's home where he called him out. He too was robbed and the 2 victims were forced to accompany the gang to home of PW2 who despite efforts to resist was overpowered and also robbed of cash. PW1 did not identify any of the attackers. PW2 apparently saw the appellant from the light provided by torches that the gangsters had. He noted a peculiarity in the appellants left eye which peculiarity the trial court saw. PW3 said that he too identified the appellant as he and others took long in his house and PW4 said that as the gang flashed torches from side to side searching the whole house she saw the appellant. PW5 however did not identify the attackers. PW6 saw and identified the appellant through torch light. PW7 said that when their house was attacked she saw the appellant from torch light which reflected from pictures on the wall of the house. PW8 visited the scene and confirmed the three houses had been broken into. PW9 arrested the appellant from members of the public who claimed he had been involved in the spate of robberies in the neighbourhood.

In a sworn statutory statement the appellant said that he was arrested by members of the public after he fought with a debtor. On cross examination he admitted that his left eye had a peculiarity and this was as a result of an accident he was involved in earlier on.

Having considered the evidence on record, the learned Magistrate found for the prosecution, convicted the appellant and sentenced him as appropriate.

As we sat down to ponder over this appeal we discerned that the learned trial magistrate had failed to record the language used during the trial. In the case of each and every witness for the prosecution and even in the case of the appellant there is no record of the language used. What seems to be of major concern to us as we perused the trial court's record is that the learned magistrate failed to indicate the language used during the trial. It is pertinent to note that the Appellant did not cross examine the witnesses in depth considering the defence he offered. Indeed during his mitigation he alluded to the difficulties that he had undergone during the trial. He stated thus, "……**I ask court to note I was unable to ask questions…..."** In the absence of any evidence to the contrary, we can only assume that his failure to put questions in depth to the witnesses who testified can be attributed to his inability to understand the proceedings as they were perhaps conducted in a language he was wholly uncomfortable with. Trial courts are expected to keep a record of the proceedings pursuant to the provisions of *Section 198* of the Criminal Procedure Act. That section provides interlia:-

"……. **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 that an accused person is entitled to interpretation of proceedings to him in criminal trial in a language that he 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, assumption and or supposition. Indeed *Section 77* of the Constitution also provides 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 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 aforesaid were the 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).* The court of appeal in that case observed:-

"……. **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 an 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…"

Lastly in the case of **Antony C. Kibatha V Republic, Criminal Appeal No. 109 of 2005** *(unreported)* again made these telling remarks.

"…….**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 as stated before fails to meet the aforesaid thresh hold. It is for that reason that we must allow this appeal.

How about a retrial? We did not have the benefit of being addressed on the issue by the respective parties to this appeal. However the law on when a retrial ought to be ordered is now well settled. A retrial will normally be ordered in the following circumstances;-

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

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

(3) If original trial was illegal or defective.

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

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

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

Recently in the case of **Kahindi V Republic Criminal Appeal No. 270 of 2006** the Court of Appeal added two further consideration to wit, the period that the appellant has been 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 evidence adduced in the lower court was not flimsy. If the self-same evidence was tendered at the retrial, we are satisfied that a conviction is most likely to result. The offence was committed about 2 years ago. The appellant was convicted and sentenced on 12th July, 2007. The appellant cannot thus claim injustice or prejudice if a retrial is ordered. Further the appellant has only been behind bars for a y ear or so. That period of incarceration is not so long to work injustice on the appellant in the event of a retrial. On the whole bearing in mind the principles that should guide us in ordering a retrial and having considered the evidence of the lower court, we are satisfied that an order for a retrial is most appropriate to make in the circumstances of this case.

In the end the appellant's appeal against conviction and sentence is allowed. The conviction is quashed and the sentence imposed set aside. We do however order that the appellant do appear before the Principal Magistrate's Court, Murang'a on 6th November, 2008 for his trial to commence before any other Magistrate of competent jurisdiction other than **A.K. Ndungu (P.M.)** who presided over the initial trial. Until then the appellant shall remain in prison custody.

Dated and delivered at Nyeri this 21st day of October 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE