



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

Criminal Appeal 129 of 2007

HARRISON MURIGI MUNJUJ.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Principal Magistrate’s Court at Murang’a in Criminal Case No.3071 of 2005 by A.K. NDUNGU – PM)

J U D G M E N T

The appellant before us, namely **Harrison Murigi Munjuu** was tried and convicted on one count of robbery with violence contrary to *section 296 (2)* of the Penal Code and upon so being convicted by the Principal Magistrate at Murang’a (**A.K. NDUNGU Esq.**) he was sentenced to death as provided by the law. He was also convicted for consorting with a person in possession of a firearm contrary to *section 89 (2)* of the Penal Code, 2 counts of making a false document with intent to deceive contrary to *section 347 (a)* of the Penal Code, and two counts of altering a false document contrary to *section 353* of the Penal Code. On these other counts the learned Magistrate correctly exercised his option not to sentence the appellant. Being aggrieved, the appellant lodged the instant appeal in person. When the appeal came before us for hearing, the appellant in his supplementary petition of appeal raised this pertinent ground of appeal, which in our view will determine the fate of this appeal. The appellant complained that;

“.....the learned trial Magistrate erred in points of law and fact in failing to do what was required for (sic) him by the law for the appellant in,

(i)

(ii) Did not afford (sic) me adequate interpretation and also not indicating the language that was used in the trial court.....”

In support of this ground of appeal, the appellant in his written submissions stated that he was denied a fair trial since the trial court had a duty to explain to him the nature of the charge and the consequences thereof using the language that he clearly understood. That the record of the trial Magistrate does not show the language that was used when the plea was taken. Neither is the language that was used by witnesses in their testimony indicated. To the appellant this was fatal omission that rendered his trial defective and or a nullity. It contravened *section 77 (2) (f)* of the Constitution as well as *section 198* of the Criminal Procedure Code.

Mr. Orinda, learned Principal state counsel’s take on the issue was in the following terms; Appellant participated in the trial by cross-examining witnesses. The charge was in a language that he understood.

No prejudice was occasioned to the appellant therefor. Way back in 1985 the court of appeal in the case of **DIBA WAKO KIYATO V REPUBLIC (1982 – 1988) 1 KAR 1974** held that:-

“It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands.”

The court in that case was of course relying on the provisions of *section 77(2) (f)* of the Constitution of Kenya and *section 198 (1)* of the Criminal Procedure Code. The court went on state that:-

“The practice of recordings (sic), if not the name of the interpreter, at least the nature of the interpretation, has been standard practice in these courts for many years. For example, that which is described as the “plea form,” Form Criminal 133, contains under all the other details of the case and of the accused, a space against the word “interpretation.” There was no compliance with either of these two statutory provisions or with the standard practice in the instant case. The magistrate made no note of the language into which the evidence of the witnesses, many of whom spoke in English or Swahili was being translated.....”

The appeal was accordingly allowed.

In the appeal before us, the record of the trial Magistrate has absolutely no record or indication as to what language the proceedings were conducted and the appellant spoke. On the day of the plea, it is not shown if there was an interpreter present in court and into what language the proceedings were being interpreted. The assumption must be that the appellants spoke to the Magistrate directly in either English or Swahili which are the official languages in the subordinate courts. It is not shown anywhere in the record what languages the witnesses gave their evidence in and if the appellant understood such language or whether it was being interpreted to them. It is not even shown what language the appellant himself addressed the Magistrate in. It is a matter of serious regret and concern to us that such a senior Magistrate adopted such a casual and lethargic approach when trying the appellant despite the several court of appeal decisions on the question of right to interpretation which we are certain he is aware of.

The trial commenced on 29th August, 2006 and was concluded on 6th May, 2007 when the appellant was convicted and sentenced. The learned Magistrate cannot claim to have been oblivious of the now notorious court of appeal decision on the subject namely the case of **Swahibu Simbauni Simiyu & Another V Republic, Criminal Appeal No.KSM.243 of 2005** (unreported) decided way back in 2006. In that case the court of appeal held that since *section 77 (2)* of the constitution requires that;

“.....Every person who is charged with criminal offence 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 violation of the appellants’ constitutional rights under the forgoing section.....”

The appeal too was allowed on that basis.

The failure of the learned Magistrate to keep a record of at least the name of the interpreter and the nature of the interpretation was a serious defect in the trial and must render the conviction of the appellant unsafe and unsustainable. It matters not that the appellant nonchalantly participated in the proceedings and asked questions in cross-examination. We cannot assume or suppose that by so doing he effectively understood what was going on in court. The court should have insisted and recorded the language of his choice. There is no room for us to assume or suppose as we have been invited to do by the learned state counsel. We are a court of record and the trial Magistrate’s record must speak for itself. The requirement is that the proceedings be conducted in a language an accused is comfortable with and understands. The appellant could have fleetingly understood English. But that is not to say that he should be forced to undertake a trial in such language when he is at ease with his mother tongue or even Kiswahili. The record must demonstrably show the language in which the appellant has elected to conduct his trial in. In

the instant case the appellant has claimed that he was not accorded adequate interpretation. We have no reason or basis to disbelieve him. We must therefore allow the appeal and set aside both the conviction and sentence.

Should we order a retrial? All indications are that this is one case where such an order is appropriate. The appellant was caught in the act with another person who was shot dead at the scene of crime. The robbery was committed during the day. The complainant had a long time with the robbers, the appellant included as he drove them around before he was bundled in the boot of the motor vehicle. He was therefore in close proximity with the appellant and could not therefore have failed to register his identity. The appellant was a driver of the hijacked motor vehicle belonging to the complainant and as he was being pursued by the police, he lost control of the motor vehicle and was involved in an accident with an on coming vehicle. He was immediately arrested and when the complainant was freed from the boot he immediately identified the appellant as having been a member of the gang that robbed him of the vehicle. There can be no question of mistaken identity therefor. We are satisfied that if a retrial is ordered in the circumstances of this case a conviction is likely to result. **See Mwangi V Republic (1983) KLR 522.** The complainant was seriously injured in the course of the robbery. The justice of the case should require that the appellant be retried. Finally we note that the appellant was arrested on 15th December, 2005 and arraigned in court on 29th December, 2005. His trial commenced immediately and was concluded on 6th May, 2007. He filed the instant appeal on 15th May, 2007 which has been heard and determined within a year or so. All the circumstances taken into account therefore, the appellant cannot be heard to complain about prejudice or injustice that may be occasioned to him by an order for retrial.

Taking all the foregoing into account, we hold the view that this is a proper and fit case for an order for retrial. We order that the appellant be presented before the Principal Magistrate's Court, Murang'a on 16th October, 2008 for his retrial to commence before any other Magistrate of competent jurisdiction other than **A.K. Ndungu** who presided over the initial trial. Pending such appearance the appellant shall remain in prison custody.

Dated and delivered at Nyeri this 3rd day of October, 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE