REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 457 of 2004

JOHN WANGILA WAFULA……..……..……..……..APPELLANT

VERSUS

REPUBLIC…… ……..……....RESPONDENT

(From original conviction(s) and Sentence(s) in Criminal Case No. 2636 of 2004 of the Chief Magistrate's Court at Kibera (Ms. Mwangi– SPM)

J U D G M E N T

JOHN WANGILA WAFULA was convicted for one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and sentenced to death as by law prescribed. He now challenges his conviction in this appeal.

Miss Nyamosi, learned State Counsel has conceded to the appeal on grounds that the Appellant's Constitutional rights were violated in that the language of the court and that used by the witnesses was not indicated on the record. Counsel relied on the case of **SWAHIBU SIMIYU vs. REPUBLIC CA 243 of 2005** (KSM unreported).

We have perused the record of the proceedings of the trial court and have confirmed that indeed the learned trial magistrate did not make a note on record of the language used by the court itself and that used by the witnesses as they testified before it. The record does not also indicate whether there was any interpretation of the evidence to the Appellant. In the cited case of **SIMIYU**, Supra, the court of Appeal stated as follows: -

"…***The trial then commenced with the first witness giving his evidence in Swahili. There is nothing in the record of the magistrate to indicate that the Appellants understand Swahili. Two witnesses gave evidence that day and as both Mr. Karanja and Mr. Musai rightly pointed out to us, the Appellant asked very few questions. The trial proceeded on 5th February 1997 when virtually all the witnesses testified with some giving evidence in Swahili and others in English. Once again each Appellant asked very few questions and when they were finally put on their defence, each Appellant is shown to have addressed the court, it being recorded:***

Accused 1 sworn states

Accused 2 unsworn states

Once again it is not shown what language each Appellant used so that from the record of the

magistrate it is really not possible to say each spoke English or in Swahili and whether each of them understood whatever language was being used. We find it incredible that this could have happened in the court of a Senior Principal Magistrate. Clearly there was not the slightest attempt to comply with the provisions of the Kenya Constitution or the Criminal Procedure Code. On that basis alone, the appeals must be allowed…

In light of the Court of Appeal ruling, where the trial of the court fails to indicate whether an accused person understood the language used in the proceedings, the trial is defective for contravening Constitutional provisions and more specifically **Section 77(2) (b)** and **(f)** of the **Penal Code**.

Failure to include the language used during trial and whether the accused person or his advocate understood it also contravenes statutory provisions. In **KIYATO vs. REPUBLIC [1982-88] KAR 418**, the Court of Appeal held: -

"*….It is a 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 through whom he can put questions to the witnesses, make his statutory statement or give his evidence. Moreover, the Criminal Procedure Code (Cap 75) Section 198 also requires that evidence should be interpreted to an accused person in a language he understands.*

2. It is the standard practice in the courts to record the nature of the interpretation used or the name of the interpreter. The trial magistrate in this case made no note of the language into which the evidence of the witnesses was being interpreted.

4. 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…."

Accordingly, the appeal was allowed. Again, in the case of **ABDALLA vs. REPUBLIC [1989] KLR 456** the Court of Appeal held: -

"…***This court has recently held that it is a fundamental right of an accused charged with a criminal offence to have the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands. See Diba Wako Kiyato Republic, Criminal Appeal No. 100 of 1985, Section 77(2) (4) of the Constitution and Section 198 (1) of the Criminal Procedure Code. the record of the trial court alludes to interpretations into Kiswahili but does not state that there was any clerk or interpreter in court; only the presence of magistrate, the prosecutor and the accused are recorded. This record lends credence to the Appellant's Complaints that there was no interpreter of the proceedings to him in a language that he understands though the record has indications that he may have followed the gist of the proceedings. in the circumstances, there was a breach of the Appellant's constitutional and fundamental right which is fatal to the proceedings…".***

We find that indeed there was contravention of both Constitutional as well as statutory provisions in the court proceedings, which rendered the entire trial a nullity. We accordingly set aside the conviction and sentence.

The next issue we must determine is whether or not to order a retrial. **Miss Nyamosi** has urged us to order a retrial on the basis that there is sufficient evidence to sustain a conviction. Learned Counsel submitted that the evidence of PW1 and PW4 was sufficient to prove theft and that the witnesses would be availed at the trial. Counsel also submitted that since the case was concluded on 3rd September 2004 the Appellant will suffer no prejudice.

The Appellant opposed the order for retrial. The Appellant submitted that he was convicted because of handling stolen things and yet he pointed out the owner of the goods to the Police who escaped in the presence of the Police. Appellant stated that he earned a living carrying luggage for people at the stage and that he was arrested as he did so for a customer. Appellant submitted that the evidence adduced by the prosecution was inconsistent and that while considering a retrial, the court should consider that he was

not to blame for the mistake which occurred during the trial.

We have perused the record to appraise ourselves with the evidence that was adduced before the trial court. In **BERNARD LOLIMO EKIMAT vs. REPUBLIC CA No. 151 of 2004** the Court of Appeal quoted with approval from the same court in the case of **AHMED SUMAR vs. REPUBLIC [1964[EA 481** at page 483 as follows: -

"***It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.***

The Court continued at the same page paragraph II and stated: -

We are also referred to the judgment to Pascal Clement Braganza vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless Court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for a retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been accepted is that each case must depend on its particular facts and circumstances but that such an order for retrial should only be made where interests of justice require it.

We have carefully considered various aspects of the case including the evidence that was adduced in support of the charge, the period the Appellant has stayed under confinement and are of the view that it would be in the interests of justice to order a retrial. We therefore order a retrial in this case.

In that regard, the Appellant should be produced before Senior Principal Magistrate's Court Kibera for plea to the self same charge on the **13th February 2007**. In the meantime, the Appellant should remain in prison custody.

Dated at Nairobi this 8th day of February 2007.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Miss Nyamosi for the Respondent

CC: Tabitha/Eric

…….

LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE