



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

**Criminal Appeal 463 of 2004**

*(From original conviction and sentence in Criminal Case No.3515 of 2003 of the Chief Magistrate's Court at Kibera – Ms. Mwangi - SPM)*

**FREDRICK MATIOLI KEFA .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

***FRREDRICK MATIOLI KEFA***, the Appellant and one ***SIMON OKUMU OTIENO*** were jointly charged with two counts of robbery with violence contrary to Section 296 (2) of the Penal Code. They also each separately faced one count of rape contrary to Section 140 of the Penal Code. Finally each one of them again faced an alternative count of indecent assault on a female contrary to Section 144 (1) of the Penal Code. The trial of the two commenced before Ms. Mwangi, Principal Magistrate on 29<sup>th</sup> May, 2003. However before the trial could be concluded, Simon Okumu Otieno passed on. Accordingly the charges against him were withdrawn under Section 87 (a) of the criminal Procedure Code.

As for the Appellant, the case proceeded to conclusion whereupon he was found guilty on two counts of robbery with violence as well on one count of rape. Upon conviction the Appellant was sentenced to death in respect of the two counts of robbery with violence and two years imprisonment for rape.

The Appellant was aggrieved by the conviction and sentence and hence lodged the instant Appeal. When the Appeal however came up for hearing, Miss Nyamosi, Learned State Counsel conceded to the same on a technicality. The technicality being that throughout the proceedings the language in which the Court conducted the proceedings and in which the witnesses testified and that used by the Appellant whilst giving his statement was not indicated. This omission by the Learned Magistrate infringed on the Appellant's rights as enshrined under Section 77 (2) (b) and (f) of the Constitution. Relying on the Court of Appeal decision in ***SWAHIBU SIMBAUNI SIMIYU & ANOTHER VS REPUBLIC CRIMINAL No 243 of 2005***, Counsel urged us to nullify the proceedings.

We have carefully perused the entire records of the proceedings of the trial Court and we are in agreement with the Learned Counsel that nowhere did the Learned trial Magistrate indicate the language of the Court, nor the language used by the witnesses as they testified or even the language in which the Appellant gave his statutory statement. The trial Magistrate's record merely indicated proceedings "***PW1 on oath***". This style of taking evidence of each of taking evidence was repeated throughout the record in respect of each of the 10 remaining witnesses and even the Appellant when it came to his

statutory statement. In the case of **SWAHIBU SIMIYU (SUPRA)**, the Court of Appeal nullified the proceedings of the trial Court on the ground that the language of the Court and in which the trial was conducted was not clearly indicated in the record. We are bound by the Court of Appeal decision. Consequently we find and hold that the proceedings of the Lower Court contravened the Appellant's Constitutional right to interpretation in terms of Section 77 (2) (b) of the Constitution as well as Section 198 of the Criminal Procedure Code. The trial of the Appellant was therefore defective and we accordingly set aside both the conviction and sentence entered against him.

Miss Nyamosi, urged us to order a retrial on the ground that the evidence on record irresistably pointed to the Appellant in the commission of the offence. The Appellant was found wearing PW2's shirt on the date of arrest one week after the robbery. The shirt was positively identified by both PW1 and PW2. On the rape charge Counsel submitted that the evidence of PW4, Government analyst, linked the Appellant to the offence. Finally Counsel urged us to find that for the sake and in the interest of justice an order of retrial is necessary.

The Appellant opposed the request for retrial arguing that the evidence as adduced was not sufficient to return a conviction. He also urged us to consider his written submissions in support of his grounds of Appeal in their entirety.

It has been said that an order for retrial should not be made if it will cause the Appellant to suffer prejudice. Whether or not an order of retrial should be made depends with the peculiar facts and circumstances of each case. An order of retrial can be made in the interest of justice. However and more importantly, an order for retrial should not be made unless an Appellate Court is certain that upon consideration of the admissible or potentially admissible evidence a conviction is likely to result.

See **MANJI VS REPUBLIC (166) EA 313 AHMED JUMA VS REPUBLIC (1964) EA 481, MWANGI VS REPUBLIC (1983) KLR 522 and PIUS OLIMA & ANOR VS REPUBLIC CRIMINAL APPEAL NO. 110 OF 1009 (unreported).**

We have carefully analysed and evaluated the evidence tendered at the trial and without saying more lest we cloud the mind of the Magistrate who might eventually preside over the retrial, we are satisfied that if the self same evidence was tendered, a conviction is most likely to result. We therefore find this a suitable case for retrial. We order that a retrial be held in this case. In that regard the Appellant shall be produced before the Senior Principal Magistrate's Court for the retrial to commence on the self – same charges on 15<sup>th</sup> February, 2007 before any other Magistrate of competent jurisdiction other than Ms. Mwangi who handled the initial trial. Until then the Appellant shall remain in prison custody.

Dated at Nairobi this 8<sup>th</sup> day of February, 2007.

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**LESIT**

**JUDGE** \_\_\_\_\_

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**MAKHADIA**

**JUDGE**

Judgment read, signed and delivered in the presence of:-

Appellant

Miss Nyamosi for State

Erick/Tabitha Court clerks

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**LESIIT**

**JUDGE**

.....

**MAKHANDIA**

**JUDGE**