REPUBLIC OF KENYA

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

Criminal Appeal 381 of 2003

From original conviction(s) and Sentence(s) in Criminal Case No. 5222 of 2003 of the Chief Magistrate's Court at Makadara (Mr. C.O. Kanyangi– SPM)

CHARLES OTIENO ODUMA…..……..……..APPELLANT

VERSUS

REPUBLIC……..……....RESPONDENT

J U D G M E N T

CHARLES OTIENO ODUMA was convicted for one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code** and was sentenced to death as prescribed in the law. He now challenges the conviction before this court.

When the Appeal came up for hearing, **Mrs. Obuo**, State Counsel representing the State, conceded to the appeal on a technicality. Learned Counsel submitted that the Constitutional provisions guaranteeing the Appellant a right to a fair trial in a language he understood was violated. Learned counsel cited **Section 77(2) (b)** of the **Constitution**.

We note that the Appellant throughout his submissions before us spoke in the English language. That however does not prove that the trial was conducted in a language the Appellant understood. For example when the Complainant's evidence was taken both the language of the court and that of the witness was not indicated. Worse still, there is no indication whether the Complainant was ever sworn or affirmed before his evidence was taken. The first violation on language contravened **Section 77(2) (b)** of the **Constitution**, which provides.

"***Section 77(2) Every person who is charged with a criminal offence –***

(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;

(e) Shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

(f) Shall be permitted to have without payment the assistance of an interpreter if he cannot

understand the language used at the trial of the charge"

The Constitution guarantees an accused person a fair trial in the language he understands. Failure to indicate the language used is a violation of this provision and such violation renders the trial a nullity. See **SWAHIBU SIMIYU & ANOR vs. REPUBLIC CA No. 243 of 2005**. Accordingly, we set aside both the conviction and sentence.

Learned State Counsel's submitted that a retrial should be ordered because the offence was serious, witnesses would be availed and because the Appellant will not be prejudiced. We have looked at the quality of the Appellant's identification and the weight of the evidence adduced by the prosecution.

We noted in addition to the violation of the Appellant's Constitutional rights, the learned trial magistrate also violated a procedural rule of law which affects the weight of the evidence adduced. **Section 151** of the **Criminal Procedure Code** provides as follows: -

"***151 Every witness in a criminal case or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."***

The provision is framed in mandatory terms. It is not possible to tell whether the evidence adduced by the Complainant was sworn or not. That goes to the weight of the evidence. Evidence that is unsworn is a mere statement which would require corroboration to sustain a conviction.

We have considered the quality of identification by Complainants. The Complainant gave conflicting evidence which raises doubt whether the Appellant was one of those who robbed the Complainant. While it was clear that the Complainant was held from behind and in the circumstances, he may not have been able to identify one who held him, the Complainant maintained that it was the Appellant who held him from behind and that despite that, he saw him sufficiently to identify him. The Complainant contradicted himself by saying that why he was able to identify the Appellant was because of the sweater he wore at the time of the incident. More important however, is the fact that the attack took 3 minutes. The Complainant could only have had a fleeting glance of his attackers. Considering the attackers were six men, that reduces the quality of the Complainant's evidence considerably.

As for PW2, he said that he saw six men pinning a man down and rob him in 3 minutes. He says he chased them and managed to arrest one 50 metres away from the scene. Considering there were many people walking in the streets at the time, we do not find the evidence of identification by PW2 reliable.

Having considered and evaluated the evidence in this case, we are not satisfied that a conviction would result if the self same evidence were adduced in a retrial. See **MWANGI vs. REPUBLIC [1983] KLR 522**.

We decline to order a retrial. We order that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 1st day of February 2007.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mrs. Obuo for the Respondent

CC: Tabitha/Eric

…….

LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE