REPUBLIC OF KENYA

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

Criminal Appeal 384 of 2004

GEORGE KIMANI ITIBU …….....…… APPELLANT

VERSUS

REPUBLIC ……..…….. .....RESPONDENT

(From Original Conviction and Sentence in Criminal Case No. 1426 of 2003 of the Senior Principal Magistrate's Court at Kiambu: G.M. Njuguna).

JUDGMENT

The Appellant ***GEORGE KIMANI ITIBI,*** was initially charged with four counts of robbery with violence contrary to Section 296(2) of the Penal Code. He was however discharged on counts 1, 3 and 4 on account of the failure of the Complainants in those counts to attend Court and testify. The Appellant was however, after full trial, convicted by Senior Resident Magistrate, Kiambu on a lesser count of simple robbery contrary to Section 296 (1) of Penal Code and was sentenced to eight years imprisonment.

Being aggrieved by the conviction and sentence, the Appellant lodged the instant Appeal in which he faulted his conviction on the grounds that his identification and or recognition was not positive, that the Prosecution case was not proved beyond reasonable doubt and finally that his defence was not given due consideration.

The Prosecution case was that PW1, Francis Gathenya Mangara was asleep in house on the material day. He was with his wife PW2, Mary Mugure Waihenya. At about 2 a.m. they heard people outside ordering them to open the door. When they refused, those people forcefully gained entry into the house through a window in the children's bedroom. They were armed with pangas and rungus. They demanded money from both PW1 and PW2 when they were unable to get any money from the two witnesses, they took two power saws and left. PW1 and PW2 apparently were able to recognize one of the robbers, the Appellant. They reported the matter to the chief and later caused the arrest of the Appellant. Following further investigations the Appellant was then charged.

Put on his defence, the Appellant in unsworn statement claimed that he was a farmer as well as a contractor. He stated that he cuts tree and that he had sub-contracted work to the Complainant on many occasions. However, since the Complainant could not pay him his dues, they fell out and thereafter a grudge developed between the two. That on the day of his arrest he had met the Complainant in a bar and on demanding that he be paid his dues, the Complainant hold him bluntly that he would never pay him the money. Subsequently, the Complainant caused the appellant to be arrested and then charged.

When the Appeal came up for hearing the Appellant sought and we permitted him to tender written submission in support of the Appeal. On behalf of the state, Miss Gateru, Learned State Counsel put the Appellant on notice that should we find the Appeal unmerited and dismiss the same, she would be asking

us to invoke our powers under Section 354(3) of the Criminal Procedure Code and enhance the conviction and sentence to that of capital robbery. We note that the charge was reduced to simple robbery by the trial Magistrate on the ground that no evidence was adduced to show that violence was visited upon the Complainant in the course of the robbery. This is of course a gross misdirection in law. Violence is not the only ingredient of the offence. Section 296(2) is very clear as to what constitutes the offence of robbery with violence. Basically there are three ingredients:

(i) The offender is armed with a dangerous or offensive weapon or

(ii) He is in the company with one or more other person or persons, or

(iii) He immediately before or immediately after the time of robbery wounds, beats, strikes or uses any other personal violence to any person..

It has been stressed on many occasions by this court that the key requirements aforesaid are disjunctive so that if any of the them exist then Subsection (2) applies. See ***JOHANA NDUNGU VS REPUBLIC – CRIMINAL APPEAL NO. 116 OF 1995 (UNREPORTED).*** In the present case the facts established on the evidence show that the application of Subsection (2) did not depend solely upon the issue as to whether violence was visited upon the Complainant. There was ample evidence that the Appellant was acting in company with one or more persons and that they were armed with offensive weapons namely pangas and rungs. Clearly, the Learned Magistrate fell into error in reducing the charge to simple robbery. As invited by the Learned State Counsel, should we find that the Appeal lacks merit and we dismiss it, we shall be minded to enhance the conviction and sentence to that of robbery with violence contrary to Section 296(2) of the Penal Code as initially charged. Despite the warning, the Appellants elected to pursue the Appeal nonetheless.

As we sat down to ponder over and consider this Appeal, we noted fatal omission in the proceedings of the subordinate Court that goes to jurisdiction. Although the issue was not raised and canvassed by either of the parties in this Appeal, we nonetheless have to deal with it as it is jurisdictional. The issue is the language used in the trial court. This is raised in connection with Section 77 (2)(b) and (f) of the Constitution of Kenya. Those provisions provide that:-

"***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 details, the nature of the offence with which he is charged.

(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 ……..”

And Section 198 (1) of the Criminal Procedure Code states:

"***198(1) 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***

(2) ……..……”

From these provisions of the law it comes out quite clearly that in a criminal trial the language of the trial must be understood by the accused person and it is standard practice in the trial 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 witness was being interpreted. In the case of ***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 ad 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 that 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 observed:

"……***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 the magistrate, the prosecutor and the accused are recorded. This record lends credence to the appellant. 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……."***

What happened in the instant Appeal? The Appellant's trial commenced before Mr. G.M. Njuguna, Senior Resident Magistrate on 13th August 2003 when P.W.1 testified. The record for that date indicated:

"***Charge read over and explained.***

It is not true

Plea of not guilty recorded

PW1 (sworn) and states"

On that occasion only PW1 and PW2 testified and the case was adjourned. In the subsequent proceedings involving 5 witnesses the learned magistrate would simply indicate ***PW…… (sworn) and states.*** Further when the Appellant gave his statutory statement on 3rd March 2004, the record does not show that there was a court clerk and whether there was interpretation of soughts.

Arising from the foregoing it is difficult to tell in what language the witnesses testified and whether the Appellant understood English in which the proceedings were recorded or any other language that could have been in use during the trial. Faced with a similar dilemma, the Court of Appeal in the case ***SWAHIBU SIMBAUNI SIMIYU AND ANOTHER VS. REPUBLIC, CRIMINAL APPEAL NO.243 OF 2005 (KISUMU) (UNREPORTED)*** observed:

"……***The trial then commenced with first witnesses 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. Musau rightly pointed out to us, the appellant asked very few questions. The trial …….. 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……..”

The same situation obtains here. Infact it is even worse in that there is no mention at all of the language used in Court during the trial. As we are bound by the Court of Appeal decisions, we accordingly allow the appeal and set aside both the conviction and sentence.

We must now consider whether we should order a retrial. Principles, upon which the court acts in determining whether a retrial should be ordered are well settled. The cardinal rule being that no retrial should be ordered if the accused person would suffer prejudice or injustice and if the Appellate Court is of the opinion that having regard to the evidence on record and if the self-same evidence was to be tendered at the retrial, conviction may not result. ***MWANGI VS. REPUBLIC 1983 KLR 522.***

Having carefully evaluated and analysed the evidence tendered, we are persuaded that if the self same evidence was to be tendered at the retrial, a conviction may not result. The Complainant was attacked in the dead of night. The only source of light available was paraffin lamp. No inquiries were made by the learned magistrate as to the intensity of the said light, its source in relation to the robbers and the time they took to observe the appellants. See ***WANGOMBE VS. REPUBLIC (1980) KLR 149***. Further it is clear from the record that the robbers were armed with powerful torches which they directed at the faces of the complainant as well as PW2. This must have impeded their observation. It is also noteworthy that the paraffin lamp was in the sitting room and not the bedroom where most of the action took place. PW1 did tell the Court that inside their bedroom there was no light. The witnesses claimed to have known the Appellant from childhood, he even knew his parents and his home as well. Yet when they made a report of the incident to PW6 and PW7, they did not as much as mention to them the name of the appellant. Further they never even volunteered to lead the police to the residence of the appellant so as to be arrested; yet this is a person they claim had worked for them previously. In the case of ***PETER OCHIENG OKUMU VS. REPUBLIC, CRIMINAL APPEAL NO. 185 OF 1997 (UNREPORTED),*** the Court of Appeal stated:-

*“…….**Failure to give names of the assailants to the police in the first instances causes uneasiness in believing a witnesses’ evidence…….”***

If indeed the two witnesses were sure about the appellant’s participation in the crime, what would have been easier than to give to the police the name of the appellant in their first report.

Further in the case of ***TOROKE VS. REPUBLIC CRIMINAL APPEAL NO. 204 OF 1987,*** the Court of Appeal warned:-

*“……**It is possible for a witnesses to believe quite genuinely that he had been attacked by someone he knows yet be mistaken, so the possibility of error is still there whether it be a case of recognition or identification ……”***

This possibility loams large in the circumstances of this case. We also doubt that the Appellant would attack and rob persons whom he knew would recognize him and take no steps to disguise himself and or take such steps as would ensure that he is not identified.

We would in the circumstances decline to make an order for retrial. Instead we order that the Appellant be released from prison forthwith unless otherwise held for some lawful cause.

Dated at Nairobi this 1st day of February 2007.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE

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

Appellant

Miss Gateru for State

Erick/Tabitha Court clerks

……..

LESIIT

JUDGE

…….

MAKHANDIA

JUDGE