REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 349 of 2004

(CORAM: LESIIT, MAKHANDIA, JJ.)

GEORGE KAMAU GACHUHI…..…..……..……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From Original Conviction and Sentence in Criminal Case Number 2434 of 2002 of the Senior Principal Magistrate's Court at Kiambu by G. M. Njuguna – S.R.M. dated 19th July 2004)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 350 OF 2004

CHACHA MACHENES OTAILE…….APPELLANT

VERSUS

REPUBLIC……..……...…..…….RESPONDENT

(From Original Conviction and Sentence in Criminal Case Number 2434 of 2002 of the Senior Principal Magistrate's Court at Kiambu by G. M. Njuguna – S.R.M. dated 19th July 2004)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 352 OF 2004

PETER KINYUA NJERU……..……..……APPELLANT

VERSUS

REPUBLIC……...……RESPONDENT

(From Original Conviction and Sentence in Criminal Case Number 2434 of 2002 of the Senior Principal Magistrate's Court at Kiambu by G. M. Njuguna – S.R.M. dated 19th July 2004)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 353 OF 2004

ANTHONY KARIUKI……...…….....…….APPELLANT

VERSUS

REPUBLIC…….…….……...…..RESPONDENT

(From Original Conviction and Sentence in Criminal Case Number 2434 of 2002 of the

Senior Principal Magistrate's Court at Kiambu by G. M. Njuguna – S.R.M. dated 19th July 2004)

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 356 OF 2004

DAVID KARANJA……..……..…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

(From Original Conviction and Sentence in Criminal Case Number 2434 of 2002 of the

Senior Principal Magistrate's Court at Kiambu by G. M. Njuguna – S.R.M. dated 19th July 2004)

J U D G M E N T

George Kamau Gachuhi, 1st Appellant, ***Chacha Machenes Otaire***, 2nd Appellant and **Peter Kinyua Njeru, 3rd** Appellant, **Anthony Kariuki,** 4th Appellant and ***David Karanja***, 5th Appellant were 4th, 1st, 3rd, 2nd and 6th accused persons respectively during the trial in the subordinate court. The trio were jointly charged before the Senior Resident Magistrate's Court, Kiambu with three counts of robbery with violence contrary to **Section 296 (2)** of the Penal Code. They were duly tried and convicted. Upon conviction they were each sentenced to death as by law provided. They now each challenge their conviction and sentence in their respective appeals.

When the five respective appeals came up for hearing, before us, we directed that the same be consolidated for ease of hearing and as they arose from the same trial in the subordinate court.

Miss Nyamosi, learned State Counsel conceded to the appeals on the technical ground that the Appellants' rights may have been violated by the failure by the trial court to indicate in the record the language of the court as well the one used by the witnesses as they testified. These omissions were fatal to the prosecution case. In line with the court of appeal decision in **SWAHIBU SIMBAUNI SIMIYU AND ANOTHER V REPUBLIC, C.A. 243 OF 2005 (KISUMU) [UNREPORTED],** counsel invited us to annul the proceedings. **Mr. Orieyo**, learned counsel for the Appellants did not oppose the request.

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 in his record 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 evidence to the Appellants. This was a clear breach of the provisions of ***Section 77 (2) (b) and (f)*** of the constitution as well as Section 198 (1) of the Criminal Procedure Code. In the case of ***Swabibu Simbauni Simiyu (Supra),*** the court of appeal faced with a similar scenario acquitted itself 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 Mutai rightly pointed out to us, the Appellants 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 sworn 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 provision of the Kenya Constitution or the Criminal Procedure Code. On that basis alone, the appeals must be allowed……"

The ratio *decidendi*, in this case appear to be that where the trial court fails to indicate in its record whether an accused person understood the language used in the proceedings, the trial is a nullity as such omission contravened ***Section 77 (2) (b) and (f)*** of the Constitution as well as ***Section 198 (1)*** of the Criminal Procedure Code. In the case of **KIYATO V REPUBLIC [1982-1988] K A R 418, the same court held: -**

"……..It is fundamental right, under the Constitution of Kenya

on 77 (2) that an accused person is entitled without payment, to the services of an interpreter who can translate the evidence to him and 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……..."

"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."

"……..There had been no compliance with the Constitution of Kenya Section 77 (2) and the Criminal Procedure Code (Cap 25) Section 198 (1) in this case……"

On the very same issue, we wish to revert to the case of ABDALLA VS REPUBLIC [1989] K L R 456 where the court of appeal again 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 v Republic, criminal appeal number 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. The record lends credence to the Appellant's complaint 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 rights which is fatal to the proceedings……"

We find on the basis of the record before us that there was contravention of the Appellants' both

Constitutional as well as Statutory Right which have rendered the entire proceedings to be a nullity. Accordingly, we would set aside both the convictions and sentences imposed on the Appellants.

We wish now to turn on the issue of retrial. **Miss Nyamosi**, sought a retrial on the basis that the evidence on record was strong against the Appellants and if the same was re-tendered, a conviction may result. The Appellants were positively identified by P.W.1, P.W.2 and P.W.5. Counsel further submitted that it would be in the interest of justice for a retrial to be ordered and finally that the evidence on record was overwhelming and a conviction is likely to result in the event of a retrial.

Mr. Orieyo in response opposed the request for a retrial. He submitted that the Appellants had been incarcerated since October, 2002 and if a retrial is ordered the Appellants would be prejudiced. Counsel further submitted that there was the issue of non-availability of witnesses and the danger of memory lapse due to passage of time which had not been addressed by the learned State Counsel. Regarding the evidence, Counsel submitted that the evidence on record was weak. There was no evidence to show that there was strong electricity light as the trial court found. Counsel submitted that therefore the evidence of identification was weak and inadequate. Counsel further submitted that ordering a retrial in the circumstances would give the prosecution opportunity to fill gaps in their case. Further counsel faulted the evidence of identification parades as being invalid. In support of all these submissions counsel relied on the following authorities which we have carefully read and considered: -

(a) Salim Issah v Republic C.A. Number 102 of 2004 [unreported].

(b) Benard Omollo Ajuoga v Republic C. A. Number 223 OF 2003 [unreported].

In the case of ***Benard Lolimo Ekimat v Republic, C. A. Number 151 of 2004, (Eldoret) [unreported],*** the court of appeal quoted with approval, the case of ***Ahmed Sumar v Republic [1964] E. A. 481***, as regards what goes into consideration before an order for retrial is made. The court stated:-

"...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…….we are also referred to the Judgment of Pascal Clement Braganza v Republic [1957] E. A. 152. In this judgment the court accepted the principle that a retrial should not be ordered unless the 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……."

From the record the Appellants have been confined either in remand or prison custody for a total of close to 5 years and it might, as correctly pointed out by **Mr. Orieyo**, be difficult to trace the witnesses. The learned State Counsel did not in her submissions touch on this question of availability of witnesses. We think that the length of time the Appellants have been in confinement militates against a retrial.

In case of **PASCAL OUMA OGOLA V REPUBLIC, C. A. 114 OF 2006** ***[unreported]*** the court of appeal stated: -

"……..***We have considered whether or not we should order a retrial. The alleged offences were committed on 9th February, 2000 and the Appellant has already been in custody for 5 years. The main critical issues amongst others at the hearing of the first appeal to the superior court were as to identification and recognition in the circumstances in which both the State Counsel and the court found out to be not favourable for identification in respect of the other Appellants who were set at liberty. It may well prove impossible to trace the witnesses and those that are traced may not have accurate memory of the details of the events. We agree with Mr. Masau that this is not a suitable case in which to order a retrial……"***

These case is on all fours with the circumstances obtaining in this case.

We would observe that justice ought to be done not only to the Appellants but also to the victims of the robbery. However such justice must be even handed and it must be ensured that all consumers not only receive it but also see it being done. We think that to ask somebody who has been in custody for 5 years to undergo a retrial in the circumstances would be wrecking injustice on the said person. Yes there may be strong evidence on record that would return a conviction if re-tendered at the retrial, however considering that a retrial may not take a day or two to conclude and it is possible that it may take years, an order for a retrial in the circumstances may very well infringe on the Appellants' right to have their case heard fairly and determined within a reasonable time.

It is for the foregoing reasons that we decline to order a retrial and instead order that the Appellants be released from prison forthwith unless otherwise lawfully held.

Dated at Nairobi this 8th day of March 2007.

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J. W. LESIIT

JUDGE

…….

M. S. A. MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellants – in person present

Miss Nyamosi for the Respondent

CC: Tabitha/Erick

……..

J. W. LESIIT

JUDGE

…….…….

M. S. A. MAKHANDIA

JUDGE