



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

**Criminal Appeal 334 of 2004**

**(From original conviction(s) and Sentence(s) in Criminal Case No. 54 of 2004 of the Chief Magistrate's Court at Kiambu (G. M. Njuguna– SRM))**

**PETER NGANGA KIHARA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**PETER NGANGA KIHARA** was convicted for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296 (2)** of the **Penal Code** and sentenced to death in the manner prescribed in the law. He was aggrieved by the conviction and therefore lodged his appeal to this court.

On 6<sup>th</sup> February 2007 when this appeal came up for hearing, the State through its Counsel, **Miss Nyamosi**, conceded to the appeal on a technicality. Counsel submitted that the learned trial magistrate failed to indicate the language used by the witnesses during the trial and therefore contravened **Section 77** of the **Constitution** denying the Appellant his **Constitutional rights**. She relied on the Court of Appeal decision of **SWAHIBU SIMBANNI SIMIYU & ANOR vs. REPUBLIC CA No. 243 of 2005**.

We have perused the record of the proceedings and have found that indeed the learned trial magistrate did not anywhere indicate the language used by the court or by the witnesses during the trial. The proceedings were defective and a mistrial. Accordingly, in light of the cited Court of Appeal case of **SIMIYU**, (Supra) we set aside the conviction and sentence.

The next issue to determine is whether or not to order a retrial. We have perused the record of the proceedings and have evaluated the evidence adduced before the trial court. **Miss Nyamosi** urged us to order a retrial asserting that the evidence against the Appellant was that of recognition by PW3 and would result in a conviction if a retrial were ordered. The Appellant on the other hand opposed a retrial. He cited the Court of Appeal case of **HENRY KIMATHI vs. REPUBLIC CA No. 24 of 2002 (Nyeri, unreported)** to effect that the evidence of recognition should be supported by a first report in which the witness claiming to have recognized the accused indicated that he could recognize his assailants. The Appellant urged us to look at the OB report of the incident by the Complainant to see that nowhere had he claimed to have known his assailants.

We wish first to correct the submission by the learned State Counsel. Learned Counsel had submitted that the evidence of PW3 would result in a conviction in this case. PW3 was a witness in support of count 2 for which the Appellant was acquitted under **Section 215** of the **Criminal Procedure Code**. That evidence cannot therefore be considered as it has no relevance to the charge under consideration.

The Appellant was convicted for robbing PW1 on 25<sup>th</sup> November 2003 during morning hours. The only evidence against the Appellant in support of count 1 was that of the Complainant himself and the arresting officer. The Complainant's evidence clearly indicates that as he delivered milk to an old lady he passed the Appellant, and three other people two of whom he knew by name as Wakarira and Njoroge. The Complainant passed by a shop and bought cigarettes on his way back. The Complainant stated that Njoroge who was armed with a knife held him by the neck. Wakarira also had a knife. The Complainant stated that the two robbed him of Kshs.5,800/-. He reported the incident to the Police the same day.

As the Appellant urged us, we have looked at the copy of the OB for the 25<sup>th</sup> November 2003 which the Deputy Registrar of this Division received from **PC Murugu** of Githunguri Police station. The Complainant's report is in OB No. 39 of that day. It was made at 2.37 p.m. The entry is short and indicates as follows: -

***“Report in: Now to the station is one Aron Ngugi Wainaina now reported that he was robbed off by one man by the name Wakarire of this town, robbed him 5600/- today at around 1.30 p.m., now seeks police help.”***

The Complainant's first report is inconsistent with his evidence in court on all material particulars. The inconsistency involves first the number of people who robbed him and about the money stolen from him. The Complainant reported that the robber was one whose name he gave and who also robbed him of Kshs.5,600/-. Issue is whether the first report is of any importance and should be considered against the evidence adduced at the trial.

The Appellant cited **KIMATHI vs. REPUBLIC, (Supra)** which we have considered. In the cited case, the Court of Appeal found that since the Complainant's report to the Police was that he was attacked by unknown persons his subsequent evidence that he had recognized the Appellant and had given his name to the Appellant during the first report was a lie. It was the Court of Appeal's view that the inconsistency ought to have been analyzed together with the evidence adduced in court. Being guided by the authority, we have analyzed the evidence adduced in court, including the Appellant's denial that he was involved in the offence. We find that the Complainant's evidence did not implicate the Appellant with the offence. The Complainant clearly stated that he passed the Appellant and 5 others on his way to an old lady and the shops. On his way back, the Complainant said it was one Njoroge and one Wakarira who robbed him. The Complainant never alleged that the Appellant was present at the scene nor did he say he participated in the robbery. That evidence was in tandem with the Complainant's first report to the police implicating Wakarira. In the circumstances, we fail to understand on what basis a conviction was entered against the Appellant in respect of the 1<sup>st</sup> Count.

Based on this finding, we are fully convinced that an order for a retrial is not called for in this case. It is not in the interest of justice to order one. Most important, it will only serve to cause the Appellant further suffering and prejudice. Accordingly, we decline to order a retrial and order instead that the Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 8<sup>th</sup> of March 2007.

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Miss Nyamosi for the Respondent

CC: Tabitha/Eric

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**LESIIT, J.**

**JUDGE**

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**MAKHANDIA**

**JUDGE**