REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 38 of 2005

JACKSON MUIGAI MUINGAI………………………….APPELLANT

VERSUS

REPUBLIC……………………….……..…………….RESPONDENT

(From original conviction and sentence in Criminal Case No.7105 of 2003 of the Chief Magistrate's Court at Kibera –Ms Mwangi SPM)

JUDGMENT

JACKSON MUIGAI MUNGAI was charged before the subordinate court with two counts of robbery with violence contrary to section 296(2) of the Penal Code. After a full trial he was convicted on both counts and sentenced to suffer death as per the provisions of the law. Being dissatisfied with the decision of the learned trial magistrate, he has appealed against both the conviction and sentence.

Learned State Counsel, Mrs. Obuo, conceded to the appeal on technical grounds. She submitted that the language used in the court and by the accused person in the proceedings was not indicated, contrary to section 77 of the Constitution. That was a fatal error, and the conviction could not be sustained. Learned State Counsel, however, asked us to order a retrial. She submitted that the appellant was positively identified by PW2. She also submitted that the appellant had been in custody for only four (4) years. The offences were serious and the appellant would not suffer any prejudice if a retrial was ordered. It was also her contention that witnesses would be readily available.

In a short reply, the appellant stated that he opposed a retrial.

We have perused the record of proceedings before the learned trial magistrate. On 2.10.2003 when the appellant appeared in court and pleaded to the charges, the language of the court was recorded as "**English/Swahili**". The appellant pleaded not guilty to the two counts. However, on all subsequent dates when the matter came up in court for hearing, the language used in court and by the witnesses was not indicated.

The failure of the learned trial magistrate to indicate the language of the court and the language used by witnesses was a contravention of the provisions of Section 77(2)(b) and (f) of the Constitution, as well as section 198 of the Criminal Procedure Code (Cap. 75).

In **SWAHIBU SIMBAUNI SIMIYU & ANOTHER –vs – REPUBLIC – Criminal Appeal No. 245 of 2005(Ksm)**, the Court of Appeal stated –

"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 in 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".

We set aside the conviction and the sentence.

Learned State Counsel has asked us to order a retrial. The principles governing when or when not to order a retrial were considered in the recent case of **BENARD LOLIMO EKIMAT – vs – REPUBLIC Criminal Appeal No. 151 of 2004(Eldoret**), in which the Court of Appeal cited with approval the case of **AHMED SUMAR – vs – REPUBLIC [1964] EA 481**, in which its predecessor the Court of Appeal for Eastern Africa stated at page 483 –

"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 – VS – REPUBLIC [1957] EA 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 the 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".

We have considered the evidence on record carefully. The robberies were committed at Runda in Nairobi at night. The evidence which led to the arrest of the appellant was that of PW3 **MERCY NJOKI MUNGAI**, who was the complainant in the second count. Her evidence was that she recognized the appellant's voice during the robbery when the appellant called PW1. The evidence of the other witnesses at the scene, PW1 and PW4, was that the robbers called out PW1, who was the complainant in the first count, to open the door. PW1, who was a step brother of the appellant, did not recognize the voice. In our view, it is incredible that PW3 could have recognized the voice of the appellant, while PW1 a step brother of the appellant, who was the person called out by name, was not able to recognise the voice.

Considering the evidence on record as a whole, we are of the view that if the same evidence was tendered afresh, a conviction is not likely to result. We consider that the interests of justice will not be served if we order a retrial, and in fact ordering a retrial is likely to cause an injustice to the appellant. We therefore decline to order a retrial. Instead, we order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated at Nairobi this 17th day of April, 2007.

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LESIIT

JUDGE

………………….

DULU

JUDGE

Read, signed and Delivered in the presence of –

Appellant

Mrs. Obuo for state

Tabitha/Eric – Court Clerk

…………………**.**

LESIIT

JUDGE

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DULU

JUDGE