REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 297 of 2004

HARUN KINYUA NYAMU……..……..APPELLANT

Versus

REPUBLIC……...……..RESPONDENT

(Being appeal against conviction and sentence by J. N. Onyiego, S.R.M., in the Senior

Resident Magistrate's Criminal Case No. 1989 of 2003 at Kerugoya)

JUDGMENT

The Appellant during the lower court's trial was charged together with a Co-accused with three counts. The first and second counts were of robbery with violence contrary to *Section 296(2)* of the Penal Code. The third count was rape contrary to *Section 140* of the Penal Code. On conclusion of the prosecution's case the court acquitted the Co-accused of all the counts under *Section 210* of the Criminal Procedure Code. The appellant was however, put on his defence and at the conclusion thereof was found guilty, convicted and sentenced in respect of the first count of robbery with violence and also count third count of rape. In respect of count 1 he was sentenced to the mandatory death sentence whereas on second count he was sentenced to ten(10) years imprisonment.

In passing, we must depricate the persistent failure by the subordinate courts to heed this court's and indeed Court of Appeal directives on sentencing where the offences charged carry both capital and imprisonment. We can only reiterate what the Court of Appeal has stated before in many other decisions, among them: ABDUL DEBANO BOYE & ANOTHER -V- R., CR.APP.NO.47 of 2001 (Ur) and MUIRURI -V- R (1980) KLR 70. In the Boyce case (Supra) in particular the Court of Appeal stated as follows:-

"***We have repeatedly said that where an accused person is convicted on more than one capital charge as was the case here, the sensible thing to do is to sentence him to death on only one of the counts and leave the others in abeyance, including any sentence of imprisonment. The reason for this ought to be obvious to anyone who was minded to apply common sense to the issues at hand. In case of death, if the sentence is to be carried out, a convict cannot be hanged twice or thrice over; he can only be hanged once and hence the necessity for leaving sentence on the other counts in abeyance. And once a person has been sentenced to die, there can be no sense in imposing on him a prison term. The case of the 1st appellant provides a good illustration of this. If the appeal is heard and finalized before the sentence of seven years imprisonment is served is he required to serve that sentence and complete it first before the sentences of death is carried out? We can find no sense at all in such a proposition and the long practice which we are aware of is that once a sentence of death is imposed once, the other counts are left in abeyance so that if there was a successful appeal on the count on which the death penalty has been imposed, the court dealing with the appeal would consider all the counts and if necessary, impose the appropriate sentence on the count on which the appeal is not allowed. We hope***

that the sentencing courts will take heed of these simple requirements and act appropriately."

Be that as it may the Appellant was aggrieved by the decision of the trial court and so mounted this appeal.

The background of this matter is that on the night of 23rd of August 2003 P.W.1 and P.W.2 were victims of robbery at their home which was carried out by many people. P.W.1 was able to identify some of the robbers during the robbery and although he was able to pick out the Appellant during the identification parade, in giving evidence in court he however stated that he was not able to identify anyone in court. P.W.2 was unable to identify anyone during the identification parade but later on the 29th August 2003 at 2.00 p.m. whilst driving in Kutus Kerugoya he said that he saw someone whom he felt was one of the persons who robbed him. In his evidence he stated "***he appeared like him".*** He then stated in evidence in chief that he was sure that the person who was in court was the person he saw as he drove who subsequently was arrested and is the appellant herein. In respect of the third count P.W.3 was unable to identify the persons who raped her. She said that she would not be able to identify anybody because she was confused. In considering the appeal by the appellant we are mandated to evaluate the evidence of the trial court. We have carefully examined the proceedings as recorded by the trial magistrate. We find that in respect of all the witnesses that gave the evidence the court invariably recorded that the testimony of the various witnesses was either given in English or Kiswahili . The court did not record anywhere that the appellant understood either English or Kiswahili. We find that is in violation of the Appellant's constitutional rights as enshrined in *Section 77(2)(b)* and *(f)* of the Constitution. That section provides as follows:

"***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 details, of 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……..."

It also ought to be noted that *Section 198* of the Criminal Procedure code provides as follows:

"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) If he appears by an advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.

In the case of **SWAHIBU SIMBAUNI SIMIYU & ANOTHER, COURT OF APPEAL NO. 243 OF 2005 t**he Court of Appeal had the following to say in respect of the language of the court:

"***It is abundantly clear from these provisions set out from the Constitution and the Criminal Procedure Code that in a criminal trial the language of the trial must be understood by the accused person and that right extends to an advocate representing an accused person if the advocate does not understand the language of the trial; even if the accused himself understands the language of the trial but his advocate does not understand the language, the language must be interpreted to the advocate into English".***

The trial court having failed to indicate the language which is understood by the Appellant or at least indicating that the testimony of the various witnesses was interpreted renders the trial that took place before the lower court a nullity. We note, however, that this is a matter that came to our attention as we sat down to ponder over this appeal. Accordingly neither counsel for the appellant nor the State Counsel was given opportunity to ventilate the issue before us. However, as the issue goes to the jurisdiction we are entitled to consider the same and make appropriate orders. We do therefore accordingly find that the trial was a nullity and hereby quash the conviction against the Appellant and set aside the sentence

imposed on him.

Having so found should we then order that the Appellant be retried. We find that such an order would be very prejudicial to the Appellant. Why do we say so? Because the evidence against the Appellant was purely one of identification. That identification as stated herein before was very poor. The only person who identified the Appellant was P.W.2 who saw him as he drove in Kutus town Kerugoya. It is however, important to note that in his evidence in chief he stated that he saw the Appellant driving a motor bike and he felt that he was one of the people who robbed him. He said that he identified him from his structure and physical appearance. He further stated that he saw his neck was similar to the one of the person who robbed him. It is important to note that this witness never gave any descriptions of his attackers to the police in his first report. Accordingly, we are of the opinion that that evidence of this single identifying witness was not sufficient to pass the test of the many cases that have been decided on this issue. We find that it was necessary for the magistrate to particularly test with the greatest care the evidence of P.W.2. Further P.W.2 failed to confirm that the person before court, one being the Appellant were the persons who committed robbery against him.

In view of the shortcomings that we find in that evidence, we are of the opinion that if retrial is ordered, it will afford the prosecution an opportunity to fill in the gaps in their evidence on identification as against the Appellant. Further the trial court dismissed the alibi evidence presented by the Appellant without giving sufficient reason. Alibi evidence was given by a watchman who mans the gate to the compound where the Appellant and his wife live. The watchman gave clear evidence of having seen the Appellant enter through the gate in the early evening of the day the robbery took place. He stated that the Appellant did not get out of the compound until 6.20 a.m. the following day when he was going to work. Similarly the Appellant's wife gave evidence that the Appellant on arriving at their home early in the evening, had dinner and thereafter retired to their bed. That evidence was not tested by the prosecution though the trial court rejected it. In the case of **SSENTALE -V- UGANDA (1968)E.A. 365** the High Court of Uganda held that an accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer. In such a case the court found that an accused person does not bare any burden in that regard. We are therefore of the view that if a retrial was ordered the prosecution may very well take the opportunity to disprove the alibi of the Appellant. We are therefore of the considered view that the Appellant should not be retried and accordingly we do hereby order that the Appellant unless otherwise legally held be set free.

Dated and delivered at Nyeri this 11th day of May 2007.

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE