REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 11 of 2005

EVANS KAMUNYA MWANGI……..……APPELLANT

VERSUS

REPUBLIC ……...……..RESPONDENT

(From original conviction and sentence in Criminal Case No.4 of 2005 of the Chief Magistrate's

Court at Makadara – Mrs. G. Nzioka PM)

JUDGMENT

EVANS KAMUNYA MWANGI alias GACHERU was charged before the subordinate court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was recorded as having pleaded guilty to the charge. Consequently, he was convicted and sentenced to suffer death as prescribed for by law. He has appealed to this court challenging both conviction and sentence on the ground that the plea was not unequivocal.

At the hearing of the appeal Mr. Oyugi for the appellant submitted that the language used in court and the language used by the appellant during the proceedings was not indicated by the trial magistrate. He contended that the failure of the trial magistrate to indicate the language used was a contravention of **Section 77 of the Constitution**. He asked us to quash the conviction and set aside the sentence and sought to rely on the case of **JACKSON LESKEI –vs- REPUBLIC Criminal Appeal No. 313 of 2005 (Nairobi),** and the case of **SWAHIBU SIMBAUNI SIMIYU & ANOTHER –vs- REPUBLIC Criminal Appeal No. 243 of 2005 (Kisumu).** He also argued that the facts as stated by the prosecutor did not disclose the offence charged.

Learned State Counsel, Mrs. Gakobo, conceded to the appeal on the ground that the language used in court was not indicated. Therefore, it was not possible to know whether the appellant understood the charge. Learned State Counsel, however, asked us to order a retrial. It was her contention that the appellant has been in custody for merely two years. It was also her contention that witnesses will be available to testify if a retrial is ordered. She also contended that it was in the interests of justice to order a retrial.

In a short reply, Mr. Oyugi opposed a retrial. He contended that the appellant had suffered in custody for a sentence which was erroneous, and that a retrial would not be in the interests of justice.

We have considered the submissions of both counsel. We have also perused the record of proceedings. Indeed, the learned trial magistrate did not indicate the language used in court and the language used by the appellant in the proceedings. That was a clear contravention of the provisions of section 77(1) and (2) of the Constitution, the pertinent part of which provides –

"**77(1) If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**

(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 detail, of the nature of the offence with which he is charged.

(c) ……..…..

(e) …..……..

(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"

From the above provisions of the law, it was imperative that the language used in court and the language used by the appellant in the proceedings be indicated by the trial magistrate. The failure of the learned magistrate to indicate the language used in court means that we are not in a position to know what language was used and whether the appellant understood the language used. As was held by the Court of Appeal in the case of **SWAHIBU SIMBAUNI SIMIYU & ANOTHER –vs- REPUBLIC – Criminal Appeal No. 243 of 2005 (KSM),** the proceedings before the trial magistrate, in which the language used was not indicated were rendered a nullity. Consequently, the conviction cannot stand. Learned State Counsel was right in conceding to the appeal on that ground. We set aside the conviction and the sentence.

Learned State Counsel has asked us to order a retrial. Learned counsel for the appellant has on the other hand opposed a retrial. In the case of **AHMED SUMAR –vs- REPUBLIC (1964) EA 481, at page 483**, the Court of Appeal for East Africa observed –

"……..**a retrial should not be ordered unless court was on 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 facts the prosecution case. The charge preferred against the appellant is a serious charge of robbery with violence contrary to section 296(2) of the Penal Code, carrying a mandatory death sentence. The time of the alleged robbery was at night. There is no indication that any of the stolen items was recovered. The summary of facts that relate to the identify and arrest of the appellant is as follows –

"**During the robbery the complainant identified the accused as a former employee and reported the matter to the police. Later the accused was overheard complaining that he received only Ksh.500/=. The complainant reported the matter to the police again. The accused was arrested and charged".**

As the appellant was convicted on his own plea, no evidence by witnesses was tendered. Learned State Counsel has informed us that witnesses are available. The appellant has been in custody for only two years. We are of the humble view that the facts and circumstances of this case justify the ordering of a retrial. A retrial will not cause any prejudice to the appellant.

Consequently, and for the above reasons, we allow the appeal, quash the conviction and set aside the sentence imposed by the learned trial magistrate. We however order that there be a retrial. Towards this

end the appellant shall appear before the Chief Magistrate's Court Makadara on 14th May 2007 for retrial on the same charge before any magistrate of competent jurisdiction other than Mrs. G. Njoka PM who presided over the initial trial. Until then the appellant shall remain in prison custody.

Dated at Nairobi this 8th day of May 2007.

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LESI1IT

JUDGE

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DULU

JUDGE

Read and delivered in the presence of –

Appellant

Mr. Oyugi for appellant - absent

Mrs. Gakobo for state - absent

Tabitha/Eric - Court clerk

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LESIIT

JUDGE

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DULU

JUDGE