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

Criminal Appeal 214 of 2004

GEORGE WAKABA WANJIRU …….……. APPELLANT

VERSUS

REPUBLIC ……..…….....RESPONDENT

(Coram : LESIIT, DULU JJ)

***(From Original Conviction and Sentence in Criminal Case No. 3150 of 2004 of the Chief Magistrate's Court at Thika – Mr. S.M Mokua SRM*)**

JUDGMENT

GEORGE WAKABA WANJIRU, the appellant and four others were arraigned jointly before the Chief Magistrate's Court at Thika with two offences of robbery with violence. The appellant was recorded as having pleaded guilty to the 1st count of robbery with violence contrary to Section 296(2) of the Penal Code, whose particulars were that –

"**On the 22nd day of April 2004, at Ndarugo village in Thika District within Central Province, jointly with another not before the court while armed with offensive weapons namely axes, pangas and rungus robbed MUNGAI GOKO RAPHAEL of Kshs.7,000/=, one coat, one jacket, one car radio and one car jack, six music compacts, one Somali sword, one jug of engine oil and one mobile cell phone make Nokia 3310 all valued at Kshs.35,600/= and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said MUNGAI GOKO RAPHAEL".**

When the case came for plea on 26th April 2004, the appellant, who was the 2nd accused before the learned trial magistrate, admitted the charge. A plea of guilty was entered by the learned trial magistrate and he was convicted and sentenced to death on the 1st count.

Evidence was thereafter tendered in court to prove the 1st count with respect to the other accused persons, and to prove the 2nd count with regard to the appellant and the other co-accused. All were, at the conclusion of trial, acquitted of both counts.

The appellant thereafter, filed this appeal against his conviction on the 1st count. His contention was that the plea was not taken in accordance with the legal procedure.

Learned State Counsel, Mrs. Obuo, conceded to the appeal. She submitted that the plea was taken

wrongly in that the appellant was not warned by the trial court of the consequences of pleading guilty to a capital charge. Secondly, the language used in court during the proceedings for taking the plea was not indicated.

We have perused the record of proceedings. The appellant was recorded, on 26.4.2004, to have pleaded "*I admit*" the 1st count. A plea of guilty was recorded. He was then convicted and sentenced by the magistrate, after the prosecutor gave a brief summary of the facts.

The offence was a capital offence, but from the record, the learned trial magistrate did not warn the appellant of the consequences of pleading guilty to the capital offence. It was held by the Court of Appeal in the case of **BOIT – vs – REPUBLIC [2002] 1 KLR 815, at page 818** that –

"**Where the offence is one punishable by death, the court recording the plea of guilty must show in its record that the person pleading guilty understands the nature of his plea. This requirement, as we have seen, was set out way back in 1946, in Kisang's case ante. We think this is an elementary requirement of common sense and fairness".**

In failing to warn the appellant on the consequences of pleading guilty to a capital charge, the learned trial magistrate made a fatal error. The plea therefore cannot be said to be unequivocal. Learned State Counsel was right in conceding to the appeal on this ground.

Secondly, we agree with learned State Counsel that during the proceedings for taking of plea, the language of the court was not indicated by the trial magistrate. This omission contravened the provisions of Section 77(2)(b) of the Constitution, which provides –

"**77(2) Every person who is charged with a criminal offence –**

(b) shall be informed as soon as reasonably practicable, in a language he understands, and in detail, of the nature of the offence with which he is charged".

The omission by the learned trial magistrate to indicate the language used in court, means that we cannot know which language was used, and whether the appellant understood the language used. On this also, we agree with the learned State Counsel that the proceedings during taking plea were irregular and therefore the plea was not validly taken. The proceedings, in which the language used was not indicated, were a nullity and the conviction cannot be sustained on that ground – (see **SWAHIBU SIMBAUNI SIMIYU & ANOTHER – vs – REPUBLIC Criminal Appeal No. 243 of 2005 (KSM)).** For both reasons advanced in this appeal, we set aside both the conviction and sentence.

Learned State Counsel has asked us to order a retrial. It is her contention that the appellant was positively identified and that the witnesses are readily available.

Our perusal of the proceedings shows that there is no evidence of identification that could connect the appellant with commission of the offence. The facts given by the prosecutor were so scanty, that they did not disclose the part played by the appellant in the alleged robbery. The prosecutor merely said –

"**On the material day, the 2nd accused and others confronted the complainant herein and robbed him of the listed goods while armed with axes, pangas and rungus. Police later informed and the 2nd accused arrested and charged**".

These facts do not show what part the appellant played in the alleged robbery nor do they show that the appellant was identified by anybody during the commission of the offence. Further, even during the full hearing of the case, when PW1 the complainant testified, he testified that the robber that he could identify was not in court, while the appellant herein was actually present in court.

As was held by the Court of Appeal in the case of **AHMED SUMAR – vs – REPUBLIC [1964] EA 481**, at page 483 –

"……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 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 facts and circumstances of this case, we are of the view that there is no admissible or potentially admissible evidence that would justify ordering a retrial.

We are of the humble view that a retrial, if ordered, is likely to cause an injustice to the appellant, as there is no evidence that could possibly result in a conviction.

Consequently, we decline to order a retrial. Instead we order that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated at Nairobi this 3rd day of May 2007.

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LESIIT

JUDGE

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DULU

JUDGE

Read and Delivered in the presence of –

Appellant

Mrs. Obuo for state

Tabitha/Eric – Court Clerks

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Lesiit

Judge

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Dulu

Judge