



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
(CORAM: OJWANG, J.)

CRIMINAL APPEAL NO.468 OF 2005

BETWEEN

PETER MWANGI WAINAINA.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the judgement of Senior Resident Magistrate Mrs. M. Mburu dated 14th September, 2005 at the Gatundu Law Courts, in Criminal Case No.636 of 2004).

JUDGEMENT

The appellant was tried on a charge of attempted rape contrary to section 141 of the Penal Code; and there was an alternative count, of indecent assault contrary to section 144(ii) of the Penal Code. The particulars of the charge were that on 6th May, 2004 at [Particulars Withheld] Village, Thika District in Central Province, the appellant attempted to have carnal knowledge of **E W K** without her consent. The particulars of the alternative count were that on the aforementioned date and at the place thus specified, the appellant indecently assaulted the same complainant, by touching her private parts, without her knowledge.

PW1, **E W K**, testified that she was lying in her bed at night, on 6th May, 2004 when there was a knock on the door to her house. Lighting up her way with a hurricane lamp, PW1 went to open the door, whereupon an intruder grabbed her by the neck, and a struggle ensued, in the course of which the lamp fell down and got broken. The intruder was the appellant, who continued the struggle in silence, despite questions by the complainant. A neighbour who heard the commotion, accompanied by the complainant's sister, came along with a lamp. By this time, PW1 testified, the appellant had attempted to remove her underpant, and had in the process torn the same, and also torn her blouse and jacket. By this time, PW1 further testified, the appellant had scratched her face, which was bleeding. She testified that the accused was a person well known to her.

PW1's sister and her neighbour who came to her rescue, arrested the appellant and took him to Kimunyu Chief's Camp, where they reported the matter to a Police Officer. The Police Officer directed the appellant to report at the Chief's Camp on the following day – but the appellant failed to do so.

On cross-examination by the appellant, PW1 had testified that the attack on her had taken place at about

8.00 p.m. She had opened the door when there was a knock, because she thought it was her husband who had arrived home. It was PW1's neighbour, **Njeri** and PW1's sister who came to her rescue as the appellant was strangling her; and these two ladies pinned him to the ground, and arrested him. While at the Chief's Camp, the appellant had told **Mr. Kibet**, a Police Officer, that the complainant owed him (the appellant) Kshs.200/=.

PW2, **David Odera** testified that one **Police Constable Kariuki**, since transferred to another station, had handed over to him certain exhibits: a petticoat, a sweater and an underwear, all recovered for the purpose of the trial. PW2 had been informed that the said items belonged to the complainant, who was a victim of an attempted rape at the hands of the appellant. The items were produced as exhibits by PW2.

PW3, **Njeri Njuguna**, testified that she was at her house at 8.00pm, when she heard screams, and realised that the alarm was coming from **W's** house. PW3 had then called PW1's sister to accompany her to PW1's house. When the two pushed open PW1's door, they saw, with the aid of a lamp, the appellant lying on top of PW1. The two ladies found PW1 bleeding in the face. They reported the matter to Kimunyu Police Post.

PW4, **E W** testified that she had been called by her neighbour, **Njeri Njuguna** at 8.00 p.m on 6th May, 2004 when they heard the sounds from PW1's house. PW4 and PW3 pushed open the complainant's door, and there, witnessed the appellant lying on the top of PW1. PW3 and PW4 had lit up the scene with a lamp, and at that time PW4 had recognised the appellant herein as the suspect. PW4 had seen the complainant, at the time, bleeding in the face; and she was one of those who took a report to the Kimunyu Police post. PW4 testified that at the scene, she witnessed the complainant's clothes torn and blood-stained; and she identified these clothes when shown to her in Court.

The appellant responded by making an unsworn statement. He said he was a farmer from Kimunyu, and he had gone to Kimunyu Police Station on the day preceding the material night, to report that the complainant owed him some money; there had been no struggle between him and PW1; he had been told to return to the Police Station the following day; the appellant never returned as directed; he was arrested more than a week later (on 14th May, 2004); he was arrested by eight Police officers at his home, on the ground that he was suspected of wearing Police uniforms; but a different charge was later laid against him.

The appellant's account, which clearly leaves gaps in terms of consistency in its mode of rendering, of course, could not be tested – as the appellant had exercised his procedural right to make an unsworn statement and so could not be cross-examined.

On the evidence, the learned Magistrate's finding was as follows:

“On assessing the evidence on record, I have no doubt that the accused attempted to rape the complainant. The complainant's evidence was well corroborated by PW3 and PW4...who both said they found the accused who was well known to them, lying on top of the complainant on the material date. Torn underpant and bloody blouse were also produced in Court as exhibits [and these] were some of the clothes...the complainant was wearing at the time ...the offence was committed. The evidence of PW3 and PW4 [was] clear and consistent, and I have no reason whatsoever to doubt it. I have also considered the accused's defence [and I find the same to have] no merit and is only meant to mislead this Court.”

The learned Magistrate convicted the appellant as charged, under s.215 of the Criminal Procedure Code (Cap.75), and sentenced him to 15 years' imprisonment.

In his petition of appeal the applicant contends that he had not been properly identified as the suspect, because of difficult visual circumstances prevailing on the material night. He contended that the learned Magistrate had failed to take into account the fact that the prosecution was actuated by ulterior motives. He contended that the trial Court failed to give due consideration to his defence statement. He contended that the prosecution failed to prove their case beyond reasonable doubt.

The appellant also tendered written submissions, in which he dwelt on some of the points in the petition of appeal.

Among other things, the appellant contended that the trial had been in breach of his constitutional rights, because the trial Court did not record the language of the Court, and did not record whether or not there had been interpretation as appropriate to the convenience of the appellant.

Learned State Counsel **Ms. Gakobo** conceded that on the date of plea-taking, the Court had not recorded the exact language used – but recorded that the charge had been explained to the appellant in a language that he understood.

What was, however, recorded was the language in which each witness testified. **Ms. Gakobo** noted that the appellant had fully participated in all proceedings, and had asked relevant questions in cross-examination. For these reasons, learned State Counsel urged that, the appellant's full participation showed he well understood the proceedings: and consequently, it was submitted, the appellant's complaint about language as used and as recorded in the trial Court, lacked merit.

However, **Ms. Gakobo** expressed willingness to concede to the appeal, on the authority of a decision of the Court of Appeal, **Swahibu Simbauni Simiyu & Another v. Republic**, Criminal Appeal No. 243 of 2005 which the appellant cited in his written submissions. In that case, it had been held that trial proceedings would be vitiated if the language of the Court is not recorded.

Learned State Counsel then urged that this Court, in its discretion, should order a retrial, as the evidence on record was cogent enough to carry the probability of a conviction, in a fresh trial. As an additional consideration, in the plea for a retrial, **Ms. Gakobo** submitted that the offence charged was a very serious one; and so it would be in the interests of justice, on the sides of both the appellant and the complainant, that the matter be retried. Still a further factor of relevance was this: out of the imposed term of 15 years' imprisonment the appellant had barely served one year-and-a-half, and so a fresh trial was not likely to cause him any prejudice. Besides, **Ms. Gakobo** affirmed, all the witnesses are likely to be available.

It is quite clear to me that, on the merits, the learned trial Magistrate fell into no error in the assessment of the evidence, and the conviction entered was well founded.

Therefore, on the merits, this Court could not very well entertain the substantive case brought on appeal.

However, a technical question is raised: that of failure by the trial Magistrate to record the language in which the proceedings was being conducted. I have read the proceedings carefully, and the following details concerning language are recorded:

(i) On 21st May, 2004 the plea was taken before the Resident Magistrate, **D. Morara, Esq.** And the following record pertaining to language appears: "The substance of the charge and every element thereof has been stated by the Court to the accused in the language that he understands who on being asked whether he admits or denies the truth of the charge...replies... 'It is not true'.."

On that occasion the appellant even successfully made an application for release on bond.

The two transactions, the 'not guilty' plea, and the successful prayer for bond, would reveal that there was no hitch at all in the communication; the appellant was accorded his constitutional right to bond after he communicated with the Court; the Court recorded that it had rendered the charge statement to the appellant in a language the appellant understood; and so this Court is entitled to deem that that same language was the medium of successful prayer for bond, before the trial Court; and so, no constitutional right of the appellant was at this stage, contravened; but his constitutional right to bond was, instead, given effect.

(ii) This matter was mentioned several times: before **D.Morara, R.M** on 4th June, 2005; before **D. Morara, R.M.** on 18th June, 2004; before **D. Morara, R.M.** on 2nd July, 2004; before **D. Morara,**

R.M. on 16th July, 2004; before **D. Morara, R.M.** on 30th July, 2004; before **D. Morara, R.M.** on 13th August, 2004; before **D. Morara, R.M.** on 25th August, 2004; before **D. Morara, R.M.** on 8th September, 2004; before **D. Morara, R.M.** on 20th September, 2004; before **D. Morara, R.M.** on 6th October, 2004; before **D. Morara, R.M.** on 15th October, 2004; before **D. Morara, R.M.** on 1st November, 2004; before **D. Morara, R.M.** on 12th November, 2004 – on which occasion the accused was released on a free bond to the value of Kshs.10,000/=; before **D. Morara, R.M.** on 26th November, 2004. During some of the adjournments, the appellant did speak to the Court expressing the fact that he had no objections. It is apparent that all the occasions of mention, as enumerated above, entailed no misunderstanding on the part of the appellant, as far as the language of the Court was concerned.

(iii) Trial began before **D. Morara, R.M.** on 28th January, 2005 when it was clearly recorded that PW1 was sworn in *Kiswahili*. On that date, PW1 was stood down, to await the production of certain exhibits.

(iv) The matter was thereafter adjourned before **Mrs. C. Mburu, SRM** on 2nd March, 2005; 18th March, 2005, 1st April, 2005; 4th April, 2005; 20th May, 2005; 8th June, 2005; 22nd June, 2005; 1st July, 2005.

(v) On 15th July, 2005 **Mrs. C. Mburu, SRM** recommenced the hearing afresh, with PW1 who was sworn in *Kiswahili*.

(vi) On 15th July, 2005 PW1, after she spoke in *Kiswahili*, was cross-examined by the appellant herein.

(vii) On 29th July, 2005 PW2 was sworn in *Kiswahili*, and duly gave her testimony.

(viii) On 29th July, 2005 PW3 was sworn in *Kiswahili*, and duly gave her testimony. She was then cross-examined by the accused.

(ix) On 29th July, 2005 PW4 was sworn in the *Kikuyu* language, and she proceeded to give her testimony. She was then cross-examined by the accused.

(x) On 14th September, 2005 the learned Senior Resident Magistrate, **Mrs. Mburu** gave her judgement which was rendered in writing in *English*.

It is clear that, throughout the proceedings up to the stage of judgement, three different languages were used: *Kiswahili*, *Kikuyu*, and *English*. In those cases in which witnesses spoke in *Kiswahili*, the appellant was *personally* able to cross-examine them, as he also did, where the witness spoke in *Kikuyu*. The appellant had no difficulties communicating with the Court, when he was responding to prayers for an adjournment, and when he was seeking bond.

In substance, therefore, the Court adopted no language which the appellant *did not* understand. The record clearly shows the three languages which were the medium of communication during the trial. Since PW4 when she gave her evidence in the *Kikuyu* language, was fully cross-examined by the appellant, I now hold that the use of that language did not in any way prejudice the appellant. Similarly, the appellant was quite comfortable with the use of *Kiswahili* in Court. Not only was he able to cross-examine the witnesses who spoke in *Kiswahili*, he also confirmed to this Court, during the hearing of this appeal – and it is on record – that he was most comfortable speaking *Kiswahili*.

I hold that the trial Court's judgement which was rendered in *English*, by no means prejudiced the appellant, in view of the fact that he has lodged all papers connected to his appeal, including a set of detailed written submissions, in *English*.

The first appellate Court is required by law to review all the evidence tendered before the trial Court. I have been able to do just that; and the conclusion to be drawn on that basis, is that the appellant had *no* language problem of any sort during the trial; he was in no way prejudiced; and the trial Court record, here and there, has clearly stated the language that was being used in Court.

The technicality of lack of language record, invoked by the appellant, therefore, cannot avail him. I am not in agreement with the appellant nor with learned counsel for the respondent: that the authority (*ratio decidendi*) of ***Swahibu Simbauni Simiyu & Another v. Republic***, Criminal Appeal No. 243 of 2005 does set up a general template regarding mode of recording of trial-Court language, the test of which the instant matter fails. The justice of a case will generally be found ultimately, and most delicately, to be lodged in its special *facts*; and from the facts of this particular case it is to be held, firstly, that the trial Court's language *is* on the record; and secondly, that the appellant fully pertook in the proceedings, through the language-medium adopted, and was nowise prejudiced.

I will, therefore dismiss the appellant's appeal, uphold the conviction, and confirm sentence as meted out by the learned Senior Resident Magistrate. Were I to decide otherwise, then I would certainly have ordered a retrial, in view of the apparent cogency of the evidence in the hands of the prosecution.

Orders accordingly.

DATED and DELIVERED at Nairobi this 13 day of June, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Respondent: Ms. Gakobo

Appellant in person