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

**Criminal Appeal 99 of 2005**

**DAN OTIENO OBARE……..……..APPELLANT**

**VERSUS**

**REPUBLIC……RESPONDENT**

***(From original conviction and sentence in Criminal Case No. 1400 of 2004 of the Principal Magistrate' Court at Garissa – Kingori Ag. PM)***

**JUDGMENT**

DAN OTIENO OBARE the appellant was charged before the subordinate court with robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that –

**On 23rd day of April 2004 at Garissa Municipality in Garissa District within the North eastern province jointly with another not before court while armed with dangerous weapon namely a Somali sword robbed Margaret Anyango of her cell phone make Siemens A 36 and handbag and cash Ksh.210/= all valued at Kshs.6500/= and immediately before or immediately after the time of such robbery used personal violence to the said Margaret Anyango.**

After a full trial, he was convicted of the offence and sentenced to suffer death as provided for by law. Being aggrieved by the decision of the trial magistrate, he has appealed to this court. His grounds of appeal can be summarized as follows –

1. That his identification was not positive.

2. That the evidence of prosecution witnesses was inconsistent and not credible.

3. That the magistrate did not consider his defence as required under section 169 of the Criminal Procedure Code (Cap. 75)

The appellant also filed written submissions.

Ms. Nyamosi, learned State Counsel opposed the appeal.

She submitted that the learned trial magistrate was correct in relying on the evidence of PW1 and PW4.

PW1 in particular described the features and dress of the robber. She was the complainant. She adduced evidence that the robber was armed with a knife. The appellant robbed PW1 of her handbag and ran off. PW4 chased the appellant. He was arrested nearby with the handbag.

Counsel further submitted that there was evidence of light at the scene. The appellant was also arrested 200 meters away with the handbag. The doctrine of recent possession therefore applied.

In reply, the appellant submitted that he was not arrested with anything belonging to the complainant. He submitted that PW4 did not chase and arrest him but found other people chasing him. Those other people were not called to testify in court, nor was the red T-shirt which he was allegedly wearing produced in court.

We have perused the record and the grounds of appeal and written submissions filed by the appellant. We have also considered the submissions made in court.

We observed that throughout the proceedings, the language of the court and the language used by the witnesses, and the accused was not indicated by the trial magistrate. The omission was clearly 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).

Section 77(2)(b) and (f) for the Constitution provides –

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

**(b) shall be informed as soon as reasonably practicable, in and in detail, 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".**

Section 198(1) of the Criminal Procedure Code (Cap. 75), on the other hand, provides –

"**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 in which he understands"**

Though the issue of language used in the subordinate court has not been taken up as ground of appeal, we do not know which language was used in court and whether, indeed, the appellant understood the language used. The failure of the trial magistrate to indicate the language used in court and the language used by witnesses the trial was a fatal omission which rendered the whole trial a nullity – see **SWAHIBU SIMBAUNI SIMIYU AND ANOTHER –vs- REPUBLIC –** Criminal Appeal No. 245 of 2005 C.A. We will allow the appeal on that account, and quash the conviction and set aside the sentence.

We now consider whether or not to order a retrial. The principles upon which a retrial may be ordered by a court were considered in **AHMED SUMMAR –VS- REPUBLIC [1964] EA 481,** at page 483, where the Court of Appeal for East African stated –

"**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"**

The court further observed on the same page –

"**We are also referred to the judgment in 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 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 injustice to an accused person"**

We have considered various aspects of this case including the charges and evidence before the trial magistrate and the period the appellant had been in custody, as well as the likelihood of availability of witnesses.

The appellant was charged with the offence of robbery with violence. He was said to have threatened the complainant with a knife. The offence was committed around 7.30 p.m. in Garissa town. He was arrested about 200 metres away from the scene of the robbery. A knife was recovered near where he was arrested. The handbag, containing the mobile phone and Kshs.210/= stolen from the complainant were also recovered near where the appellant was arrested. They were all produced in court. The appellant was sentenced in February 2005 which is more than two years now. We cannot now be certain now whether witnesses will be available. We are also not sure whether the exhibits, especially the alleged stolen items that is the handbag, the mobile phone and the money will be readily available for use in a retrial. Therefore, we consider that ordering a retrial will not serve the best interests of justice. It is likely to cause injustice to the accused person. We will therefore not order a retrial.

Consequently, we allow the appeal quash the conviction and set aside the sentence imposed by the trial magistrate. We order that the appellant be set at liberty forth with unless otherwise lawfully held.

Dated at Nairobi this 7th day of June 2007.

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**LESIIT**

**JUDGE**

…….

**DULU**

**JUDGE**