REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 102 of 2004

MOHAMMED SALE MURIUKI ……..……. APPELLANT

VERSUS

REPUBLIC ……..…….…… RESPONDENT

(Appeal from original Judgment and Conviction in Criminal Case No. 98

of 2003 of the Senior Magistrate's Court at Nanyuki by P.C. Tororey – S.R.M)

J U D G M E N T

Mohammed Sale Muriuki, the appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He pleaded not guilty to the charge and his trial ensued. At the conclusion thereof, the appellant was convicted. Upon conviction by the then Senior Resident Magistrate at Nanyuki **P.C. Tororey,** the appellant was sentenced to death as is mandatorily prescribed by the law. That conviction and sentence triggered the instant appeal.

When the appeal came before us for hearing, **Ms Ngalyuka,** learned state counsel conceded to the same on the grounds that the learned magistrate allowed the prosecution to produce the P3 form contrary to law and procedure, that the learned magistrate did not indicate in her record the language of the court, the language in which the witnesses testified as well as the language in which the appellant gave his statutory statement. Finally it was also the learned state counsel's view that the learned magistrate shifted the burden of proof to the appellant in her judgment. For all these reasons, the learned state counsel felt that the trial of the appellant before the learned magistrate was therefore a nullity. He invited us to so hold with the consequence that we would allow the appeal, quash the conviction and set aside the sentence of death imposed.

As to whether a retrial should be ordered, the learned state counsel opted not to pursue the same on the grounds that the evidence on record was not sufficient to return a conviction.

The learned state counsel received tremendous support for her position from the appellant. This was as expected. The appellant however maintained that he never stole from the complainant. Rather they only fought with the complainant over a woman.

We have carefully considered the record of the proceedings and the judgment of the learned magistrate and we are in no doubt at all that the concerns raised by the learned state counsel are germane and are indeed reflected in the record. The record does not show as required the language of the court, the language in which the witnesses testified as well as the language in which the appellant gave his statutory statement of defence.

All that the learned magistrate did was simply record "…**.. P.W. sworn and states ….." in respect of every witness called to testify.** From the foregoing it is quite clear that the learned magistrate made no attempts at all to comply with the mandatory provisions of section 77(1) & (2) of the Constitution of Kenya

record is replete with silence as to the language that was being used by the court. Various witnesses testified on behalf of the prosecution; the language in which they did so is not shown. That is the exact position that obtained in the case of the Jackson Leskei v/s Republic, Criminal Appeal No. 313 of 2005 (unreported). Dealing with that issue the court of appeal (Bosire, Waki and Onyango Otieno, JJA.) having set out the provisions of section 77(1) & (2) of the constitution, remarked:

"…… By entrenching in the constitution the right to interpretation in a criminal trial the framers of the constitution appreciated that it is fundamental for an accused person to fully appreciate not only the charge against him but the evidence in support thereof. It is then that it can be justifiably said that an accused person has been accorded a fair hearing by an independent and impartial court. It is the court's duty to ensure that the accused's right to **interpretation is safeguarded and to demonstratively show its protection ……..."**

Commenting on this statement of the law in a later case, the same court **(Omolo, Githinji and Deverell, JJA.)** stated and we quote;

"…….**We do not think we could ever improve on that statement of the law concerning the fair trial provisions under section 77 of the constitution. A court can only demonstratively show that the rights of an accused person under section 77 have been protected if its record shows that that has been the case …."**

See **Antony C. Kibathi v/s Republic, Criminal appeal No. 109 of 2005 (unreported)**. The record of the magistrate in this appeal, as was the position in Leskei's case does not show that the trial court protected appellant's right to fair trial. In view of the foregoing we think that the appellants trial was flawed, and his conviction unsafe. Learned state counsel was therefore right to concede to the appeal on that aspect of the matter.

We also note that on the 13th January 2004, the prosecutor applied to be allowed under section 77 of the Evidence Act to produce the P3 which application was readily granted by the magistrate and the prosecution proceeded to hand in the P3 form. This was rather strange and unorthodox manner of receiving evidence. Evidence can only be adduced through a witness. The prosecutor cannot be a prosecutor as well as a witness at the same time. It was therefore irregular on the part of the magistrate to have allowed the prosecutor to tender evidence by allowing him to hand in the P.3 form. Section 77 (1) of the Evidence Act allows any document purporting to be a report under the hand of Government analyst, medical practitioner or any ballistic's expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis to be used in evidence without calling the maker as a witness. The same could be produced by an investigating officer in the case provided the accused does not object. It is however necessary that in a case such as this where an accused person is not represented by counsel, that the accused be made aware of the consequences of P3 or such other documents being produced by the police in the absence of the maker of such documents. The court should explain to the accused his right to insist on seeking to cross-examine the maker if he so wishes. In this case, the appellant, should have been made aware that he could seek to cross-examine the maker of P3 if he so wished. This was not done. This was a fundamental error and of course prejudicial to the appellant. Once again the learned state counsel was right in conceding to the appeal on this ground as well.

For all the foregoing reasons, there is only one order which commends itself to us in the circumstances of this case. The order is to allow the appeal, quash the conviction and set aside the sentence.

We now turn to consider whether we should order a retrial. As already pointed out the learned state counsel was not intent on asking for the same.

We have considered the record before us though, the submissions by the learned state counsel and the appellant as well as the law. The court of appeal has in several decisions of late considered the same question of when and when not to order a retrial. In the case of **Pascal Ouma Ogolo v/s Republic, Criminal Appeal No. 114 of 2006 (unreported)**, the court stated:

"……. **We have considered whether or not we should order retrial. The alleged offences were committed on 9th February, 2000 and the appellant has already been in custody for 5 years. The main critical issue amongst others at the hearing of the first appeal by the superior court were as (sic) by identification and recognition in the circumstances in which the state counsel and the court found out (sic) to be favourable for identification in respect of the other appellants who were set at liberty. It may well prove impossible to trace the witnesses and those that are traced may not have accurate memory of the details of the events. We agree with Mr. Musau that this is not a suitable case in which to order a retrial ....."**

By parity of reasoning, we would also hold that this is not a suitable case for a retrial. More so considering that the learned state counsel did not confirm the availability of the witness in the event a retrial was ordered. Further we think that if a retrial was to be ordered, the prosecution may have been accorded an opportunity to fill in the gaps in the evidence tendered at the first trial. In fact they may end up getting a witness to now properly produce the P3 form.

In the end, much as the offence committed was serious and it is only proper that whoever could have been responsible be brought to book, on the record before us, it will be futile to make an order of retrial in the circumstances. We decline to make an order for retrial and instead order that the appellant be set at liberty forthwith unless otherwise lawfully held for other reasons or cause.

Dated and delivered at Nyeri this 3rd day of October 2007

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE