REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Criminal Appeal 304 of 2001

SAMUEL WAITHAKA GACHURU ……..…..... ……..APPELLANT

VERSUS

REPUBLIC ……..……..……...….RESPONDENT

(Being an appeal against conviction and sentence of the judgement dated 25th July, 2001 of M. G. Rintari (S.R.M.) in Criminal Case no.4221 of 2000 at

Chief Magistrate's Court in Nyeri)

JUDGEMENT

The appellant herein was charged in lower court with two counts of robbery with violence. The learned magistrate in lower court convicted him on the two counts and sentenced him to death on both counts. The appellant being aggrieved by that judgement has appealed to this court against conviction and sentence. Before we begin to consider his appeal it ought to be noted that the learned trial magistrate convicted the appellant to death on both counts. In other words the death sentence was in respect of 1st count and again he sentenced to him to death on the 2nd count. In deed it has been found by the court of appeal and now accepted that an accused cannot be sentenced to death twice. It suffices if he is sentenced to death on one count.

In our evaluation of the evidence of the lower court we note that the learned magistrate in recording of the proceedings failed to indicate the language of the court. Such failure is a violation of the appellant's constitutional rights. This indeed was the holding in the case of **Swahibu Simbauni Simiyu and another v Republic CR. APP. NO. 243 of 2005 (unreported) as follows:**

"**Every person who is charged with a criminal offence:**

Shall be informed as soon as reasonably practicable, in a language that he understands and in details, of the nature of the offence with which he is charged…"

In that decision the Court of Appeal quoted Section 77 of the Constitution which provides as follows:-

"**(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**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) Shall be presumed to be innocent until he is proved or has pleaded guilty;

(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) …

(d) …

(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".

The Criminal Procedure Code provides in Section 198 as follows;

(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 which he understands.

(2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.

We are therefore of the view that the learned magistrate violated the appellant's rights as seen in both of the above provisions. In view of that violation the conviction and sentence of the appellant cannot stand.

We therefore allow the appeal, quash the conviction and set aside the sentence.

We have however considered the lower court proceedings and we find that the offence occurred in November, 2003. There was a gun involved and the victims were injured. We were not told by the State that the witnesses cannot be traced. We are of the view that order of retrial would not prejudice the appellant and that it would be in the interest of justice for retrial of the appellant. The Court of Appeal in the case of **Ahmed Sumar v Republic (1964) E.A. 481** stated as follows in respect of a retrial;

"**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 of Appeal also in the case of Bernard Lolimo Ekimat v Republic Cr. Appeal No.151 of 2004 (unreported) had the following to say:

"**There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it" .**

We are of the considered view that the appellant should be retried for the charges in this matter.

We therefore do hereby order that the appellant be presented before the Chief Magistrate Nyeri on 8th October, 2007 for mention with a view to fixing a hearing of his trial. Pending such appearance, the appellant shall remain in prison custody.

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

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE