REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 345 of 2002

STEPHEN LOKOTON LOBOKUON ……..……. APPELLANT

VERSUS

REPUBLIC ...……..……....RESPONDENT

(Appeal from original Judgment and Conviction in Chief Magistrate's Court at Nyeri in Criminal Case No. 310 of 2001 dated 17th July 2002 by Mr. C. D. Nyamweya – S.R.M)

J U D G M E N T

STEPHEN LOKOTON LOBOKUON, the appellant herein, appeals to this court from the judgment of the Chief Magistrate's Court at Nyeri **(C. D. Nyamweya S.R.M. as he then was)** dated 17th July 2002 in which the learned magistrate convicted and sentenced him to death for the offence of robbery with violence contrary to section 296(2) of the penal code. It was alleged that on the night of 21st and 22nd January 2001 at White Rhino Hotel in Nyeri District of Central Province, the appellant with two co-accused, **Charles Emmana Echakan** and **Jackson Ekina Ngorik** jointly with others not before court while armed with dangerous weapons namely panga and rungus robbed **Francis Kahiga Nderitu** of a safe, a radio cassette make Pioneer, a wheel barrow and cash Ksh.20,500/= and at or immediately before or immediately after the time of such robbery killed **Francis Kahiga Nderitu**. The appellant again jointly with co-accused aforesaid faced another count of grievous harm contrary to section 234 of the Penal Code. It was said that on the same night and place the appellant and his co-accused jointly with others not before the court unlawfully did grievous harm to **Michael Meme**.

The appellant and the co-accuseds pleaded not guilty to the two counts and their trial began in earnest. The prosecution called a total of seven witnesses and at the end of it all, the appellant, was found guilty on the first count, convicted and sentenced as aforesaid. His co-accused were however acquitted pursuant to the provisions of section 215 of the criminal procedure code.

The appellant was aggrieved by the conviction and sentence and hence lodged the instant appeal, citing a total of four grounds. However when the appeal came up before us for hearing, **Ms Ngalyuka,** learned state counsel conceded to the appeal. The concession was on the technical grounds that the language of the court and in which the witnesses testified was not clear nor indicated in the court record, and secondly, it would appear that none of the witnesses who testified were sworn before they began their testimony. Accordingly the proceedings before the learned magistrate were a nullity. The learned state counsel invited us to so hold with the consequence that the appeal should be allowed, and both the conviction and sentence set aside.

The learned state counsel however did not seek retrial and advanced no grounds and or reasons for that position. The appellant welcomed the state's gesture. However he urged us to consider the period he had

spent behind bars as we ponder over the issue of retrial.

We have carefully perused the record of the trial court as expected of us as the first appellate court. We note that throughout the trial it is not indicated in the record whether there was an interpreter provided or the language in which the court conducted the proceedings, witnesses testified and the language in which the appellant gave his statutory statement. The record also does not show that the witnesses were ever sworn before they commenced their testimony. A situation remarkably similar to the one obtaining in this appeal is found in the case of **Jackson Leskei v/s Republic, Criminal Appeal No. 313 of 2005, (unreported)**. In Leskei's case, a plea was taken on 18th 2000 and the record showed that the languages being used were English and Swahili. But after the plea, the record was wholly silent as to what language was being used. The trial commenced on 6th February 2001 when the charge was once again read and explained to the appellant, however the language in which that was done was not shown. Various witnesses testified on behalf of the prosecution, the language in which they did so was not however shown. The appellant when put on his defence made a statutory statement but once again the language in which he addressed the court was not shown. In the instant appeal, the appellant pleaded to the charge on 8th February 2001. The record shows that the charges were not interpreted to him nor were they read to him in a language that he understood. Thereafter the trial commenced before **C. D. Nyamweya** on 6th August 2001 when three witnesses testified. The language in which they testified is not indicated. All that was reflected in the learned magistrate's record was "**P.W…. Michael Menee Mutila"**. This was repeated with all the other remaining witnesses. Eventually the appellant gave a statutory statement but it is not clear whether it was sworn or not. Yet again the language in which he did so is not clear from the record. The learned magistrate merely indicated "Accused 1 **Stephen Lokoton Lobokuon".**

The court of appeal in the Leskei's case dealt with the aforesaid issue in the following manner: After setting out the provisions of section 77(1) and (2) of the Constitution of Kenya

court stated;

"…… by entrenching in the constitution the right to interpretation in a criminal trial, the framers of the constitution appreciated that it is a fundamental right 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 ……."

Faced with yet a similar scenario, the court of appeal in the case of Antony C. Kibatha v/s Republic, Criminal Appeal No. 109 of 2005 (unreported) having reverted to the aforesaid statement of the law commented:

"…… we do not thin**k 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 has been the case ……."**

In Leskei's case the court concluded inter alia:

"……**. In view of the foregoing, we think that the appellant's trial was flawed, and his conviction unsafe. As a result we do not consider it necessary to consider the judgment of the superior court as that court did not deal with the issue of language nor do we find it essential to consider the propriety or otherwise of the appellant's conviction. Considering the seriousness of the charge the appellant faced we consider this is to be a fit case for a retrial ……."**

We think that the circumstances in Leskei's case are indistinguishable from the circumstances in this appeal.

Finally the court of appeal grasped with a similar situation in the celebrated case of **Swahibu Simbauni Simiyu & Another v/s Republic, Cr. Appeal No. 243 of 2005**. In that case **Omolo, Bosire & Waki JJA**. delivered themselves in this manner:-

"**What happened in the appeal now before us? The trial of the appellants opened before Mr. Indeche on 28th November 1996 when the plea was taken. The prosecutor is shown as Chief Inspector Mokua and the court clerk's name is also shown as Catherine. The record for the date shows:**

Charge read over and explained:

Accused 1: Count 1: Not true

Count 2: not true

Count 3: not true

Count 4: not true

Count 5: not true

Count 6: not true.

Accused 2: Count 1: not true

Count 2: not true

Count 3: not true

Count 4: not true

Count 5: not true

Count 6: not true.

Plea: Not guilty.

The trial then commenced with the first witness giving his evidence in Swahili. There is nothing in the record of the magistrate to indicate that the appellants understood Swahili. Two witnesses gave evidence that day and as both Mr. Karanja and Mr. Musau rightly pointed out to us, each appellant asked very few questions. The trial resumed on 5th February, 1997 when virtually all the witnesses testified with some giving evidence in Swahili and others in English. Once again each appellant asked very few questions and when they were finally put on their defence, each appellant is shown to have addressed the court, it being recorded:-

"**Accused 1 sworn states".**

…….

"**Accused 2 unsworn states".**

……

Once again, it is not shown what language each appellant used so that from the record of the magistrate it is really not possible to say each spoke in English or in Swahili and whether each of them understood whatever language was being used. We find it incredible that this could have

happened in the court of a Senior Principal Magistrate. Clearly there was not the slightest attempt to comply with the provisions of the Kenya Constitution or the Criminal Procedure Code. On that basis alone, the appeal must be allowed. Mr. Musau did not ask us to make an order for retrial, taking into account the time that has lapsed. Accordingly, we allow the appeal of each appellant, quash the conviction recorded against each one of them, set aside the sentence of death ……..”

As the court of appeal decisions are binding on us and considering the holding in the two cases **Leskei and Simiyu (supra)** we have no choice but to go along with them.

But that is not the end of the problem. How about failure to swear witnesses? Section 151 of the Criminal Procedure Code specifically provide that:-

“……**.. Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath ……..”**

From the foregoing it is abundantly clear that all witnesses in a criminal trial must be examined on oath. What then would be the effect if a witness was to testify without being sworn as happened in the instant case? Guidance is provided by **Archbold, Criminal pleading, Evidence and Practice, 2002 Edition at paragraph 8 – 25** wherein the learned authors state that:

“……**.. The general common law rule is that the testimony of a witness to be examined viva voce in a criminal trial is not admissible unless he has previously been sworn to speak the truth …..”**

Further Section 17 of the oaths and statutory Declarations Act specifically provide that:

“…… **Subject to the provisions of section 19, oaths or affirmation shall be made by**:-

(a) all persons who may lawfully be examined, or give evidence or be required to give evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence ……..

(b) …….

It would appear therefore that a witnesses in a criminal trial must either be sworn or affirmed before his or her testimony can be received in court. The court of appeal in the case of **Samwel Muriithi Mwangi v/s Republic, C.A. 39 of 2005 (unreported)** faced with a similar scenario where the record of the trial court was not clear as to whether the witnesses were sworn delivered itself in the following terms:

“……**... Mr. Kaigai, learned Senior State Counsel, submitted that it was in conceivable that a Senior Magistrate like Mr. Nyamweya would have received the evidence of all the prosecution witnesses without having sworn them first. The usual practice of all courts in Kenya is, of course, to show in the record that a witness has taken an oath before testifying. In the record before us, there is no way in which we can determine, one way or the other that the witnesses were or were not sworn before they gave evidence. Most likely, they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position, it would mean that the appellant was convicted on evidence which was not sworn. This would be a violation of section 151 of the criminal procedure code and the other provisions we have set out herein. That in our view, cannot be a matter curable under section 382 of the criminal procedure code. To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the possibility of his having been convicted on unsworn evidence. It does not matter that the issue is being raised for the first time in this appeal. If the trial is a nullity then it does not matter at what stage the issue is raised ……”**

This case is again on all fours with the circumstances obtaining in this case. Surprisingly it was also an

appeal arising from the decision of **C. D. Nyamweya, SRM** just as in this case.

For all the foregoing reasons we hold that the proceedings before the learned magistrate were a nullity. Accordingly we allow the appeal, and set aside both the conviction and sentence.

However about retrial? We have anxiously considered whether to order a retrial or not in this matter. In doing so, we have considered the law and the circumstance of this case. There are several court of appeal decisions on the matter regarding circumstances under which an order for retrial should be made. See for instance **Pascal Clement Braganza v/s Republic (1957) E.A. 152, Ahmed Sumar v/s Republic (1964) E.A. 481, Manji v/s Republic (1966) E.A. 313, Mwangi v/s Republic (1983) KLR 522, Elirema & another v/s Republic (2003) KLR 537** and **Bernard Lolimo Ekimat v/s Republic Cr. Appeal No. 151 of 2004 (unreported)**

Recently in the case of **Tajiri Kalume Kahindi Cr. Appeal No. 270 of 2006 (unreported)**, the court of appeal has added other considerations apart from those set out in the aforesaid authorities. The court stated and we quote:

"……. **We may add that the period that the appellant has taken into custody must also be considered as well as whether the witnesses would be traced in good time to mount a successful retrial ….."**

Though the state did not seek a retrial we are however not bound by such decision. We have considered the issue in the light of the principles set out in the aforesaid authorities. The offence herein was committed sometimes in January 2001. The offence was committed in a most vicious and horrendous manner. A victim was seriously injured in the process and subsequently died as a result of the injuries sustained. The scales of justice have to be balanced. We do not think therefore that if a retrial is ordered in the circumstances of the case, an injustice will be occasioned to the appellant. Having glanced at the evidence on record, we have no doubt at all that if the self-same evidence was re-tendered at the retrial a conviction is likely to result. The evidence which was brought against the appellant was weighty and not frivolous at all. There will be no need therefore for the prosecution to look for any other evidence to fill up the gaps in their case as we discern no such gaps.

Taking all these matters into account we are convinced that we ought to make an order for a retrial. That being our view of the matter, we allow the appeal, set aside the conviction and sentence of death recorded against the appellant and order that he shall be retried before any other magistrate of competent jurisdiction in the Senior Principal Magistrate's court, Nyeri on the self-same charges. Towards this end, the appellant shall be presented to the said court on 12th October 2007 for his retrial to commence. Pending his retrial, the appellant shall remain in prison custody. Those shall be our orders in this appeal.

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

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE