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

Criminal Appeal 476 of 2003

(From original conviction and sentence in Criminal Case Number 86 of 2003 of the Chief Magistrate's Court at Kiambu –G. M. Njuguna, S.R.M)

JOHN NGUGI WANJIKU ……...……..…….. APPELLANT

VERSUS

REPUBLIC …….……..…..……RESPONDENT

JUDGMENT

JOHN NGUGI WANJIKU, the Appellant herein was found guilty and convicted for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code after a full trial. He was then sentenced to death as prescribed in the law. It is against the said conviction and sentence that he has lodged the instant Appeal.

The Appellant challenges his conviction and sentence on the basis of visual identification by a single witness. That the Prosecution case was not sufficiently proved and finally that his Alibi defence was not given due consideration.

The facts of the Prosecution case were that PW1, Joseph Mbugua Njoroge, the Complainant was at Karuri market on the 14th January, 2003 where he bought oranges, bananas and pumpkins. At About 4 p. m., he left the market for Kawaida Village. After about 100 metres a person whom he had seen at the market and who had followed him out of the market, suddenly tripped him and he fell down. That person then assaulted the Complainant with a rungu and in the process robbed him of Kshs.800/= and left. The Complainant thereafter reported the matter to Karuri Police Station and was issued with a P3 Form which was subsequently filled by PW5, a District Clinical Officer at Kiambu District hospital. PW5 classified the injuries sustained by the Complainant during the robbery as harm. Soon after the robbery, the Complainant returned to the Market and informed people thereat, including PW2 and PW3 what had transpired. PW2 had seen the person who allegedly robbed the Complainant at the market and knew him very well. The two i.e. PW2 and PW3, then asked the Complainant to hide as the person used to frequent a certain bar at the market. That person then appeared at 7 p. m. and entered the bar. The Complainant was called from where he was hiding and the person pointed out to him and he confirmed that indeed he was the same person who had robbed him earlier. He was then arrested by members of Public and taken to Karuri Police Station and was re-arrested by PW4 who upon further investigation preferred the charge against the person. According to PW1, PW2 and PW3 that person was the Appellant. PW1 identified the Appellant because he had seen him in the market loitering around and also when he came and stood behind him as he bought the oranges, bananas and pumpkins. He also saw him as he followed him from the market for about 100 meters before he assaulted and robbed him. As for PW2, who operates some

business at the same market, she saw the Appellant stand behind the Complainant as he bought the items aforesaid. She also saw him follow the Complainant as he left the market. She knew him very well as he used to frequent a nearby club or bar as a customer. She was part of the team that waylaid and subsequently caused the arrest of the Appellant. As for PW3 who also operates some business at the same market, he also knew the Appellant very well. He too was part of the team that arrested the Appellant when he resurfaced at the club two hours after the robbery.

When put on his defence, the Appellant claimed that he resided at banana and sold water for a living. That on the material day he was in a bar at Banana shopping Centre when he was called out by two women. He was thereafter arrested and taken to Karuri Police Station where a woman claimed he had robbed somebody. The Appellant however claimed that he had quarreled with the Complainant over a lady in the bar when she snubbed the Complainant advances in favour of the Appellant.

The Appeal was opposed. Miss Gateru, Leaned State Counsel, submitted that the evidence presented by the Prosecution was overwhelming and well corroborated. That the offence was committed at about 4 p. m. in broad day light and consequently the question of mistaken identity cannot arise. On the basis of the foregoing, Counsel urged us to find that the evidence adduced was sufficient to convict the Appellant for the capital offence and that the Learned Magistrate correctly rejected his Alibi defence due to the strong evidence by the Prosecution. On his part, the Appellant, with the permission of the Court, tendered written submission which we have carefully read and considered.

We have subjected as required of us as a first Appellate Court, the evidence adduced by the Prosecution during the trial as well as the defence to fresh scrutiny, analysis and evaluation while bearing in mind that we neither saw nor heard any of the witnesses as they testified and giving due allowance. See ***OKENO VS REPUBLIC (1972) EA 32.***

We think that this Appeal can be determined on an issue that was neither raised by the Appellant nor the Respondent. The record of the proceedings does not indicate the language of the Court and the one used by the witnesses as they testified before it. As the issue is of critical importance and goes to jurisdiction, and though not raised by either of the parties to this Appeal, we feel that we must nonetheless grapple with it. The Court of Appeal has recently dealt with the issue in the case of ***SWAHIBU SIMBAUNI SIMIYU AND ANOR VS RPEUBLIC, C. A. NO. 243 OF 2005 (UNREPORTED)***. The Court allowed the Appeal on the ground that the Appellant's right to a fair trial in a language he understands was violated as the record of the trial Court did not indicate the language used during the trial. That case is in all fours with the instant Appeal.

Section 77 (2) (b) and (f) of the Constitution provide that:-

"….***..77 (2) every person who is charged with a criminal offence:-***

(a). ……..…….

(b). 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.

(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 above Constitutional provisions are reinforced by Section 198 of the Criminal Procedure Code which provides interalia:-

(i). 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.

What emerges from the foregoing is that in a criminal trial the language of the trial must be understood by the accused person. The language used during the proceedings must be reflected in the record of the proceedings of the trial Court. How else would this Court determine the language of the Court and whether the Appellant understood the same? What happened in the instant case? The Appellant was arraigned in Court on 20th January, 2003 when his plea was taken. The matter was then set down for hearing before G. M. Njuguna (SRM) on 29th January, 2003. On the date of hearing, the record indicates as follows:-

"…..***Before G. M. Njuguna (SRM)***

I.P Nyamai for Prosecution

Court clerk wainaina

Accused – present

Charge read over and explained.

It is not true

Plea of not guilty entered.

PW1 (Sworn) and states……."

The same scenario was to be repeated with regard to all the other witnesses who testified. It is therefore clear from the record that the language of the Court is not indicated. Neither is the language of the witnesses who testified indicated nor the language in which the Appellant gave his defence. In the premises, it is impossible to tell whether the proceedings were in English, Kiswahili or in some dialect and whether the Appellant understood any of those languages or indeed the proceedings. Small wonder that the Appellant asked very few questions and at times no questions at all to the witnesses in cross-examination. Commenting on a similar issue the Court, of Appeal in the case of ***SWAHIBU (SUPRA)*** observed:-

"…….***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….."***

As already stated the scenario obtaining in the Swahibu case is a complete replica of what transpired in the instant case. As we are bound by the Court of Appeal decisions, we have no choice in the matter other than to allow the Appeal on the grounds of non-compliance with Section 77 (2) of the Constitution as well as Section 198 of the Criminal Procedure Code. Accordingly, the Appeal is allowed, and both conviction and sentence set aside.

We have pondered over whether we should order a retrial in this case. The principles applicable in determining whether or not to order a retrial are now well settled. A retrial can be ordered where:-

(i). Original trial was illegal or defective.

(ii). It is in the interest of justice.

(iii). It will not occasion injustice or prejudice to the Appellant.

(iv). It will not accord the Prosecution opportunity to fill gaps in the evidence at the impugned trial.

(v). If upon consideration of the admissible and potentially admissible evidence a conviction may result and finally,

(vi). Each case must depend on its own particular facts and circumstances.

See ***AHMEDALI DHARAMSHI SUMAR VS REPUBLIC (1964) EA 481, FATEHALI MANJI VS REPUBLIC (1966) EA 343, M'MKANAKE VS REPUBLIC (1967) EA 67*** and ***MWANGI VS REPUBLIC (1983) KLR 522***.

The above conditions that must be satisfied are conjunctive and not disjunctive and one of them which must be present is that the trial in the Lower Court must have been defective or a nullity. We have so held in this case.

We agree with the Learned State Counsel that the evidence adduced in the trial Court linking the Appellant to the crime was overwhelming. If this self-same evidence was to be tendered at the retrial, we are convinced that a conviction may result. We say no more.

The Appellant was convicted and sentenced on 23rd May, 2003. He had been arrested on 14th January, 2003. Accordingly the Appellant has been behind bars for a period of about 4 years. Considering the seriousness of the offence and the brevity with which it was executed, we do no think that the Appellant will suffer any prejudice or injustice if a retrial is ordered. The Prosecution had a watertight case against the Appellant and there were no gaps in their evidence that they will seek to fill in the event a retrial is ordered. Finally, we are of the view that everything considered, it would be in the interest of justice to order a retrial.

Accordingly, we order that there be a retrial in this case. Towards this end the Appellant shall appear before the Senior Principal Magistrate's Court at Kiambu on 31st January, 2007 for a plea to the self-same charges and for trial to commence before any other Magistrate of competent jurisdiction other than G. N. Njuguna (SRM) who handled the original trial. Until then the Appellant shall remain in prison custody.

Dated at Nairobi this 23rd day of January, 2006.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Miss Gateru for State

Erick/Tabitha Court clerks

……..

LESIIT

JUDGE

…….

MAKHANDIA

JUDGE