



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 206 of 2004

ANTONY MURIITHI NJUE.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal Case No.10499 of 2003 of the Chief

Magistrate's Court at Thika – B. N. Olao ,C. M.)

JUDGMENT

This is a first Appeal by the Appellant against his conviction by the Chief Magistrate, (B. N. Olao) for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. Upon conviction the Appellant was sentenced to death as by law provided. Being aggrieved by the conviction and sentence, the Appellant proffered this Appeal.

When the Appeal came up for hearing before us, Mrs. Kagiri, Learned State Counsel conceded to the same on the grounds that having perused the entire proceedings she had noted that nowhere was the language of the Court and that in which the witnesses testified indicated. That omission on the part of the Learned Magistrate contravened Section 77 (2) (b) and (f) of the Constitution as well as Section 198 of the Criminal Procedure Code. The proceedings were thereby rendered a nullity and or defective. In support of this submission, Counsel referred this Court to the recent Court of Appeal decision in the case of **SIMBAUNI SIMIYU & ANOR VS REPUBLIC, CRIMINAL APPEAL NO. 243 OF 2005 (unreported)**.

The Learned State Counsel therefore urged us to find and hold that the proceedings were a nullity.

We have perused the record of the trial Court and we are in agreement with the Learned Counsel that nowhere in the proceedings is the language of the Court indicated. Similarly the language in which the witnesses testified is not indicated. All that the Learned Magistrate recorded of the witnesses was as follows:-

“PW1 Waweru Wachira Githinji M/A/S/S

PW2 No. 69360 P. C. Humphrey Ng’ang’a M/A/S/S/”

As for the Appellants statutory statement, the record was reflected as follows:-

“DW1: Anthony Muriithi Njue from Dock.”

From the foregoing it is difficult to tell in what language the proceedings of the Court was conducted. We would imagine that the initials M/A/S/S/ mean “**Male Adult Sworn States**”. They do not tell us anything about the language. The omission of the Learned Magistrate to indicate the language of the Court flew in the face of the mandatory provisions of Section 77 (2) (b) and (f) of the Constitution of Kenya as well as Section 198 of the Criminal Procedure Code. As held by the Court of Appeal in the **SIMIYU CASE (SUPRA)** such breach renders the Prosecution defective and or a nullity. As we are bound by the Court of Appeal decisions, we have no hesitation whatsoever in holding that the proceedings in the trial Court were,

by virtue of the omission aforesaid rendered defective. We would on that score allow the Appeal and set aside both the conviction and sentence.

On retrial, the Learned State Counsel was of the view that it would be prejudicial to the Appellant if such an order was made. The evidence on record was not sufficient to return a conviction if a retrial was ordered. The Appellant too was not keen on an order for retrial.

Ordinarily a retrial would be the appropriate order to make since such fundamental irregularities would result in a miscarriage of justice which is not curable under Section 382 of the Criminal Procedure Code. The Appellant did not have a satisfactory trial. This Court has however stated before, that a retrial should not be ordered unless the Appellate Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result – See **MWANGI VS REPUBLIC (1983) KLR 522.**

Having considered afresh the evidence on record we very much doubt whether a conviction may result in the event of a retrial and the self same evidence was to be tendered. The evidence of the Principal witness is to the effect that he was accosted by two panga wielding thugs at about 5 a.m., on his way to work. The question that immediately needs determination is whether the conditions were conducive for proper identification. When dealing with the issue PW1 stated in evidence:-

“.....It was day break and I could see you well..... There was light nearby....”

Was the witness assisted by natural light to identify and recognise the Appellant as it was day break or was he assisted in the endeavour by the light nearby? The issue was not resolved. Even if it was day break the sufficiency of the natural light that assisted in the identification of the Appellant ought to have been explored by the Prosecution and or the Learned Magistrate having regard especially to the rather strenuous circumstances that PW1 found himself in during the commission of the offence. As for the light nearby, the details of the sought of light were lacking. How near was “nearby”. How bright were those lights and their position in relation to the assailants; Were all issues that the Learned Magistrate failed to inquire.

All these were pertinent questions that could have gone along way in ensuring that the identification of the Appellant was free from error. It is not enough to merely hold that it was the case of recognition and not identification when it is now settled that mistakes in recognition occur even amongst close relatives and friends. As rightly stated in the case of **MAITANYI VS REPUBLIC 91986) KLR 198:-**

“.....Strange fact is that many witnesses do not properly identify another even in daylight....”

As regards reliance on the evidence of a single identifying witness in difficult and unclear conditions, the jurisprudence emerging is that the evidence must be watertight to justify a conviction. It is our view that there are numerous gaps in the evidence of PW1 which bring into question its veracity. It should not have been used as a basis of conviction without corroboration. The Magistrate never looked around for such corroboration evidence. And even if she did we doubt whether he would have found any.

In the upshot it is our finding that the identification/recognition evidence fell way below the required standard and as such the conviction was unsafe. Learned State Counsel was therefore right in not asking for a retrial. In the end we make no order of retrial. Instead we order that the Appellant be set at liberty

forthwith unless otherwise lawfully held.

Dated at Nairobi this 15th day of February, 2006

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LESIIT

JUDGE

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MAKHANDIA

JUDGE

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

Appellant

Mrs Kagiri for State

Erick/Tabitha Court Clerks

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LESIIT

JUDGE

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MAKHANDIA

JUDGE