REPUBLIC OF KENYA

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

Criminal Appeal 425 & 426 of 2004

BENSON MUCHEKE NJERI ……..…….. APPELLANT

VERSUS

REPUBLIC ……..…….RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 426 OF 2004

JULIUS LOGEL SAITOTI ……....…….APPELLANT

VERSUS

REPUBLIC……..….....RESPONDENT

From the Original Conviction and Sentence in Criminal Case No. 2455 of 2003 of the Chief Magistrate's Court at Makadara – Mr. Nyakundi – C. M)

JUDGEMENT

BENSON MUCHEKE NJERI and ***JULIUS LOGEL SAITOTI*** were the 1st and 2nd accused persons in the trial before the subordinate Court where they faced one count of robbery with violence contrary to Section 296 (2) of the Penal Code. After the trial, the Learned Chief Magistrate, Mr. Nyakundi convicted both of them and sentenced them to death, being the only lawful sentence prescribed by the law. It is against the convictions and sentences that they now appeal to this Court. The two Appeals were consolidated for ease of hearing and as they arose from the same trial.

Mrs. Obuo, Learned State Counsel conceded to the Appeals when they came up for hearing before us. The ground upon which the Learned State Counsel conceded to the Appeals was that the trial Court did not indicate in the record the language of the Court or the language used by the witnesses and the Appellant as they testified in Court. According to the Learned State Counsel, this omission by the trial Magistrate contravened Section 77 (2) (b) of the Constitution of Kenya which rendered the proceedings a nullity. In support of this submission Counsel relied on the following authorities.

(i). SWAHIBU SIMBAUNI SIMIYU AND ANOTHER VS REPUBLIC CRIMINAL APPEAL NO. 243 OF 2005 (UNREPORTED

(ii). ABDALLA VS REPUBLIC (1989) KLR 456

(iii). KIYATO VS REPUBLIC (1982 – 88) KAR 418

Counsel therefore invited us to nullify the proceedings on that basis. Counsel however urged us to order a retrial. The basis for that request was that there was overwhelming evidence on record against the Appellants. That the Prosecution called four witnesses, three of whom were Police officers. These witnesses are readily available to testify again in the event that there is a retrial. Finally Counsel submitted that the Appellants could not be prejudiced by an order of retrial as they had been in custody for only 3 years which is nothing compared to the death penalty.

The Appellants opposed the request for an order for retrial in their written submissions. They also added orally that they were victims of mistaken identity, that they were charged following their inability to pay money solicited from then by the Police and finally that the evidence tendered by the Prosecution was contradictory.

We have on our part confirmed from the record that the trial Magistrate never made any note regarding the language that the Court used and the language(s) used by the witnesses as they testified and that used by the Appellants as they gave their statutory statement. This was in contravention of Section 77 (2) (b) and (f) of the Constitution of Kenya and also Section 198 of the Criminal Procedure Code. These provisions of the law reinforce the fact that in a Criminal trial the language of the trial must be understood by the accused person. In the case of ***SWAHIBU SIMBAUNI SIMIYU (SUPRA)*** the Court of Appeal observed:-

"…… ***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…….. The trial resumed on 5th February, 1997 when 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 sworn 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 the slightest attempts to comply with the provisions of the Kenya Constitution or the Criminal Procure Code on that basis alone, the Appeals must be allowed….."***

The holdings in ***KIYATO AND ABDALLA CASES (SUPRA)*** which were extensively quoted in the ***SIMBAUNI CASE*** are along the same lines. In the instant case the situation was worse compared to those that obtained in the authorities cited. In the instant case, there was no record at all as to the language used by the Court and the witnesses. For the foregoing reasons, we are satisfied that the Learned State Counsel was right in conceding to the Appeal. We accordingly annul the proceedings, set aside both convictions and sentences.

Mrs. Obuo urged as to order a retrial. We have carefully considered both oral and written submissions made in support of the Appeals by the Appellants and in support of a retrial by the Learned State Counsel. We have also scrupulously evaluated the evidence tendered during the trial. The principles applicable in determining whether or not to order a retrial have long been settled. We can only reiterate the same. A retrial should only be ordered where the original trial was defective or a nullity ***(AHMED JUMA VS REPUBLIC) (1964) EA 581.*** No order for a retrial should be made if it will cause the accused person to suffer prejudice or injustice ***(MUYIMBA VS UGANDA (1969) EA 581.*** Most of all an Appellate Court should only order a retrial where upon consideration of the admissible or potentially admissible evidence it is of the opinion that a conviction may result ***(MWANGI VS REPUBLIC (1983) KLR 522).*** We have taken into account these principles and applied them to the circumstances and facts of this case

We are satisfied upon consideration of the evidence on record that if the self-same evidence was to be re-tendered at the retrial, a conviction is likely to result. Although there are disparities and or inconsistencies here and there in the testimonies of some of the witnesses, they are not material and do not go to the core of the Prosecution case. As correctly pointed out by the Learned State Counsel, the Appellants have only been in prison for a period of roughly 3 years. That period is not inordinate and therefore it cannot be said that the Appellants will suffer prejudice nor injustice if a retrial is ordered. It

should be borne in mind that the charge that faced the Appellants was serious whose sentence upon conviction is death. It is due to the seriousness of the charge that we feel that it will be in the interest of justice that a retrial be ordered. Accordingly, we order a retrial in this case. Pursuant to this order, the Appellant's will be held in prison custody until 8th of February 2007 when they shall be presented before the Chief Magistrate's Court at Makadara for the retrial to commence on the self-same charge before any other Magistrate of competent jurisdiction other than Mr. Nyakundi, CM who presided over the initial trial.

Dated at Nairobi this 1st day of February, 2006.

…….

LESIIT

JUDGE

……

MAKHANDIA

JUDGE

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

Appellant

Mrs. Obuo for State

Erick/Tabitha Court clerks

……..

LESIIT

JUDGE

…….

MAKHANDIA

JUDGE