REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 376 of 2004

ELIAS MWANGI WANJIRU …….……..…….. APPELLANT

VERSUS

REPUBLIC …….……..……RESPONDENT

(From original conviction and sentence in Criminal Case Number 17047 of 2002 of the Chief Magistrate's Court at Makadara R. Nyakundi - CM)

JUDGMENT

The Appellant was charged before the Subordinate Court with attempted robbery with violence contrary to Section 297(2) of the Penal Code. The particulars upon which the prosecution hinged their case are that on 15th July, 2000 at Salama Hotel and Lodges situated at Kumasi Road in Nairobi Province, the Appellant jointly with others not before Court whilst armed with dangerous weapons namely a pistol attempted to rob Earnest Njenga Kiruku cash money and at or immediately after the time of such attempted robbery threatened to use actual violence to the said Ernest Njenga Kiruku. After a full trial, the Appellant was convicted of the offence. He was accordingly sentenced to death as required by the law.

The Appellant was aggrieved by the conviction and sentence. Hence he lodged the instant Appeal. In his petition of Appeal, the Appellant claims that his trial in the Lower Court was a nullity on the grounds that there was non compliance with Section 85(2) as read together with Section 88 of the Criminal Procedure Code, that there was also non-compliance with Section 193 of the Criminal Procedure Code and finally the Appellant claims that there was non-compliance with Section 77(2) of the Constitution of Kenya.

In support of the above grounds of Appeal, the Appellant with our permission tendered written submission which we have carefully considered. The Appeal was opposed. With regard to non-compliance with Sections 85(2) and 88 of the Criminal Procedure Code, the Learned State Counsel submitted that the case was presented by qualified prosecutors in terms of Sections 85(2) as read together with Section of the Criminal Procedure Code. The only times an unqualified prosecutor appeared was during the mention of the case. As mentions are purely administrative function, the trial of the Appellant was thereby not affected. On the allegation by the Appellant that on 28th April, 2004 the coram of the Court was merely reflecting as "***coram as before"*** and therefore the rank of the prosecutor was unknown, Counsel submitted that on 26th April, 2004, the date preceding 28th April, 2004 I.P. Kariuki was the

prosecutor. He was a qualified police prosecutor. On the authority of ***NASORO MABUYA VS REPUBLIC***, where the Court of Appeal held that where previous corams are express, clear and proper, a subsequent entry of coram as before should be read as referring to the previous proper coram. With regard to non-compliance with Section 198 of the Criminal Procedure Code as well as Section 77(2) of the Constitution Counsel maintained that the Appellant followed the proceedings. Counsel pointed out that on 23rd July, 2002 the Court indicated that there was translation from English to Kiswahili. It must therefore be assumed that that was the case during the subsequent proceedings.

We have carefully perused the proceedings of the trial Court. On the issue of non-compliance with the provisions of Sections 85(2) and 88 of the Criminal Procedure Code, we would entirely agree with the submissions of the Learned State Counsel that the entire prosecution case was conducted by qualified police prosecutors and accordingly the provisions of Section 85(2) and 88 of the Criminal Procedure Code were not breached. We note however that on 18th November, 2002, one Police Constable Radak appeared for the prosecution. However this was during the mention of the case. The issue of persons not qualified to prosecute attending mentions was revisited by the Court of Appeal in the case of ***AHMED ANAKEYA & ANOTHER VS. REPUBLIC CRIMINAL. APPEAL NO. 161 OF 2004 (UNREPORTED)*** in which it delivered itself thus: -

"…….***In this case the three "mentions" were made before the Chief Magistrate. Not even the trial Magistrate. No witnesses were called by the prosecution and they could not have been called. Some of the accused persons were not even present. In sum nothing of substance took place. The Elirema case does not apply ……".***

This ground of appeal must therefore fail in the sense that P.C. Radak did not conduct any prosecution before Rinjeu – P.M. whose mandate on that particular day was to mention the case for purposes of assigning a hearing date.

With regard to the complaint that on 28th April, 2004 the Court coram of the day merely indicated "***coram as before"*** and that it was therefore impossible to tell whether the Court was properly constituted and if so whether there was a Prosecution who he met the requirements set out in Section 85(2) and 88 of the Criminal Procedure Code respectively we find that the Learned State Counsel was right in her submission. On the date preceding 28th April, 2004 i.e. 26th April, 2004 the coram of the Court was reflected as follows:

"***Before Mr. Nyakundi – CM***

Prosecutor – I.P. Kariuki

Accused in custody present"

It is therefore clear that on that date the Court was properly constituted. On the 28th April, 2004 the Court coram was indicated as "***coram as before."*** This must have had reference to the previous coram aforesaid. Forced with a similar scenario, the Court of Appeal in the case of ***NASSORO MOHAMED MWABUYA VS REPUBLIC, CR APP. NO. 155 OF 2004 (MOMBASA), (UNREPORTED)*** stated:-

"…….***We consider that the use of the phrase "coram as before" in the Judge's or Magistrate's note of proceedings must, unless there is express contrary indication, mean that the appearances are the same as in the immediate proceeding entry. Where there is a record of the prosecutor being a named inspector of police and it is followed by an unbroken chain of one or more occasions where the phrase is used, the natural meaning of the use of the phrase is that on each occasion the initially named prosecutor was present. It is only if there is a break in the chain of use of the phrase that it can validly be claimed that there is no evidence of the presence of the previously qualified officers……".***

Applying the above analysis to the record of the proceedings before us, we are satisfied that this ground must also fail. The case of ***BERNARD LOLIMO EKIMAT VS REPUBLIC, CRIMINAL APPEAL NO.***

151 OF 2004 is inapplicable in the circumstances of this case.

We now wish to deal with the troublesome question of none compliance with Section 198 (1) of the Criminal Procedure Code as well as Section 77(2) of the Constitution. What the Appellant is basically saying is that in all the corams indicated and dated, there is no indication which language was in use during the proceedings. Despite the fact that the evidence on recorded is written in English language, it is not shown that the evidence was interpreted to the Appellant nor that the Appellant understood English. In response the Learned State has stated that on 23rd July, 2002, the record indicated that there was translation from English to Kiswahili. That though in subsequent proceedings there was no such indication, Counsel invited us to assume that there must have the same interpretation to the Appellant as on 23rd July, 2002. With tremendous respect to the Learned State Counsel, we decline such invitation. Ours is a Court of record and assumptions and speculation have no place. If there was such interpretation, the Court record must specifically state so. In the absence of such indication, and specific entry we cannot assume that there was such interpretation. We also note that on 23rd July, 2002 is when the plea was taken and thereafter the case allocated to another Court. As the case was heard by another Magistrate other than the one who took the plea, the argument that we must assume that there was interpretation is unsustainable.

The Court of Appeal has had occasion to grapple with the issue in the case of ***SWAHIBU SIMBAUNI SIMIYU & ANOR VS REPUBLIC, CR. APP. 243 OF 2005 (KISUMU) (UNREPORTED).*** After quoting in extenso the provisions of Section 77(2) (b) and (f) as well as Section 198 of the Criminal Procedure Code, it went on to observe thus

" ***….It is abundantly clear from these provisions set out from the Constitution and the Criminal Procedure Code that in a criminal trial the language of the trial must be understood by the accused person and that right extend to an advocate representing an accused person if the advocate does not understand the language of the trial; even if the accused himself understands the language of the trial but his advocate does not understand the language, the language must be interpreted to the advocate into English …….."***

The Court further referred to the case of ***KIYATO VS REPUBLIC (1982 – 88) KAR 418*** in which it was held

"… ***It is a fundamental right, under the Constitution of Kenya Section 77(2) that an accused person is entitled without payment, to the services of an interpreter who can translate the evidence to him and through whom he can put question to the witnesses, make his statutory statement, or give his evidence. Moreover, the Criminal Procedure Code (Cap 75) Section 198(1) also requires that evidence should be interpreted to an accused person in a language that he understands …….. It is the standard practice in the Courts to record the nature of the interpretation used or the name of the interpreter. The trial Magistrate in this case made no note of the language into which the evidence of the witnesses was being interpreted ……."***

The Appeal was allowed.

In the instant case from the date the trial commenced before R. Nyakundi SPM until the end, there is nothing on the record to suggest that the Appellant understood the language in which the proceedings were being conducted. All the Magistrate did was to state thus

"…***... PW …… sworn/states as follows……..."***

Even when it came to the Appellant giving his statutory statement it is merely indicated

"***DW1 Elias Mwangi Wanjiru unsworn statement ……..."***

Clearly there was not the slightest attempt to comply with the provisions of the Constitution or the Criminal Procedure Code. We would therefore on this ground find the Appellant's Appeal meritorious.

Accordingly we allow the Appeal and set aside both the conviction and sentence.

Should we order a retrial? We note that the Appellant was arrested on 15th July, 2002 and has since been behind bars. If we order a retrial it may not be until another two or so years before his trial is concluded. This would be unjust and indeed prejudicial to the Appellant. It may also breach the Appellant's rights as enshrined in Section 77(1) of the Constitution with particular regard to the right to a fair hearing within a reasonable time. We have also considered the evidence tendered in support of the charge and we are of the considered view that if the self-same evidence was to be tendered at the retrial a conviction may not result. For instance from the charge sheet it is alleged that the offence was committed at Usalama Hotel and Lodges along Kumasi Road. The complainant is one Ernest Njenga Kiruku. However during the hearing of the case, the complainant is indicated as Mr. Ernest Nganga Kimaku and runs his business at cross-road. From the foregoing can it be said that the person named in the charge sheet as the complainant is the same person who was the complainant in the proceedings. Further according to the charge sheet the alleged complainant was attacked at Usalama Hotel and Lodges along Kumasi road but in his evidence in chief, the complainant alleged that his business and where he was attacked was along cross-road. It is obvious that the evidence tendered was at variance with the charge sheet. It follows therefore that if a retrial is ordered, the prosecution may be accorded an opportunity to fill the gaps aforesaid. An order for retrial can be refused on that basis.

In the end then, we decline to make an order for retrial. Instead we order that the Appellant be released from prison forthwith unless otherwise held for some other lawful cause.

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

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LESIIT

JUDGE

…….

MAKHANDIA

JUDGE

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

Appellant

Miss Gateru for State

Erick/Tabitha Court clerks

……..

LESIIT

JUDGE

…….

MAKHANDIA

JUDGE