



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

Criminal Appeal 478 of 2003

(From Original Conviction(s) and Sentence(s) in Criminal case No. 10092 of 2003 of the Chief Magistrate’s court at Makadara (Mr. C.O. Kanyangi -SPM)

ELIAS MWANGI MACHARIA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

ELIAS MWANGI MACHARIA was convicted on his own plea of guilty for the offence of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code**. The Appellant was consequently sentenced to death as by law prescribed. He now challenges his conviction on three grounds. The first ground is that the learned trial magistrate never cautioned him of the consequences of pleading guilty to the Capital charge. Secondly, the language used in court was nowhere indicated in the record and thirdly the conviction should not have been entered since Police had held him in custody for one week before taking him to court. The fourth ground raised by the Appellant that he was convicted in his absence lacks merit and is dismissed as the record clearly shows that the Appellant was in court during the plea and subsequent conviction.

Mr. Makura, learned State Counsel represented the State in this appeal. Learned Counsel conceded to the appeal on the grounds that the learned trial magistrate failed to caution the Appellant of the death penalty to the capital charge he was facing at the time the plea was taken. Counsel urged us to order a retrial on the basis that the Appellant had been in custody for only 3 years and would therefore suffer no prejudice and on the grounds that the prosecution will avail witnesses for the retrial.

We have perused the court record and have noted that the learned trial magistrate has nowhere in the record indicated the language of the court or whether any interpretation of the proceedings was made for the Appellant. The Appellant raised this in his second ground of appeal. In the recent Court of Appeal decision in **JACKSON LESKEI vs. REPUBLIC CA No. 313 of 2003, BOSIRE, WAKI and ONYANGO OTIENO JJA** held: -

“As to language, the Constitutional provision on it is Section 77(1) & (2) which in pertinent part, provides as follows: -

“77(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court

established by law.

(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 detail, of the nature of the offence with which he is charged.

(c)

(d)

(e)

(f) Shall be permitted to have without payment the assistances of an interpreter if he cannot understand the language used at the trial of the charge.”

By entering in the Constitution the right to interpretation in a criminal trial the framers of the Constitution appreciated that it is fundamental 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.

In the matter before us, while, by inference, we think that the appellant was possibly allowed the services of an interpreter, in absence of a note to that effect, we entertain a doubt that that was so. It is a matter which has caused us much anxiety more so considering that the Appellant has a sentence of death hanging over his head...”

On that ground alone, the learned Justices of Appeal ordered a retrial of the Appellant’s case. In the instant case, we shall order a retrial of the case on account of two factors. One, the lack of an indication of the language used during the contested plea and two, the failure by the learned trial magistrate to warn the Appellant of the mandatory death sentence to the charge facing him before he pleaded guilty.

We order a retrial of this case. The Appellant should be produced before the Chief Magistrate’s Court Makadara for a plea to the self same charges, on 1st December 2006. In the meantime, the Appellant should be held in prison custody.

Dated at Nairobi this 28th day of November 2006.

.....

LESIIT, J.

JUDGE

.....

MAKHANDIA

JUDGE

Read, signed and delivered in presence of;

Appellant present

Miss Gateru for the State

Wambui/Erick – Court clerks

.....

LESIT, J.

JUDGE

.....

MAKHANDIA

JUDGE