REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 60 OF 2008

DANCAN WACHANIA IRUNGU ….……APPELLANT

Versus

REPUBLIC ……..…RESPONDENT

{*Appeal from Original Conviction and sentence in the Senior Principal Magistrate's Court at Murang'a*

in Criminal Case No. 208 of 2006 dated 6th March 2008 By A.K. NDUNGU P.M}

JUDGMENT

This is a first appeal by **Dancan Wachania Irungu** (*the appellant)* against his conviction and sentence for the offence of robbery with violence contrary to section 296(2) of the Penal Code, particulars of which were:-

"***On the 20th January, 2006 along Kangema/Kiriaini road at Boyo in Murang'a district within Central Province jointly with others not before court being armed with dangerous weapons namely pangas robbed Peter Kamau Maragua of cash Kshs. 300/= and at or immediately before the time of such robbery threatened to use actual violence to the said Peter Kamau Maragua."***

This was the 2nd count. The appellant had also faced a similar charge in count 1. However he was acquitted of the same at the stage of no case to answer.

At the time of plea there is no indication in the trial Magistrate's record what language was used when the charges were read over and explained to the appellant, nor is there any indication which language the appellant opted to use when he pleaded to the charges. Thereafter, the case came for mention on several occasions but at no time was the language of the court used in communicating with the appellant noted in the court record. Eventually the case came up for hearing before **A.K. NDUNGU,** Principal Magistrate, who received evidence of the 1st prosecution witness. He thereafter stood down the witness for cross-examination on another day. However that was the last time that the complainant participated in the proceedings. Apparently he thereafter relocated to Southern Sudan and was never re-called for cross-examination. Subsequent thereto the prosecution went on to call three other witnesses and then closed their case. The appellant thereafter gave an unsworn statement of defence and called no other witness(s). Throughout all these proceedings, there is no indication as to the language the witnesses used in giving their evidence.

In his judgment the trial magistrate carefully evaluated the evidence, found the appellant guilty as charged, convicted and sentenced the appellant to the mandatory death sentence.

In his petition of appeal to this court the appellant did not raise any ground relating to non-compliance with the provisions of section 77(2) (b) of the Constitution of Kenya and section 198(1) of the Criminal Procedure Code that deal with the issue of language during a criminal trial. The issue was however raised by **Mr. Orinda,** learned Senior Principal State Counsel when conceding to this appeal. **Mr. Orinda's** lamentation whilst conceding the appeal was however not that the appellant did not understand the proceedings before the trial court, but that the language that was used in the proceedings was not stated in the court record.

Section 198(4) of the Criminal Procedure Code provides that:-

"***198(4) The language of the High Court shall be English and the language of a subordinate court shall be English or Swahili."***

It must therefore be assumed that the trial of the appellant was conducted in English or Swahili or in both English and Swahili. It is not however, evident whether the appellant understood either of the two languages. Section 198(1) of the Criminal Procedure Code provides thus:-

"***198(1) 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."***

Section 77(2) (b) of the Constitution of Kenya does not however provide that the language used in the trial be indicated. The sub-section provides as follows:-

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

This provision has to be read with section 198 (1) of the Criminal Procedure code, aforesaid which require interpretation to the accused of the evidence given in his presence at his trial. Reading the two provisions together, there is neither a Constitutional nor Statutory provision requiring the language in which criminal proceedings are conducted to be indicated. The import of both provisions is that the accused person should be in a position to understand the proceedings relating to his trial.

According to **Mr. Orinda** the failure to indicate the language of the proceedings before the trial court rendered the trial a nullity. He thus urged us to declare the trial null and void.

Mr. Muchemi learned advocate for the appellant associated himself with **Mr. Orinda's** submissions and went on also to raise and submit on other grounds of appeal. However since the fate of this appeal will turn on the issue of language of the trial court, we do not think that it is necessary to consider **Mr. Muchemi's** submissions on the other grounds of appeal.

In the case of **Moses Karagu Wambugu v Republic, Nyeri Criminal Appeal Number 112 of 2003, (UR)** the court of appeal observed "…. ***There is no legal requirement that the language of the proceedings be indicated. What the law requires is that where an accused person does not understand the language of the court, he should be provided with an interpreter to enable him fully understand the proceedings. The noting down of the language used arises from practice and is intended to show that the appellant was unable to follow the proceedings in English or Swahili or both English and Swahili. The language to be noted is the language which the accused person understands best and where appropriate the person who interpreted the proceedings into that language."***

We entirely agree with the above observations and or sentiments. Notwithstanding the foregoing however, we have gone through the record of the trial court and we are unable to tell whether during the trial the appellant was able to follow the proceedings of the court since the language in which they were conducted is not indicated. We must resolve those doubts in favour of the appellant. **Mr. Orinda** was thus right to concede the appeal on that ground. Accordingly we allow the appeal, quash the appellant's conviction and set aside the sentence of death imposed to him.

The next question for consideration would have been whether or not we should order a retrial. **Mr. Orinda** did not pursue a retrial and rightly so in our view. If a retrial was ordered in the circumstances of this case, the prosecution may have the opportunity to have the complainant cross-examined. We would therefore have unwittingly assisted the prosecution to fill in the gaps in their case. An order for retrial cannot be made on that basis. The appellant from the evidence was allegedly chased and arrested after the commission of the offence. However the chase was not continuous. None of those who allegedly chased and

arrested the appellant were called as witnesses. The alleged robbers were more than 5. Upon completing their mission they took off. However they never took off in a single file. Rather they split. This information was volunteered by P.W.2. However P.W.2 was not among those who chased them. It is also not lost on us that the evidence tendered was full of contradictions and inconsistencies. Looking at the entire record, the prosecution had difficulties assembling witnesses. Indeed it took a warrant of arrest to have the investigating officer testify. We suspect therefore that witnesses might not be easily traced, and if they are, they are unlikely voluntarily to give evidence.

Having considered the circumstances outlined above, we are of the view that a retrial will not be a proper order to make in the circumstances of this case. Accordingly we decline to do so with the consequence that the appellant should forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 7th day of May 2009.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE