REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 32 OF 2003

HARRISON MWANIKI MAINA…...……. ……APPELLANT

Versus

REPUBLIC ………………………………..…RESPONDENT

{*Appeal from Original Conviction and sentence in the Chief Magistrate's Court at Nyeri*

in Criminal Case No. 1799' of 2001 dated 26th November 2002 By C.D. NYAMWEYA SRM}

JUDGMENT

The appellant, **Harrison Mwaniki Maina** was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. Particulars being:

That on the 12th day of July 2002 at Othaya township in Nyeri District of the Central Province jointly with others not before court being armed with offensive weapons namely axes, craw bars and pangas robbed Patrick Murigi Mbugua of one long trouser and cash Kshs. 800/= and at or immediately before or immediately after such robbery used actual violence to the said Patrick Murigi Mbugua.

He pleaded not guilty to the charge and his trial ensued.

The facts of the case in brief were that on 12tt July, 2002 at about 4 a.m. the complainant, a clinical officer at Othaya sub district hospital was asleep in his house within Othaya township when he heard a knock on his door. Thinking that it was his friend who had knocked perhaps seeking for his assistance he went to the sitting room to open the door. However thugs started smashing his window panes demanding for Kshs. 10,000/=. The complainant then retreated to the bedroom and collected his trouser which he intended to put on and open the door. When he reached the sitting room once more one of the thugs ordered him to handover the trouser and he did so. The complainant retreated once more to the bedroom and raised alarm. Neighbours responded and the thugs fled with neighbours in hot pursuit. They managed to apprehend one of the thugs who turned out to be the appellant as he hid in the bush. The trouser that had been taken from the complainant was recovered from him. He was then escorted to the police station which was barely 800 metres away from the scene and upon being searched Kshs. 800/= that had been in the complainant's trouser was recovered from him as well. The appellant was then charged with this offence.

Put on his defence, the appellant claimed that he was a driver. That his vehicle had broken down at a place called Kiariaini. On the morning of 12th July 2002 he woke up in the morning and took a vehicle to Othaya so that he could collect the conductor who lived there so that they could go to Kiariani to repair the vehicle. On reaching Othaya he entered a shop and purchased cigarette and he started smoking, then the owner of the shop started interrogating him and asking him where he came from. The appellant told him that he had come from Nyeri and explained his mission. It was then that 5 other people came in the shopp and the shopkeeper informed them that the appellant was a stranger in the area. They also started interrogating him but the appellant told them that if they were not satisfied with his explanation they should take him to the police station which they did. At the police station he was searched and his Kshs. 862/= taken away. He was put in custody and after 3 days was taken to Karatina Police Station and later was returned to the police station and charged with this offence.

The learned magistrate having carefully evaluated and analyzed the evidence tendered by the prosecution and also the defence was persuaded that the appellant was guilty as charged. Accordingly he convicted the appellant and sentenced him to the only permissible sentence, death.

The appellant was dissatisfied with the conviction and sentence, hence this appeal. In his petition of appeal, the appellant faults his convictions on inconsistencies in prosecution evidence, flimsy evidence of recent possession and wrongful rejection of his otherwise valid defence.

At the hearing of the appeal, **Mr. Orinda** learned Senior Principal State Counsel conceded to the same on the grounds that the record of the trial magistrate did not show that the witnesses were sworn nor was the language in which the witnesses testified indicated. **Mr. Orinda,** further submitted that those mistakes could not be blamed on the prosecution however. Rather it was the mistake of the court. It was thus a mistrial. **Mr. Orinda,** nonetheless sought for a retrial claiming that the evidence tendered was strong. That no prejudice will be occasioned to the appellant although he was convicted and sentenced in November, 2002.

In response, the appellant much as he agreed with **Mr. Orinda** on the reasons for conceding to the appeal, he was nevertheless opposed to an order for retrial arguing that we should consider the period that he had been kept in custody.

We have scrutinized the record of the trial magistrate and found that when the trial commenced on 28th June, 2004 it was not recorded in what language the proceedings were being conducted, though there was an interpreter. The appellant who was unrepresented throughout the proceedings. All the witnesses who testified are merely recorded in the record as:

"**P.W.1 Patrick Murigi Mbugua**

P.W.2 Samuel Wambugu

P.W.3 David Ndirangu

P.W.4 Jecinta Murigi Gakere

P.W.5 no. 7716 P.C. Geoffrey Njuguna

The language in which they testified in thus not indicated. Neither is there indication that they were sworn. Assumption here however is that they must have testified in English or Kiswahili as these are the trial languages in the subordinate court. However there is no basis for making that assumption. In any event even if one was to make such assumption we cannot also assume that the appellant understood the two languages.

The record further shows that the appellant cross-examined the witnesses, but the language used is not indicated. The appellant gave sworn evidence and was cross-examined by inspector Kagambi, but here again, it is not shown what language was used.

As we have said, there is no reason for us to presume that the appellant spoke and understood the language in which he is recorded to have answered the charge and conducted the trial including his defence. On the question of language the court of appeal in the case of **Degon Degon Nunow V Republic cr. Appeal No. 233 of 2005(UR)** had this to say**:**

"***Of course there was right from the beginning of the trial an interpreter present in court, that is clearly shown in the record of the magistrate. What is not shown throughout the record is the language which the appellant or the witnesses addressed the magistrate …………***

On this aspect of the matter, the burden is on the trial court to show that an accused person has himself selected the language which he wished to speak and in which proceedings are interpreted to him. As we have repeatedly pointed out, those are not mere procedural technicalities. There is, first section 198 of the Criminal Procedure code and that section provides:-

"***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.***

2. If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate it shall be interpreted to the advocate in English."

The court went further to say in the judgment:-

"***The provisions show that the question of interpretation of evidence to a language which an accused person understands is not a matter for the discretion of the trial magistrate – it must be done and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak. Section 77 of the Constitution is in relevant parts, in these terms:-***

"***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;

(c) ……………………

(d) …………………**..**

(e) …………………**.**

(f) Shall be permitted to have without payment the assistance of an interpret if he cannot understand the language used in the trial of the charge.""

The court then continued:-

"***It is the responsibility of the trial courts to ensure compliance with those provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place".***

On this ground alone therefore we must allow the appeal. We do not think it is necessary to consider the fact that all the witnesses who testified would appear not to have been sworn. The record speaks for itself.

Mr. Orinda has urged us to order a retrial. Of course we have jurisdiction to make such an order. However the law is pretty settled as to the circumstances under which an order for retrial can be made. In the case of **Benard Lolimo Egimat V Republic Cr. Appeal number 151 of 2004 (UR)** the court of appeal observed

"….. ***there are many decisions on the question of what appropriate case would attract an order for retrial but on the main, the principal that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interest of justice require it…"***

This principal was followed in the recent decision of the court of appeal again, in the case of **Julius Karuga v Republic, Criminal appeal number 189 of 2000.**

Much as the evidence against the appellant was overwhelming and if we order a retrial a conviction is likely to follow, we are however not oblivious to the fact that the appellant has been in custody since 12th July, 2002 a period of well over 7 years. It would thus not be in the interest of justice in our view to take him though the ordeal of a trial once more. Indeed we even suspect that the prosecution may have problems with the retrial, given the manner in which the proceedings were conducted in the trial court. We doubt whether the only exhibit tendered in evidence, the trouser will still be available.

In those circumstances we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. We decline to order a retrial. Instead we order that the appellant be released forthwith, unless otherwise lawfully held.

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

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE