REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 51 of 2006

JOHN WAGURA NYAMBURA …….....……..….. APPELLANT

Versus

REPUBLIC ……..……..…….. RESPONDENT

(Being an appeal from the conviction and sentence of

M. R. GITONGA Principal Magistrate in Chief Magistrate's

Criminal Case No. 4477 of 2001 at NYERI)

JUDGMENT

The appellant was charged and convicted of *robbery with violence contrary to section 296(2) of the Penal Code* before the Chief Magistrate's court at Nyeri. The appellant was sentenced to suffer death as prescribed under the law. The appellant being aggrieved by that conviction and sentence has preferred this appeal. We have as we re-examined the evidence tendered in the lower court found that the learned trial magistrate failed to indicate the language of the court. Throughout the proceedings of the lower court there is no indication of the language used. Failure to do so renders the trial to be a nullity. The court of appeal in considering situation where the record did not show the language of the court stated in *Court of Appeal Criminal Appeal No. 11 of 2004 (NRB) Francis Macharia Gichangi & 3 others vs Republic;-*

"*Regarding the first issue, the trial court record is silent on the language of the proceedings were conducted. In Fredrick Kizito Vs Republic Criminal Appeal No. 170 of 2006, this court authoritatively stated thus:-*

In the matter before us, while, by inference, we think that the appellant was possible allowed the services of an interpreter, in absence of a note 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. This and several other cases we have handled before, show the grave danger inherent in the failure by the trial court to record the essential details in proceedings before it, for instance, the name of the officer trying the case; the prosecutor and his rant; the court interpreter or clerk and the language or languages of the proceedings; the language used by each witness; that judgement was pronounced; the date thereof and in whose presence et cetera. These are as important as the evidence and form part of the fair process of justice, the omissions of which might affect an otherwise sound conviction."

In *Albanus Mwasia Mutua vs Republic Criminal Appeal No. 120 of 2004*, the same court, after citing the case of *Swahibu Simbauni Simiyu and Another v R. Court of Appeal Criminal Appeal No. 243 of 2005,* rendered itself thus:

"*Since the record of the magistrate did not show the language used by the two appellants, there was a violation of the appellant's Constitutional Rights under the foregoing section (Section 77(2) (b) of the Constitution) and the appeal was allowed. Once again the nature and strength of the evidence brought by the prosecution in support of its charge did not really count."*

With that in mind we need to consider whether to order for a retrial since the lack of language in the

record of the lower court renders that trial to be a nullity. A case in point is Court of Appeal decision in *Criminal Appeal No. 221 of 2006 (KSM) CISSE DJIBRILLA vs Republic;-*

"*In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."*

What we need to consider is whether to order retrial in this particular case. The evidence tendered before the lower court was that PW 1 and 2 and the second accused who was later acquitted were drinking alcohol in Ndungumano trading centre. During their movement from one bar to another they noticed the appellant. When they started to go home the appellant followed them. The second accused was so drunk that he was making noise. While they were on their way PW 1 and 2 momentarily parted ways with the second accused and the appellant. The appellant was said to have gone to PW 1 and announced that he was a police officer. He accused PW 1 of having bhang. He went into his pocket and took there from Kshs. 3000. When PW 1 inquired why he was doing so, he head butted him. PW 1 became unconscious and lost teeth in the process. PW 2 repeated the evidence of PW 1. It is pertinent to note that PW 1 and 2 had taken notice of the appellant whilst at the trading centre where there was light. When they began to walk and as stated before had parted company with the appellant. The prosecution led evidence that the appellant assaulted by PW 1 and stole from him. Prosecution did not lead evidence of what time the drinking spree ended nor did he lead evidence on how PW 1 and 2 recognized the appellant in the darkness. The evidence shows that PW 1 and 2 and the second accused went to the trading centre at 7.30 p.m. It does seem that they moved from bar to bar thereafter. It therefore does also follow by the time they were going home it was far much later than 7.30 pm. What is not clear from the evidence is how PW 1 and 2 were able to recognize the appellant in the conditions under which they were since they had parted ways prior to the attack. All this should be taken into account with the background to the fact that they all had been drinking alcohol. The said recognition of the appellant in the dark needed to have been tested. When we test that evidence we find that we entertain doubt on whether PW 1 and 2 were able to recognize the appellant. In the light of that we are of the view that it would not be safe to order the appellant to be retried. Accordingly the appellants' appeal succeeds and the conviction of the lower court is hereby quashed. We do also set aside the lower court's sentence. We order the appellant be set free from custody unless otherwise lawfully held.

Dated and delivered at Nyeri this 2nd day of October 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE