



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 31 of 2006

JOSEPH GUANDARU NDONGA 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. 1156 of 2004 at NYERI)

JUDGMENT

The appellant in the lower court was charged with ***Robbery with violence contrary to section 296(2) of the Penal Code***. The lower court convicted him after trial and sentenced him to suffer death as provided under the law. As we consider this appeal we found that the learned trial magistrate failed to indicate the language used by witnesses when they gave evidence. The record as a whole up to the defence hearing does not show the language of the court.

The court of appeal in considering situation where the record did not show the language of the court stated in the case *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*, this 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.”

The lower courts failure to indicate the language of the court renders that trial to be a nullity. What we now need to consider is whether to order a retrial. A case in point is *Court of Appeal 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.”

We have considered the evidence tendered before the lower court. The robbery with which the appellant was charged with led to the death of one person. PW 1 stated that she was ordered to go under the bed and whilst there she heard her husband screaming and inquired why they wanted to kill him. Having reconsidered the evidence we are of the view it can sustain a conviction and there will be no opportunity for the prosecution to add or fill gaps in the evidence. Accordingly the judgement of this court is that the appellant’s appeal against conviction and sentence is hereby allowed. The conviction of the lower court is hereby quashed and the sentence is hereby set aside. We order the appellant to be retried before Chief Magistrate court Nyeri and in that regard the appellant shall be produced before that court for mention with a view to fixing a retrial on 16th October 2008. The appellant shall be detained in custody until that date.

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

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE