REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 177 of 2006

PAUL GITAHI NGUTHIRU ……..…….. 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. 2801 of 2005 at NYERI)

JUDGMENT

The appellant was charged together with his co accused with ***robbery with violence contrary to section 296(2) of the Penal Code.*** The lower court after conducting the trial acquitted the appellant's co-accused of the main count but convicted him for handling stolen goods for which he was sentenced to seven years imprisonment with hard labour. The appellant was convicted of robbery with violence and sentenced to suffer death. Being aggrieved of his conviction and sentence the appellant has filed this appeal. When the appeal came before us for hearing it became apparent to us that the lower court had failed to indicate the language used by the witnesses during the trial. The appellant relied on his written submissions and the learned State Counsel in response supported the conviction saying that the evidence tendered was sufficient to sustain the conviction. But as stated on our perusal of the lower court's proceedings we have found that the learned trial magistrate failed to indicate the language of the court. It was only at the time of taking the plea that there is indication of interpretation from English to kikuyu. Thereafter the language of all the witnesses that gave evidence on behalf of the prosecution and even the defence of the accused does is indicated in the court record. The Court of Appeal in considering situation where the record did not show the language of the court stated in the *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 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. 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 rank; 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."***

The evidence of PW 1 the complainant did not identify the appellant during the robbery. PW 1 from the evidence seems to have been terrorized by the robbers who broke first the first door using a stone, then broke the kitchen door and finally her bedroom door. During the robbery when various items were stolen the robbers permitted her to switch on the light since it was night but she declined to look at their faces. She was therefore unable to identify any of the robbers. A grandson, PW 2 did however look at the robbers and identified the appellant as one of the robbers. He even pointed out the appellant at an identification parade mounted by the police. The only problem with that evidence is that PW 2 was said to be attending standard eight at Nyeri Good Shepherd Academy. The learned magistrate did not indicate the age of PW 2 in the record. We on our part cannot assume the age of PW 2. It was imperative to indicate in the record the age of the witness so as to determine whether the witness ought to have given evidence under oath or otherwise. *See Section 19 of the Oaths and Statutory Declarations Act Cap 15.* If indeed the witness was of tender age the learned magistrate ought to have conducted a voire dire examination to determine whether the witness understood the importance of an oath or telling the truth. The procedure to be followed in such a case was well set out in the case of *Joseph Karanja Mungai vs republic (2006) eKLR* as follows:

"***The proper procedure to be followed when children are tendered as witnesses was set out in the decision of this court in JOHNSON NYOIKE MUIRURI vs R. (1982 –88) 1 KAR 150 at p. 152 where Madan, J. A. (as he then was) said:-***

"***We once again wish to draw the attention of our courts as to the proper procedure to be followed when children are tendered as witnesses.***

In <u>Peter Kirigi Kiune</u> Cr. App 77 of 1982 we said:-

"***Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which event his sworn evidence may be received. If the court is not so satisfied his unsworn***

evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understand the duty of speaking the truth. In the latter even an accused person shall not liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him (Section 19, Oaths and Statutory Declarations Act, Cap 20 The Evidence Act (S 124, Cap 80).

It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided, and not be forced to make assumptions.

A similar opinion was expressed by the Court of Appeal in England recently in R vs Campbell (1982) Times, 10 December.

"***If the girl (10 years) had given unsworn evidence then corroboration of those issues was an essential requisite. If she gave sworn evidence there was no requirement that her evidence had to be corroborated but the jury had to be directed that it would not be safe to convict unless there was corroboration".***

Dealing with the question of the girl taking the oath it should be borne in mind that where there was an inquiry as to the understanding of a child witness of the nature and solemnity of an oath, the court of appear in Re v Lal Khan (1981) 73 Cr. App R 190) made it quite clear that the questions put to a child must appeal on the shorthand note so that the course the procedure took in the court below could be seen...

There Lord Justice Bridge said:

"***The important consideration …... when a judge has to decide whether a child should properly be sworn, is whether the child has sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct".***

There were therefore two aspects when considering whether a child should properly be sworn: first that the child had sufficient appreciation of the particular nature of the case and, second a realization that taking the oath did involve more than the ordinary duty of telling the truth in ordinary day to day life".

We have on the whole considered the totality of the evidence against the appellant and with that consideration and the fact that the lower court failed to carry out a voire dire examination of PW 2 we find that we cannot order for a retrial. Accordingly, the appellants appeal does succeed and the conviction of the lower court is hereby quashed and the sentence is hereby set aside. We order the appellant to be set free unless otherwise lawfully held.

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

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE