REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO 169 OF 1990

NAGIGI MARIGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No 198 of 1990 of the Resident Magistrate's Court at Nairobi O G Githinji)

JUDGMENT

The appellant was convicted in the court below on 6 counts of robbery with violence contrary to section 296 (2) of the Penal Code and was sentenced, in respect of each conviction, to the mandatory death sentence. He now appeals to this Court against conviction and sentence.

The conviction of the appellant on count 1 was entered on the basis of his own plea of guilty but in his appeal to us he says the plea of guilty was not proper in that he did not understand the language of the court below. The question of the language of the lower court and more specifically whether the appellant understood the proceedings comprises the appellant's major ground of appeal against conviction on all counts. It is therefore an issue we shall have to revert to later in this judgment. Before we do so, we must however pause here to briefly state the facts of the case.

All the complainants except one (the fifth) were German tourists on holiday in Kenya. The fifth Titus Kyalo was a driver of a local tour company known as Polman's Tours and Safaris.

On 8.1.90 at about 5 pm the five complainants were being driven in a minibus by the 5th complainant in the Masai Mara when they were ambushed by a gang of robbers, one wearing an outfit which looked like that of a game ranger and was totting a gun. His companions had *pangas, rungus,* bows and arrows and a spear.

When the minibus stopped, the robbers attacked the occupants injuring the driver and one tourist, the 6th complainant, who received a blow to the right hand fracturing it. The driver of the minibus was cut on the hand.

After the robbers had overpowered the occupants of the minibus they robbed them of various items including an Omega watch, three passports, two bags and cash in deutch marks and local currency. After robbing the tourists of their belongings, the robbers disappeared into the bush. Immediately after the disappearance of the robbers the driver of the minibus drove to Masai Mara Police Post where he reported the matter to Corporal Samuel Cheruiyot. The latter proceeded to the scene of the incident accompanied by 4 other police officers. There they found two game rangers already at the scene and they were shown the direction the bandits had taken in their escape route. The police officers and the rangers then started

tracking the robbers.

Three bandits were seen by Cpl Cheruiyot as they emerged from the bush. He fired at them but they disappeared into the bush. The police officer and the rangers continued with their search and later saw a man whom they suspected to be one of the robbers hiding in a pool of water. When he was ordered to give himself up, he refused and was fired at. He immediately surrendered and was arrested. That person was the appellant.

At the time of his arrest the appellant was found in possession of 3 passports, two belonging to the complainants in counts I and his wife and the third belonging to the 2nd complainant. He was also found in possession of an Omega watch, the property of the second complainant. Two bags stolen from the 1st complainant during the robbery were also recovered from the pool of water from which the appellant was flushed.

In a caution and charge statement, which was, in our view properly admitted in evidence, the appellant admitted his involvement in the robbery. That admission was corroborated by the recovery of some of the stolen items from him soon after the robbery.

When put on his defence, the accused, in a unsworn statement, said that he was a farmer from Timau and that in January, 1990 he was in the Masai Mara Game Reserve hunting for animals for house consumption. He said he was using a rope and a knife and had entered the Game Reserve on 7.1.90 but up to 9.1.90 when he was arrested in the bush, he had not caught any animal. At the time of his arrest he said he had *unga* and a bed sheet.

That defence was carefully considered by the learned trial magistrate and rejected. The learned trial magistrate believed the evidence of the prosecution witnesses and convicted the appellant on the five counts in respect of which he was tried.

To summarise, the conviction of the appellant was based on the evidence of the complainants, as well as that of the security personnel who arrested him and finally the statement the appellant made to IP Mulole.

The evidence of the arresting officers showed that the appellant was found in possessin of the stolen items immediately after the robbery.

In his petition of appeal and mainly in the written submission, the appellant attacks the judgment of the court below on the following grounds:

1. That he did not understand well the language used in the Court during trial.

2. That he was not mentally fit to stand trial.

3. That he did not have a satisfactory trial.

Grounds 1 and 3 relate to the question of language as well as the issue raised by the fact that the guilty plea on count 1 was recorded by the Chief Magistrate while the trial on the remaining five counts was conducted by OG Githinji, Principal Magistrate. We shall first deal with the question of language, as that complaint forms the core of the appellant's appeal.

In his written submissions, the appellant claims that he does not understand the Swahili language properly and applies to this Court for assistance in obtaining the services of a Kuria interpreter during the hearing of the appeal.

The proceedings of this Court were in English and Swahili. They were interpreted into the Swahili language by our court clerk Mr Njoroge. This Court did not know that the applicant had any problem with the Swahili language until it was his turn to reply to learned state counsel's submissions when he said that he did not understand the Swahili language. He had however not said so in his opening remarks when he

said he had written submissions. Upon our own consideration of the matter, we are genuine in saying that he does not understand the Swahili language.

The appellant first appeared before the then Chief Magistrate (now Hon Justice Mango) on 11.1.90 when, as reflected in the record the charge was read over to him and explained whereupon the accused failed or refused to plead. On that day, the language of the Court is not shown. The case was however adjourned to 12.1.90 for plea. On that date the record clearly shows that the language of the Court was English/Swahili and that a certain Mr Mohamed Noor was the court clerk. Nowhere is it shown that the appellant complained about his inability to understand the Swahili language. On the contrary, he pleaded guilty to the first count in the following words:

> "It is true I was one of the robbers"

and pleaded not guilty to all the other charges. When he was told that count 1 was a capital charge and conviction carried the mandatory death sentence, his answer is shown in the record as follows:

> "I understand. I still admit the first count"

And after the facts were stated, he said:-

> "I have understood the facts and they are correct. I took part in the robbery. I admit the facts. I am 20 years old".

At this stage, the Chief Magistrate referred the appellant for medical examination before mitigation and sentence as in the words of the Chief Magistrate, "the appellant did not look quite well."

The case came back to Court on 16.1.90 when the Court noted that the (medical) report had been filed and the accused was given an opportunity to mitigate. Instead of mitigating the appellant told the Court he wished to have the charge read to him. The proceedings, which are shown to have been in English/Swahili were as follows:

> Accused: "I ask that the charge be read to me again".
>
> Court: "Fair enough"
>
> Charge read over and explained.
>
> Accused: "I have been beaten and I was cut and I did not appreciate the nature of the charge and its implications".

The court prosecution opposed the attempt to change the plea and the Chief Magistrate reserved his ruling to 21.1.90 when he rejected the request to change the plea and convicted the appellant as charged in count 1 and sentenced him to death.

We may again pause here and ponder the question whether there was an indication in the record that the appellant did not understand the language of the Court. Before we can answer that question, we wish to consider the provision of the law.

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

> "The language of the High Court shall be English and the language of a subordinate court shall be English or Swahili".

And section 198 (1) of the same Code provides as follows:-

> "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".

In our view while the law is very clear on the matter it is equally clear with regard to the instant case that the law was followed to the letter. The languages were shown and even the name of the interpreter was also shown. We also think that throughout the record the appellant's participation in the proceedings is shown to be such that the claim that he did not understand the Swahili language cannot just be true. In our view the above quotation of parts of the proceedings showed beyond any doubt that the appellant understood Swahili.

In the case of *Diba Wako Kiyato vs R* [1982-88] I KAR 974 the Court of Appeal held:

> "It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language he understands".

That we must accept is the law of this land but as regards the instant case we think the position is different and that the case of *Diba Wako* is clearly distinguishable from the instant case.

We now turn to consider whether it was proper to reject the appellant's plea to the Court that he be allowed to change his plea. In the case of *Wanjiru v R* [1975] EA 5 the appellant was recorded by the magistrate as having answered "it is true" when charged with an offence. The magistrate recorded a plea of guilty and the appellant then made statements which amounted to a denial of the charge. He was nevertheless convicted. On appeal it was held that:-

> "the Court has power to alter a plea at any time before sentence".

And in the case *R v Changueny arap Kisang* (1946) 20 EACA 153 it was held that:-

> "In the absence of statutory provision invalidating a plea of guilty to a charge of murder it is not improper in the circumstances of a particular case for the trial Judge to convict on such a plea".

But "precautions" are necessary (See *Chacha s/o Wambua v R* (1953) 20 EACA 339).

In the instant case, the appellant was warned that the count he was admitting was a capital charge which carried the death sentence but he maintained that he understood the position and still wished to admit the charge. The facts were stated and interpreted to the appellant who admitted them as all correct. He was then convicted. The conviction was in our view proper and the learned trial magistrate was justified in refusing a change of plea.

As for convictions on counts 2 and 6 there was clear and consistent evidence establishing beyond any reasonable doubt that the appellant was arrested soon after the robbery in possession of three passports and an Omega watch stolen from the occupants of the minibus. The time space between the robbery and the appellant's arrest was so short that in our view the learned trial magistrate was fully justified in finding that the appellant was one of the robbers. The appellant attacks the taking of plea on count 1 by the Chief Magistrate and that of the other counts by a different magistrate but there is no legal prohibition of the course of action taken in the Court below. There is no merit in the appellant's grounds of appeal.

The appellant's appeal against conviction and sentence is dismissed.

Dated and delivered at Nairobi this 15th day of July , 1992

T. MBALUTO **S.O OGUK**

JUDGE **JUDGE**