



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAKURU**

**Criminal Appeal 30 of 2006**

**JAMES MAINA WANJIRU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Nakuru  
(Apondi, J) dated 28<sup>th</sup> September, 2005***

**In**

**H. C. Cr. A. No. 150 of 2003)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant James Maina Wanjiru was, on 7<sup>th</sup> June 2002, charged before the Principal Magistrate at Nyahururu (Kathoka Ngomo) with the offence of robbery with violence and the particulars of the charge were that :-

***“On the 28<sup>th</sup> day of May 2002 at Maina Estate in Laikipia District within Rift Valley Province jointly with others not before court while armed with a home made gun robbed Peter Macharia Ndirangu cash Kshs.500/-, two torches, two pangas (sic) and a wrist watch all valued at K.sh.1500/- and at or immediately before or immediately after the time of such robbery threatened to shoot the said Peter Macharia.”***

He pleaded not guilty but after full hearing the learned magistrate reduced the charge to that of simple robbery contrary to section 296 (1) of the Penal Code; found him guilty of that charge and sentenced him to serve five years imprisonment. He felt dissatisfied with that conviction and sentence and appealed to the superior court vide High Court at Nakuru Criminal Appeal No. 150 of 2003. That appeal came up for hearing before the learned Judge of the superior court (Apondi, J) on 23<sup>rd</sup> May, 2005. The learned Judge warned the appellant before hearing his appeal that on fresh evaluation of the entire evidence tendered in the subordinate court, the court might, on finding the offence of robbery contrary to section 296 (2) proved, substitute the sentence of five years imprisonment with one of death. However, the record shows that the appellant, notwithstanding the warning still wanted to proceed with the appeal. The learned Judge proceeded to hear the appeal as a single Judge and found that the evidence that was before the subordinate court proved the offence of robbery with violence contrary to section 296 (2) of the penal Code. He then convicted the appellant of the offence of robbery with violence contrary to section

296 (2) of the Penal Code and sentenced him to death. The appellant has now come to us on a second and last appeal. He filed on his own five grounds of appeal but on 10<sup>th</sup> July 2007, Mr. Maragia – Ogaro, the learned counsel assigned to him by the Court filed a supplementary grounds of appeal containing five grounds of appeal which were as follows:-

***“1 That the learned Judge erred in law and in fact in failing to note and consider that the statement of inquiry and certificate of translation sheets. were defective.***

***2. That the learned Judge erred in law and in fact in failing to note and consider that the trial court relied upon a different statement under inquiry from that which was tendered by the prosecution.***

***3. That the learned Judge erred in law and in fact in failing to note and consider that the plea was not properly taken and it was not done in the language (the accused) the appellant understood.***

***4. That the learned Judge erred in law and in fact in failing to note that the trial court based its decision upon a retracted. confession against the standards under law that are set out in the Evidence Act and other laws.***

***5. That the learned Judge erred in law and in fact in failing to note and consider that the proceedings before the trial court were a nullity and the Honourable court is urged to find that the proceedings with the subsequent (sic) court were void.”***

Mr. Maragia, the learned counsel for the appellant addressed us at length on each of the above grounds of appeal and urged us to allow the appeal, quash conviction, set aside the sentence and set the appellant free. Mr. Njogu, in opposing the appeal and supporting the decision of the learned Judge of the superior court also raised several points, urging us to dismiss the appeal. We will hereafter consider the submissions by both counsel but first the brief facts as appear in the record before us.

On 28<sup>th</sup> May 2002 at about 10.00 P.M., Peter Macharia Ndirangu (PW1) (Ndirangu) and his wife Ann Wambui Macharia (PW2) (Wambui) were asleep in their house at Maina village. He heard dogs yelping outside their house. Ndirangu woke up, looked through the window and saw five people outside one of whom had something looking like a gun. These people hit the door with a stone and started to push off the timber. He blew the whistle and Wambui opened the door. All the five thugs entered the house and told Ndirangu to give them money. He gave them Ksh.50/- but those people who were armed with a gun and rungu said they wanted Ksh.200,000/- which he told them, he did not have. They were beaten and ordered to lie on the floor. The thugs searched the house and got Ksh.500/- which they took. They also took a panga, two torches and Wambui's wrist watch. In the meantime, the neighbours responded to the screams made by Ndirangu and Wambui. The thugs started to escape. Four of them escaped but the last one identified by the witnesses as the appellant remained behind and started to scare away with what looked like a gun the neighbours who had gathered. Ndirangu gave chase and hit the appellant with a stone. The appellant fell down and was arrested by Ndirangu and members of the public. The gun he was carrying turned out, on being checked by the witnesses, to be an imitation of a gun. Ndirangu and members of the public took the appellant to AP's post at Maina. The complainant and P.C. Jonathan Kimathi (PW5) of Nyahururu police station together with the O.C.S. and P.C. Maina went to AP's Camp at Maina, found the appellant, re-arrested him and took him to Nyahururu Police Station. They also collected the gun which they described as home made gun. Once at the police station, IP Michina Ndege (PW4) of Nyahururu CID Office recorded a statement under inquiry from the appellant on 3<sup>rd</sup> June 2002. At his trial, the appellant repudiated that statement but after a trial within a trial, the trial court admitted the statement as evidence in the case. The evidence of Wambui and Christopher Maina Wachira, on the main supported Ndirangu's evidence. The appellant was taken to court. In his defence, the appellant stated that on 28<sup>th</sup> May, 2002, he went on duty as usual and worked until 7.00 p.m. when he closed his place of work. He was informed that his sister was sick. He went to see his friends so as to borrow money to take his sister to hospital. After getting money, he left for Maina where his sister was staying but before he got there, he met a person who cut him on the head with a panga and he lost consciousness until the next day at police station when he regained it. On 7<sup>th</sup> June,

2002 he was taken to court and was charged with the offence of robbery with violence. He was shocked to learn of the charge as he did not know anything about it.

Mr. Maragia's complaints as regards the admission of the statement that was recorded from the appellant by I.P Michina Ndege was first that the translation of that statement was not signed by the appellant and this being so, the statement should not have been relied on at the trial to convict the appellant. The second complaint is that the statement was not dated and so should not have been admitted as evidence. In our view, both complaints lack merit. The statement taken from the appellant which required to be signed by the appellant was the statement made in Swahili. That was the statement taken from the appellant in a language the appellant understood and in which he communicated to IP. Muchina. It is the statement that reflected what he actually stated and which was read to him. He signed that statement. The English version of that statement was a translation made in a language the appellant admittedly did not understand. He needed not sign it and could not sign it for he could not vouch for its contents as he did not understand English. As to the allegation that the statement was not dated, we have on our own perused the statement. It is dated 3<sup>rd</sup> June, 2002.

On the second ground of appeal, we do agree that the learned Magistrate was plainly wrong in stating as he did as follows:-

***“None other than the accused has also corroborated that flow of evidence by a statement under inquiry which he recorded in his own handwriting and confessed to the offence. His defence therefore that he was not involved in this robbery cannot be the truth and it is hereby disbelieved.”***

We have perused the evidence on record and we have not found any entry in the record supporting the learned Magistrate's statement. IP. Maina Ndege stated in evidence:-

***“He offered to give the statement. He would explain and would record. He told me to record for him as he could not write promptly out of the injuries. He was speaking in Swahili. I was recording in Swahili, I did not write anything that he did not tell me.”***

Indeed, in his ruling in which the statement was admitted, the learned Principal Magistrate stated correctly that the statement was recorded by IP Muchina Ndege. Mr. Njogu, while admitting that the Principal Magistrate erred in making that finding in his judgment, felt that it could be cured under section 382 of the Criminal Procedure Code. We do not agree. That finding clearly influenced the learned Magistrate's mind as he used that statement as one of the reasons for concluding that the appellant's defence that he was not involved in the robbery could not be true. Clearly he gave a higher value to that statement mainly because it was “written” by the appellant himself. We have no doubt that the holding affected the learned Magistrate's mind and therefore his decision.

Mr. Maragia's argument in supporting the fourth ground of appeal which is to the effect that the statement under inquiry should have been taken by a magistrate as is required by the provisions of the current section 28 of the Evidence Act Cap 80 Laws of Kenya, is clearly misplaced as the subject statement in this case was taken on 3<sup>rd</sup> June 2002 long before the relevant section was amended. The original section 28 was amended by legal Notice No. 5 of 2003. At the time the inquiry statement was taken, the amendment had not been done and therefore I.P Michina Ndege was entitled in law to take such statements. Nothing turns on that complaint. The fifth ground of appeal also lacks merit as no unqualified person conducted the hearing of the case at any time. It is correct that the record shows that Sgt. Kiama attended court for prosecution on several occasions. We have gone through the evidence on record and our finding is that whenever he appeared, the hearing never proceeded and so he never prosecuted the case at any time. That ground cannot stand.

The next ground taken by the appellant was that the learned Judge of the superior court erred in hearing the appeal as a single Judge whereas according to him the provisions of section 359 of the Criminal Procedure Code are that the appeal should have been heard by two Judges of the superior court and not by one judge. As we have stated above, the appellant was originally charged with robbery with violence contrary to section 296 (2) of the Penal Code but after hearing, the trial court reduced that charge to that

of simple robbery contrary to section 296 (1) of Penal Code and sentenced the appellant to serve a prison term of 5 years. Section 359 (1) of the Criminal Procedure Code states:-

***“359 (1) Appeals from the subordinate courts shall be heard by two judges of High Court except when in any particular case the Chief Justice or a judge to whom the Chief Justice has given authority in writing, directs that the appeal be heard by one judge of the High Court.”***

We have seen the original file in respect of the appeal before the superior court and we note that the appeal to that court was admitted by Visram, J. We have no evidence that he had no authority from the Chief Justice to do so. He directed at the time he admitted the appeal, that it be heard by a single judge. That was proper. The single Judge who heard the appeal had jurisdiction to hear it. Before he started hearing the appeal, he warned the appellant that if after hearing the appeal, he was satisfied that the evidence on record proved the offence of robbery contrary to section 296 (2) of the Penal Code, then he would substitute the sentence of five years awarded by the trial court with that of death as provided by law. The appellant, notwithstanding the warning preferred to proceed with his appeal with the result that the learned Judge at the end of the hearing dismissed the appeal, found that the evidence proved the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced the appellant to death. Whereas it would have been ideal, once the appellant decided to proceed with the appeal notwithstanding the warning, for the learned Judge to adjourn the hearing and have the matter heard by two judges, there was in law nothing illegal in his hearing the appeal as a single Judge and proceeding to substitute the sentence as he did. Section 354 of Criminal Procedure Code spells out the powers of the High Court when hearing a criminal appeal. It provides at section 354 (3) (a) (iii) as follows:-

***“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may –***

***(a) in an appeal from a conviction –***

***(i) -----***

***(ii) -----***

***(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence.”***

The sentence for the offence of robbery with violence is death. That is what the trial court would have awarded and that is the sentence the learned Judge of the superior court awarded. That ground of appeal lacks merit

We have discussed all the above on the assumption that the appellant fully understood what went on during the entire hearing of the case. But is that so? Is it evident that the proceedings were conducted in a language that the appellant understood? That brings us to the third ground of appeal which is on the language that was used when the plea was taken and in giving evidence during the proceedings in the subordinate court. The Constitution of Kenya emphasizes the need to have an accused person understand the reasons of his arrest and detention. Section 72 (2) provides as follows:-

***“(2) A person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.”***

That is at the time he is arrested. Once he is charged with a criminal offence, section 77 (2) (b) states:-

***“(2) Every person who is charged with a criminal offence***

***(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.”***

In order to ensure that the above provisions of the Constitution are complied with, section 198 (1) of the Criminal Procedure Code states:-

***“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 and in a language which he understands.”***

In the record before us, the plea was taken on 7<sup>th</sup> June, 2002. It is recorded that the charge was read out and every element thereof explained. The language in which the charge was read out to the appellant is not stated. Indeed there is nothing to indicate the language which the appellant chose to speak in and in which he communicated to the court. The hearing of the case started on 6<sup>th</sup> January, 2003. The record shows that PW1 was sworn and he gave evidence. It is not stated in what language he gave evidence and whether there was any interpretation. That scenario holds for all witnesses. There was throughout the hearing no indication as to the language in which each witness gave evidence. The appellant gave an unsworn statement in his defence in the trial within trial and in his defence of the main case but again it was not indicated in which language he did so.

In our view this was a serious lapse in constitutional requirement. The appellant has now raised it in this appeal. It was not raised in the superior court and the learned Judge did not consider it. Mr. Njogu says in his submissions that the appellant was not prejudiced by that lapse as he (appellant) conducted his case well in the subordinate court and he appeared to understand the language that was used. We are of the view that the requirements of the Constitution should not be ignored. The reason as to why such a requirement was entrenched in the Constitution was to ensure a fair trial at all times and to ensure that none is punished on account of his inability to understand the language used when conducting his case and that he is able to be fully involved in the conduct of the case against him. Such matters cannot be left to the whims of individual judicial officers. The courts must ensure that the requirements are complied with to the letter. All that is necessary is to indicate at the commencement of the trial the language that an accused person has chosen to speak and the interpretation.

In our view, the omission to indicate anywhere throughout the record the language which the appellant understood and in which the court communicated to him during the time his plea was taken, during the time witnesses gave evidence and when he gave his statement in defence vitiated that trial.

Should we order retrial? We have considered the entire case as appears above. The prosecution did not ask for retrial as indeed that issue did not arise at the time this appeal was heard although the issue of language was argued.

In the case of **Benard Lolimo Ekimat vs. R.** Criminal Appeal No. 151 of 2004 this Court considering a matter similar to the one before us on principles stated as follows:-

***“There are many decisions on the question of what appropriate case could attract an order of retrial but on the main, the principle that has been acceptable to courts 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 interests of justice require it.”***

In this case, what commends itself to us considering all the above circumstances of the case is not to order retrial. We quash conviction, set aside the sentence of death and order that the appellant be released forthwith unless otherwise lawfully held. Judgment accordingly.

Dated and delivered at Nakuru this 22<sup>nd</sup> day of February, 2008

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**