



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CRIMINAL APPEAL NO. 189 OF 2000**

**JULIUS KAUNGA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Nairobi (Aluoch & Githinji, JJ.) dated 30<sup>th</sup> June, 1999***

**in**

**H.C.CR.A. NO. 736 OF 1997)**

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

**JUDGMENT OF THE COURT**

Although the appellant in his original memorandum of appeal drawn in person and a supplementary memorandum of appeal filed by his counsel has raised no less than twenty grounds of appeal, the bulk of them relate to concurrent findings of fact made by the two courts below and on credibility of witnesses. As this is a second appeal, only matters of law should be raised as clearly stated in **section 361 (1)** of the Criminal Procedure Code. This Court has also stated, times without number, that it will not interfere with concurrent findings of fact made by the two courts below unless they were based on no evidence or on a perversion of it. The test to be applied is whether there was any evidence on which the trial court found as it did – see Reuben Karani s/o Karanja v Republic (1950) 17 EACA 146. In M’Riungu v Republic [1983] KLR 455, this Court held:

“Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law (Martin v Glyneed Distributors Ltd (t/a MBS Fastenings – The Times of March 30, 1983).”

As for credibility of witnesses consideration must be made, and allowance given for it, that the trial court, unlike the appellate court, had the advantage of hearing and seeing the witnesses testify in court. That is why Sir. Kenneth O’Connor P, in **Peters v Sunday Post Ltd [1958] EA 424** at page 429 said:

“It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge

who tried the case, and who has had the advantage of seeing and hearing the witness.”

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The jurisdiction to review the evidence at the appellate level must therefore be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.

The one ground that raises a substantial issue of law and which, we think, is sufficient to dispose of this appeal, is in the supplementary memorandum of appeal, and is couched as follows:-

*“1X. That the superior court erred in law by failing to resolve (sic) that the appellants (sic) right under section 77 (1) 2 (a) (b) (c) (d) (e) (f) of the constitution (sic) as read with section 198 of the Criminal Procedure Code (Cap 75) Laws of Kenya were violated to the prejudice of the appellant.”*

We shall revert to that ground of appeal shortly.

The appeal arose from the conviction of the appellant by Makadara Principal Magistrate, (M. Muya, Esq.) on two counts for the offence of robbery with violence contrary to *section 296 (2)* of the Penal Code. It had been alleged that on the 6<sup>th</sup> day of February, 1997 at Eastleigh Section Seven, Nairobi, jointly with others not before the court, being armed with pangas and simis, he robbed George Karui Thayu cash Shs.197,000 and ten compact cassettes all valued at Shs. 199,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said *George Karui Thayu*. The second count related to a similar robbery on one *Moses Ole Kinuthia Mollel* from whom cash Shs.800, a Timex wrist watch and a National Identity Card, all valued at Shs.2,870 were stolen.

Upon his conviction the appellant was sentenced to death on both counts with a strange rider that the “*sentences to run concurrently*”. He challenged his conviction before the superior court, which dismissed his appeal and confirmed the sentence. We say the mode of sentencing was strange because a person convicted and sentenced to death can only be hanged once and not twice over! There need only have been one sentence of death on one count whilst the other is left in abeyance. This procedure has been repeatedly made clear by this Court in many previous decisions including **Abdul Debanoye & Anor. Vs. R. Cr. App. No. 19/2001 (ur) and Muiruri V R. [1980] KLR 70.**

The evidence that led to the conviction of the appellant came from the two complaints, an Administration Policeman who came to their assistance, and the investigating officer.

At about 3.30 a.m. on 6<sup>th</sup> February, 1997, ***Moses Ole Kinuthia*** (PW2) (Moses) was guarding his employer’s house in Eastleigh. It is a storied house near a road, and his employer ***George Karui Thayu*** (PW1) (George) was sleeping inside. A gang of about 30 people armed with iron bars, pangas and clubs suddenly struck and ordered Moses to raise his hands. He was tied up with ropes and the gang stole his watch and Shs.800/=. They ordered him to take them to the room which George occupied upstairs and he did so. They broke the main gate as they went upstairs and that is when George woke up. He heard a knock on his main door and when he checked outside, he saw many people. He asked who they were and Moses told him they wanted to kill him (Moses) if he did not call George to open the door. One of the gangsters then told him they were thieves and would kill the watchman if he did not open for them. Instead of opening the door, George escaped through an exit door and took a taxi to a Chief’s camp nearby. He reported the matter and was given three armed Administration Policemen, among them ***APC Edward Ndinga*** (PW3). Shortly after, they were at the scene where they found the robbers still in the premises upstairs and two of them sitting on Moses downstairs. The officers fired at them and killed one. APC Ndinga then fired at the other who came charging at him with a panga and he shot him in the leg.

The other gangsters who were upstairs escaped but one of them jumped through the window, broke his legs and later died in hospital. The man who was shot in the leg by APC Ndinga started running away after dropping his panga but APC Ndinga and George gave chase and caught him as he fell barely 20 metres from the house near the road. The man was the appellant. He was arrested and handed over to **Pc. Joseph Maina** (PW4) the Investigating Officer, in Shauri Moyo Police Station. The gangsters had stolen the money and cassettes complained of by George. The appellant was taken to hospital for treatment and was later charged with the offences stated earlier.

In his defence, the appellant denied that he was at the scene of the robbery. He was a resident of Eastleigh where he was a hawker in clothes. At about 5 a.m. he was on his way to get some clothes when he heard some gunshots. He was then shot by a person he never saw and fell near a bus stage. His claim was simply that he was a passerby who was shot by accident or mistake.

The trial court found that the appellant was visually identified at the scene by George, Moses and APC Ndaina but the superior court rejected that finding. Both courts were however of the same view that the circumstantial evidence linking the appellant to the robbery led to the inescapable conclusion that he was part of the gang that robbed the two complainants. The two courts rejected the appellant's defence as incredible in the circumstances.

We must now revert to the complaint made by the appellant in the ground of appeal reproduced above. The long and short of it as submitted by learned counsel for him, Ms. Arati, is that the entire record of the trial court is in the English language, which language the appellant is not conversant with. There was no indication at any stage as to the language chosen by the appellant for conduct of the trial. In that event the trial was in contravention of the Constitution and the Criminal Procedure Code and must therefore be declared a nullity. The appellant should then be set at liberty.

It is indeed so that the record of the trial court is made in the language of the court – English. At no stage is there any indication that English was the language of choice made by the appellant for his trial. He first appeared before the court for plea on 5<sup>th</sup> March, 1997 and that was the first and best opportunity for the court to find out what language the appellant understood and to record it. The court would also have indicated whether interpretation was necessary and provided the necessary interpreter. Instead the record is totally quiet and it was simply recorded that “*charge read over and explained*” and the appellant is recorded as stating “*not guilty*”. The hearing commenced on 14<sup>th</sup> April, 1997 and once again the plea was retaken in the same fashion before PW1 took the witness stand and presumably spoke in English. The record simply shows

**“PW1, sworn/states”**

So does the record on the evidence of PW2, PW3 and PW4 who testified on different dates before the prosecution case was closed on 9<sup>th</sup> May, 1997. The appellant who gave unsworn testimony is shown to have done so in English but he contends that he does not understand it; it is not the language he used and therefore the record is deceptive. In opposing the appeal on that ground, learned State Counsel Mr. Kivihya conceded that there was omission to indicate in the record whether any language other than English was used. He asserted however that the presumption is that the proceedings were conducted in English language because the appellant participated fully in the trial in cross-examining witnesses and in giving his own testimony. The complaint about an unfair trial was not therefore valid. Mr. Kivihya further submitted that even assuming that there was default in recording the language, a retrial of the appellant was still feasible since there was no time limit for prosecution of a criminal offence, and there was ample evidence to sustain a conviction in this matter.

We have considered the issue of law raised and the submissions of both counsel. This Court has repeatedly stated that the matter of language which criminal proceedings are conducted is not a mere technicality. We said in **Rwaru Mwangi v Republic Cr. A. 18 of 2006 (ur)**.

**“It has its foundation in the Constitution and in the Criminal Procedure Code, Cap 75. The burden is therefore on the trial court itself to show that an accused person has himself selected the language**

he wishes to speak during the trial. Section 77 of the Constitution in relevant parts states as follows:

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

- (a) .....
- (b) Shall be informed as soon as reasonably practicable, in the language that he understands and in detail of the nature of the offence with which he is charged;
- (c) .....
- (d) .....
- (e) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used in the trial of the charge”

The mode of taking and recording evidence in trials is also provided for in Part V of the criminal Procedure Code. As relates to subordinate courts, section 198 of the Code provides: -

“198.

- (1) 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.
- (2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.
- (3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.
- (4) The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili.”

In our view, the only way a trial court would demonstrate compliance with those provisions is to show, on the face of the record at the beginning of the trial, the language which the accused person has chosen to speak.”

See also Degow Dagane Nunow vs. Republic Cr. A. No. 223/05 (ur) where similar procurements were made and it was emphasized that:

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

- (a) .....
- (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;
- (c) .....
- (d) .....
- (e) .....
- (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used in the trial of the charge.”

**It is the responsibility of trial courts to ensure compliance with these provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place.”**

We are satisfied in this matter that the trial court did not comply with the provisions of the law cited above and we agree with the appellant that the trial was irreversibly flawed. We declare it a nullity.

Should there be a retrial?

In **Benerd Lolimo Ekimal v R. Cr. App. No. 151/04 (ur)** this Court stated:

**“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 an order for retrial should only be made where interests of justice require it.”**

The events that gave rise to the trial in this case took place some 10 years ago. The Attorney General must have been aware of the appeals filed before the superior court and before this Court since Notices of Appeal are always served on him. The appeal before the superior court was finalized on 30<sup>th</sup> June, 1999 and a notice of appeal to this Court was filed on 8<sup>th</sup> July, 1999. There is no explanation as to why the appeal took another 8 years before it was placed before this Court for hearing. We refuse to accept that the Attorney general will simply be served with a Notice of Appeal and for years on end does not bother to follow up the matter. Take this case; the natural consequence of the delay is the likelihood that witnesses may have disappeared, died or their memories faded. Exhibits may be difficult, if not impossible to locate. Such circumstances would be prejudicial to the appellant in a retrial and in this matter the order that commends itself to us is to decline to order a retrial.

In the result we allow the appeal, quash the conviction and set aside the sentences of death imposed on the appellant. He will be set at liberty unless he is otherwise lawfully held.

***Dated and delivered at Nairobi this 14<sup>th</sup> day of March, 2008.***

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

**P.N. WAKI**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**