



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NYERI

Criminal Appeal 112 of 2003

MOSES KARAGU WAMBUGU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma & Mitey, JJ) dated 19th March, 2003

In

H.C. CR. A. No. 273 of 2000)

JUDGMENT OF THE COURT

This is a second appeal by Moses Cargo Wambugu (the appellant) against his conviction and sentence for the offence of robbery with violence contrary to **section 296 (2)** of the Penal Code, particulars of which were:-

On the night of 7th January, 2000 at Naigiri village in Kirinyaga District of the Central Province being armed with offensive weapon namely panga robbed Paul Mwangi Gachoki, two maize flour of 2 kgs, Three packets of home baking flour, 4 kgs, Two bottles of fruit juice, Two Kasuku fat, 500 grams, 2 blue band of 100 grams all to the total value of Kshs.360/- and at or immediately before or immediately after the time of such robbery wounded the said Paul Mwangi Gachoki.”

At the time of plea there is no indication in the trial Magistrate’s record what language was used when the charge was read over and explained to the appellant, nor is there any indication which language the appellant used when he pleaded to the charge. Thereafter, the case came for mention on several occasions but at no time was the language the court used in communicating with the appellant noted in the record of his case. Eventually the case came for hearing before W. N. Njage, Senior Resident Magistrate, who then received evidence from four prosecution witnesses and the unsworn statement of the appellant before reserving his judgment on the matter. Throughout their testimony there is no indication what language they used in giving their evidence.

In his judgment the trial magistrate carefully evaluated the evidence, found the appellant guilty as charged, convicted and sentenced the appellant to the mandatory sentence of death.

In his first appeal to the superior court the appellant did not raise any ground relating to non-compliance with the provisions of **section 77 (2) (b)** of the Constitution of Kenya and **section 198 (1)** of the Criminal Procedure Code. This ground was raised for the first time before us in a supplementary memorandum of appeal which was filed with our leave. The nature of the appellant’s lamentation is not that he did not understand the proceedings before the trial court, but that the language that was used in the proceedings was not stated.

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

“198(4) The language of the High Court shall be English and the language of a subordinate court shall be English or Swahili.”

It must be assumed that the trial of the appellant was conducted in English or Swahili or in both English and Swahili. It is not however, evident whether the appellant understood either of the both languages.

Section 198 (1) of the Criminal Procedure Code provides thus:-

“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.”

The appellant’s ground of appeal relating to language is curiously framed. It is not framed in such a way as to show that the proceedings at his trial were conducted in a language he did not understand, but, in pertinent part, that:-

“... the superior court erred in law in failing to find that there was violation of the appellant’s fundamental rights under section 77 (2) (b) of the Constitution of Kenya in that the language of trial was not indicated.” (Emphasis, supplied).

Section 77 (2) (b) of the Constitution does not provide that the language used in the trial be indicated. The sub-section provides as follows:-

“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.”

This provision has to be read with **section 198 (1)**, Criminal Procedure Code, which we earlier quoted, which requires interpretation of the evidence given in his presence at his trial. Reading the two provisions together, there is neither a Constitutional nor Statutory provision requiring the language in which criminal proceedings are conducted be indicated. The import of both provisions is that the accused person should be in a position to understand the proceedings relating to his trial.

Mr. Wanjohi Mburu appeared for the appellant in this appeal. In his submission, the failure by the trial Magistrate to indicate the language the trial was conducted is fatal to the trial and renders it null and void. He prayed that we declare the appellant’s trial before the subordinate court and subsequent proceedings before the superior court, a nullity, quash the appellant’s conviction and set aside the sentence of death.

Mr. Orinda, for the state, conceded the appeal, and like Mr. Mburu, submitted that the failure to indicate the language of the proceedings before the trial court rendered the trial a nullity. While agreeing that the trial should be declared null and void, he requested that we order a retrial.

As we stated earlier there is no clear legal requirement that the language of the proceedings be indicated. What the law requires is that where an accused person does not understand the language of the court, he should be provided with an interpreter to enable him fully understand the proceedings. The noting down of the language used arises from practice and is intended to show that the appellant was unable to follow the proceedings in English or Swahili or both English and Swahili. The language to be noted is the language which the accused person understands best and where appropriate the person who interpreted the proceedings into that language.

The foregoing notwithstanding, we ourselves have gone through the record of the trial court and we are unable to understand whether in the course of his trial the appellant was able to understand the language of the court. For that reason alone, we allow the appeal, quash the appellant’s conviction for the offence of robbery with violence contrary to **section 296 (2) (a)** of the Penal Code, and set aside the sentence of death which was meted out to him.

The next question for consideration is whether or not we should order a retrial. Mr. Mburu, for the appellant, submitted that it would be inappropriate to do so as the appellant, in his view, has been in custody for a long time. He was convicted about 8 years ago, and in counsel’s view, witnesses might not be traced, and if they are traced they are unlikely to remember well relevant facts in the appellant’s case. He cited this Court’s decision in **JULIUS KAUNGA V. R.** Criminal Appeal No. 189 of 2000, in support of his submissions on that issue.

Mr. Orinda, on the other hand was of the view that 8 years cannot, in the circumstances of this case, be regarded as unduly long. Prosecution witnesses were from the same family, in his view, the appellant was caught red-handed, and the trial did not involve documentary exhibits, nor will the retrial. Therefore it is unlikely that any problem with regard to evidence will arise. He concluded his sub-mission that it will be in the public interest that a retrial be ordered.

We eschew any attempt at commenting on the evidence as we think this is an appropriate case in which a retrial should be ordered.

The complainant, Paul Mwangi Gachoki (PW1) was attacked at his house by several people who gained entry by digging a hole in the ground and burrowed into his shop which shared a wall with his residence. When they gained entry into the shop they found the door into the complainant’s residence open whereupon they went to where the complainant and his wife were asleep, cut him on the forehead with a sharp object and struggled with him when he tried to confront them.

It was the complainant’s evidence that he held one of his attackers firmly. They struggled together and in the course of that struggle they found themselves in the sitting room. In the meantime the complainant was screaming calling for help. Neighbours responded to the screams and came to his rescue. The appellant was arrested inside the complainant’s house.

A part from the complainant, his wife Margaret Wangithi (PW2), and Peter Njanja Gateri (PW3) were the other eye witnesses. The last prosecution witness was a police officer. These are the circumstances which Mr. Orinda says justify a retrial.

We have considered the circumstances outlined above. We are of the view that it might not be difficult to locate the whereabouts of

witnesses and if for any reason they are not able to fully remember what transpired on the material night of he alleged robbery that is not a matter which can be said to be prejudicial to the appellant. We do not lose sight of the fact that trials take long. However, the evidence the prosecution relied upon in the appellant's trial was not, prima facie, flimsy. The offence itself is capital in nature, and in the circumstances, and as rightly pointed out by Mr. Orinda, public policy would demand that there be a retrial, which we hereby order. The appellant to be presented before a magistrate other than Mr. Njage, within fourteen days from the date hereof to be retried for the same offence herein first stated. It is so ordered .

Dated and delivered at Nyeri this 16th day of May, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.