REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Criminal Appeal 109 of 2005

ANTONY C. KIBATHA ……..……. APPELLANT

AND

REPUBLIC ……..……..... RESPONDENT

(An appeal from judgment of the High Court of Kenya at Nairobi (Ochieng & Makhandia, JJ)

dated 27th July, 2004

In

H. C. Cr. A. No. 613 of 2001)

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JUDGMENT OF THE COURT

Antony Chege Kibatha, the appellant herein, appeals to the Court from the judgment of the High Court of Kenya (Ochieng and Makhandia, Ag. JJ – as they then were) dated 27th July, 2004 and by that judgment the learned Judges had dismissed an appeal the appellant had lodged against his conviction and sentence of death imposed upon him by the Senior Resident Magistrate of Kiambu on the 11th May, 2001. Before the trial Magistrate, the appellant had been charged with the offence of robbery with violence contrary to *section 296(2)* of the Penal Code and the particulars contained in that charge were that on 1st day of June , 2000 at Tinganga village of Kiambu District in Central Province, the appellant, jointly with others not before the court, and while armed with offensive weapons namely rungu's, robbed John Mukiri Kimani of Kshs.12,500/- and at or immediately before or immediately after the time of the robbery, they used or threatened to use actual violence to the said John Mukiri Kimani.

John Mukiri Kimani gave evidence for the prosecution as P.W1. He worked in Nairobi and on the day of the robbery, he had been paid his salary. John Mwangi Gathitu PW2, was a friend of P.W1 and that day the two friends agreed that P.W2 was to visit P.W1 at the latter's home in Ting'ang'a. For the entertainment of his friend, P.W1 bought one kilogram of meat but on the way home, the two friends entered a local bar near home and they started drinking beer. The meat was kept with the bar-maid Esther Wanjiku Nanguru (P.W3). P.W1 knew the appellant and according to P.W1, P.W2 and P.W.3, the appellant was with them at the bar. At around midnight P.W1 went out to relieve himself. The appellant followed him outside and told P.W1 that P.W2 had already left the bar. That information was false . Then, it appears from the recorded evidence, that the appellant ran back and collected the meat which

PW1 had kept with P.W3 . The appellant told P.W2 that P.W1 had gone away. The appellant then asked P.W1 to take him to the home of one Thuku. P.W1 at first agreed but on the way, he changed his mind and started to walk back . The appellant followed P.W1 and on the way, P.W1 came upon two persons who were armed with rungus or such like weapons. One of those people hit P.W1 on the head and he fell down. The appellant put his hand in P.W1's shirt pocket and removed the Kshs.12,500/- which was there. The appellant and the two men disappeared and P.W1 reported the matter to the police, was issued with a P3 Form and was later examined by Dr. Ndakayu (P.W5) who completed and signed the P3 Form on 14th June, 2000. The appellant was then arrested on 5th July, 2000 and P.C David Ouma (P.W4) said that though P.W1 gave him the name of the appellant on the night of the attack, he did not arrest the appellant immediately because he was either waiting for the P3 Form to be filled in and signed or for P.W1 to come and take him to the appellant. P.W1 swore he gave the name of the appellant to constable Ouma on the night of the attack. The appellant's version on this aspect of the matter was that he was not arrested immediately because P.W1 never saw him at the scene of the robbery and therefore could not have given his name to the police. But both P.W1 and P.W4 were positive that the appellant's name was given on the night of the attack.

In his sworn statement, the appellant did not say anything about the night of the robbery. His evidence was confined to the 5th July, 2000 when he was arrested and what happened after his arrest.

The learned Magistrate considered the two versions put before him and having done so he concluded as follows:-

"***The evidence against the accused is strong, consistent and voluntarily (sic). Complainant was badly injured and taken to Kiambu Hospital that very same night. He was robbed by accused who was with other two people. Accused defence which is a mere denial relating to the date he was arrested and not the date of robbery has no merit at all."***

Of course, the magistrate in his assessment of the recorded evidence made two serious misdirections which the High Court dealt with on first appeal to it. The Magistrate had wrongly thought that P.W1 had said it was the appellant who had hit him on the head. That was not correct as P.W1 said it was one of the two people with the appellant who had hit him on the head. The High Court correctly appreciated this point and dealt with it. Again the Magistrate had wrongly thought that the appellant had admitted the offence before he was arrested and brought to court. The evidence on which the alleged admission was based was at best hearsay. Once again the High Court correctly appreciated the position in its assessment and re-evaluation of the evidence and put the position right. The High Court then concluded its judgment as follows:-

"***The complainant was hit on the head with a rungu. Immediately thereafter, the appellant put his hands into the complainant's shirt pocket and removed K.shs.12,500/-. As the appellant and the complainant knew each other very well, over a long period of time prior to the incident, there was no doubt about the appellant's positive identification. We therefore hold that the convictions as safe.***

Accordingly we dismiss this appeal and uphold both conviction and sentence."

This is the decision the appellant was contesting before this Court and his learned counsel Mr. Ngumbani Mutua filed a supplementary memorandum of appeal containing two grounds as the basis for the challenge of the High Court decision. Those grounds were:-

"***1. THAT the learned first appellate court Judges erred in law by failing to find that the appellant was not provided with an interpreter contrary to section 198(1) CPC and section 77(2) of the Constitution of Kenya.***

2. THAT the learned appellate Judges erred in Law by failing to analyze and re-evaluate the evidence on record exhaustively."

These were the only grounds argued by Mr. Mutua before us. On the first ground, Mr. Mutua

contended that the appellant was only provided with an interpreter on the day his plea was taken but that during the trial it was not indicated in the record that there was an interpreter provided Mr. Mutua relied on the Court's decision in **JACKSON LESKEI VS. REPUBLIC**, Criminal Appeal No. 313 of 2005, unreported. In that case, the position was remarkably similar to that obtaining in this appeal. **LESKEI's** plea was taken on 18th October, 2000 and the record showed that the languages being used were English and Swahili. But after the plea, the record was wholly silent as to what language was being used. The trial opened on 6th February, 2001 when the charge was once again read and explained to **LESKEI**; but the language in which that was done was not shown. Various witnesses testified on behalf of the prosecution; the language in which they did so was not shown. The appellant himself made a short-statutory statement but once again the language in which he addressed the court was not shown. That is the exact position in this appeal and dealing with that issue, this Court (Bosire, Waki & Onyango-Otieno, JJ.A), having set out the provisions of ***section 77(1) &(2)*** of the Constitution, stated as follows:-

"***By entrenching in the Constitution the right to interpretation in a criminal trial the framers of the Constitution appreciated that it is fundamental for an accused person to fully appreciate not only the charge against him but the evidence in support thereof. It is then that it can be justifiably said that an accused person has been accorded a fair hearing by an independent and impartial court. It is the court's duty to ensure that the accused's right to interpretation is safeguarded and to demonstratively show its protection."***

We do not think we could ever improve on that statement of the law concerning the fair trial provisions under ***section 77*** of the Constitution. A court can only demonstratively show that the rights of an accused person under ***section 77*** have been protected if its record shows that that has been the case. The record of the Magistrate in this appeal, as was the position in **LESKEI's** case does not show that the trial court protected the appellant's right to have the proceedings interpreted to him in the Kikuyu language. In conclusion, the Court in **LESKEI's** case stated:-

"***In view of the foregoing, we think that the appellant's trial was flawed, and his conviction unsafe. As a result we do not consider it necessary to consider the judgment of the superior court as that court did not deal with the issue of language nor do we find it essential to consider the propriety or otherwise of the appellant's conviction. Considering the seriousness of the charge the appellant faced we consider this to be a fit case for a re-trial. ……"***

We think the circumstances in **LESKEI's** case are indistinguishable from the circumstances in this appeal and the same order for a re-trial must also be made in the appeal we are dealing with. **LESKEI's** plea was taken on 18th October, 2000; the present appellant's plea was on 14th July, 2000; **LESKEI** was eventually sentenced to death on 19th April, 2001; the appellant before us was sentenced to death on 11th May , 2001. **LESKEI** re-trial was ordered by this Court on 22nd September, 2006. Taking all these matters into account we are convinced that we ought to make orders similar to those made in **LESKEI's** case. The evidence which was brought against the appellant was not frivolous and might well result in a conviction. That being our view of the matter, we allow the appellant's appeal, set aside the conviction and sentence of death recorded against him and order that he shall be re-tried before a magistrate with competent jurisdiction at the court of the magistrate at Kiambu. Pending his re-trial, the appellant shall remain in custody. Those shall be our orders in the appeal.

Dated & delivered at Nairobi this 16th day of March, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.