



IN THE COURT OF APPEAL OF KENYA AT NYERI

Criminal Appeal 18 of 2006

RWARU MWANGI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Meru (Onyancha & Sitati, JJ.A) dated 17th November, 2005 In H.C. Cr. A. No. 158 of 2004)

JUDGMENT OF THE COURT

In concluding their judgment on the first appeal in this matter, the learned Judges of the superior court (Onyancha/Sitati, JJ) had this to say:-

“We are however very perturbed by the careless and shoddy manner in which this serious case was handled. We do not see why the case was not fully investigated by an independent investigating officer. No clear record of arrest and detention of the accused at Chogoria police patrol base or any other where accused was detained and later charged, were put in evidence during the prosecution of the case. No evidence of the handling of the gun from the time it was received in some police station, through the process of sending it for ballistic tests and return of it with the report, were put in evidence. This conduct is below the standard of our police force which otherwise is competent. We castigate it. We have recently noticed a number of cases where due to poor investigations, the cases which should not otherwise be lost, were lost. We hope this issue will be taken up seriously by the Attorney General’s office in this part of the Republic. May the office properly express the court’s concern over the matter to the various police stations under his jurisdiction.”

Despite such shortcomings, however, the superior court dismissed the appellant’s appeal. We are now told by Mr. Orinda, Principal State Counsel, that there is no indication in the record as to how the superior court resolved the reasonable doubts they expressed or why the doubts did not enure to the benefit of the appellant. He conceded the appeal before us on that ground and on the further grounds that the language used in the trial of the appellant was not apparent on the face of the record; the recording of evidence by the trial Magistrate was perfunctory; the manner of arrest of the appellant was not in evidence; and that the evidence on an alleged gun used in the incident in issue was botched up.

What is the appeal before us about?

The appellant was charged and tried before Chuka Senior Resident Magistrate with one count of robbery with violence contrary to **section 296 (2)** of the Penal Code, and one count of being in possession of a firearm without a firearm certificate contrary to **section 4(1)** as read with **section 4 (3)** of the Firearms Act. It had been alleged in the charge sheet, that he did, on the 15th day of September 2003 at Chogoria Township in Meru South District jointly with others not before court, while armed with a Helwan pistol rob one Isaac Wambugu Garagari of his motor vehicle Reg. No. KAB 650Z, a Toyota Corolla valued at Kshs.350,000/- and at or immediately before or after the time of such robbery, threatened to shoot Isaac

Wambugu Garagari. In the second count it was alleged that he had no license for the pistol he allegedly used in the robbery.

The trial commenced before A.N. Kimani, Senior Resident Magistrate on 2nd December, 2004 when two prosecution witnesses testified, and was concluded on the 9th December, 2004 when the third witness, and the appellant testified. The first two prosecution witnesses were the complainant, Isaac Wambugu (PW1) and his friend Antony Muriithi Mwangi (PW2). They were both in PW1's Toyota car, driving around Chogoria at about 1.30 p.m. when they approached a road junction and slowed down to join a main road. Then they saw two young persons who looked drunk approach them. Suddenly one of them grabbed the car keys and switched off the engine. He ordered the complainant to move to the back seat. The other one who was holding a pistol entered the car and threatened PW2 but PW2 grabbed the pistol and wrested it from him. The young man at the steering wheel started driving off but PW2 turned the steering wheel sideways forcing the car into a ditch after about 200 metres. The two young men jumped off the car and ran away. PW1 and PW2 screamed for help. Some 300 metres away from the scene, according to PW1, members of the public arrested the appellant and brought him back to the scene. None of the members of the public who arrested the appellant was called to testify. The only other witness for the prosecution was a police officer, Cpl. Obed Kiio (PW3) who was standing near Chogoria Police Patrol base that afternoon and saw a car driving past in a zig zag manner with four men inside. Soon after, it ended up in a ditch and one man ran away. According to him, one man was arrested on the spot by members of the public. He went to the scene and took possession of a pistol which was given to him by PW1. He also arrested the appellant who was handed over to him by members of the public.

For his part the appellant said he was in Chogoria market to buy some tobacco and did in fact buy some 40 kilograms of it. As he went near a car where some members of the public were, the owner of the vehicle said "*one person looked like this one.*" He protested his innocence but was still handed over to a police officer in civilian clothes, who came to the scene. He was taken to Chogoria police station and was subsequently charged with the offences stated earlier.

The trial Magistrate believed that the appellant was arrested at the scene and was identified by PW1 and PW2. He convicted him for the offence of robbery with violence in count one. The offence of possession of the pistol in count 2 was rejected on the ground that the attacker who disappeared is the one who had possession of the pistol and not the appellant. The superior court upheld those findings and dismissed the appeal, hence the second and final appeal before us.

The appellant raised six issues of law before us through his counsel Mr. Kingori. In view of the result we have reached in this matter and the concession made by Mr. Orinda, we need only deal with the main ground which was emphasized by Mr. Kingori, and that is, the language used in the trial.

This Court has repeatedly stated that the matter of language in which criminal proceedings are conducted is not a mere technicality. 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 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”

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.

In the matter before us the trial opened on 2nd December, 2004. There is no indication of the language chosen by the appellant for the proceedings on that day. The witnesses who testified, PW1 and PW2 apparently spoke in the English language which is on record as the trial Magistrate simply recorded:-

“PW1 Adult male Christian sworn states.”

So too for PW2. At the end of the day however, without any explanation, the prosecutor made a curious application as follows:-

“Court Prosecutor: We need an interpreter who understands Kikuyu.”

The court then made an order:-

“Hearing 9.12.2004

Summons (sic) Jane Kamau to help translate”

There is no coram recorded for the resumed hearing on 9th December, 2004 when PW3 and the appellant testified. The evidence of both was however recorded in English without any indication that there was interpretation from any other language.

It is clear in the above circumstances that the trial was conducted in contravention of the law and the Principal State Counsel properly, in our view, conceded the appeal.

Should we order a retrial?

Mr. Orinda for the State did not ask for one and we think in the circumstances of this case that it is undesirable to order one. Ordinarily a retrial will be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial; the length of time having elapsed since the arrest and arraignment of the appellant; and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not. See **Muiruri vs. Republic [2003] KLR 552**. It is also necessary to

consider whether on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result from a retrial - See Mwangi vs. Republic [1983] KLR 522. We have taken all those principles into account and we think an order for retrial in this case would not be proper.

In the result, we allow this appeal. We quash the conviction of the appellant and set aside the sentence of death imposed on him. The appellant shall be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 11th day of May, 2007

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.