



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

Criminal Appeal 313 of 2005

JACKSON LESKEI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Appeal from judgment of the High Court of Kenya at Nairobi (Lessit J & Ochieng Ag.J)
dated 26th October 2004*

in

H.C.CR.A NO 518 of 2001)

JUDGMENT OF THE COURT

In this second appeal against conviction and sentence for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, Jackson Leskei, the appellant, in addition to grounds challenging his identification, failure to call essential witnesses and paucity of evidence, raises three supplementary grounds of appeal namely:-

- (1) The learned Judges of the High Court misdirected themselves by disregarding the explanation given by the appellant when they found that the appellant did not challenge or shake the evidence adduced against him by the prosecution witnesses thereby shifting the burden of proof upon the appellant.
- (2) The learned Judges of the High Court erred in law in affirming the conviction of the appellant whereas the trial in the subordinate court was conducted in a language which the appellant did not understand.
- (3) The learned Judges of the High Court erred in law in affirming the conviction of the appellant whereas judgment of the subordinate court was neither delivered nor pronounced in open court and the appellant who was in prison custody was neither before court nor produced in court at the time of the purported delivery of judgment.

As is clear from the grounds of appeal, the appellant’s complaints are centred on the procedural aspects of his trial and eventual conviction and sentence. That being the case we consider it essential to go through the proceedings to ascertain the truth or otherwise of his complaints.

Plea was taken on 18th October, 2000, when it was recorded that the appellant was present, the

language used was English and Swahili, and the appellant pleaded not guilty to the charge of robbery with violence contrary to **section 296 (2)** of the Penal Code. The coram in subsequent dates when the appellant's case came for mention is correctly recorded, but there is no indication as to what language was used. The appellant came for trial on 6th February, 2001, and it is recorded that the charge was read and explained but the language used is not recorded. Three witnesses testified, and two of them are shown to have been cross-examined by the appellant in person. The third one, a police officer, was not cross-examined, we believe because his evidence was formal and related only to the re-arrest of the appellant. The appellant was put on his defence and made a short statutory statement. He called no witnesses.

Judgment was reserved to be delivered on 19th March, 2001, but on that day it was not delivered, and there is no explanation on record for the failure to do so. Eventually the judgment was apparently-“delivered” on 5th April, 2001 as it bears that date under the magistrate's signature at the bottom. There is however no note that it was pronounced. What is noted, is that the prosecutor did not have the appellant's previous record, with the result that the trial magistrate fixed the appellant's case for mention on 19th April 2001, for record and sentence. There was no note whether or not the appellant was present in court on that day.

Mr Wamwayi, for the appellant submitted before us that the appellant was not present, otherwise a note to that effect would have been made on record. We have checked the trial court's original record, and we note that a remand warrant shows the appellant was indeed in court. It therefore follows that the trial magistrate omitted to record his presence.

The appellant was sentenced on 19th April, 2001, to the mandatory death sentence provided for an offender under **section 296(2)** of the Penal Code. In his first appeal to the superior court the appellant essentially raised three broad issues, the first one being identification, and the second the alleged failure by the trial court to consider his defence. He did not raise any ground relating to language. Other than the issue of the appellant's identification, this is the only other issue in the appellant's grounds of appeal which is outstanding for consideration, in view of the fact that we made a finding that the appellant was indeed present when judgment was purportedly pronounced against him. Again, looking through a copy of his written submissions to the superior court we are left with no doubt that the trial court pronounced its judgment in open court.

As to language, the Constitutional provision on it is **section 77(1) & (2)** which in pertinent part, provides as follows:-

“77 (1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(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 at the trial of the charge.

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.

In the matter before us, while, by inference, we think that the appellant was possibly allowed the services of an interpreter, in absence of a note to that effect, we entertain a doubt that that was so. It is a matter which has caused us much anxiety more so considering that the appellant has a sentence of death hanging over his head. This and several other cases we have handled before, show the grave danger inherent in the failure by the trial court to record the essential details in proceedings before it, for instance, the name of the officer trying the case; the prosecutor and his rank; the court interpreter or clerk and the language or languages of the proceedings; the language used by each witness; that judgment was pronounced; the date thereof and in whose presence, et cetra. These are as important as the evidence and form part of the fair process of justice, the omission of which might affect an otherwise sound conviction.

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 retrial. Accordingly we set aside the appellant's conviction for the offence of robbery with violence contrary to **section 296(2)** of the Penal Code, set aside the sentence of death imposed on him, and order that the matter be referred back to the trial court for a retrial by a magistrate with competent jurisdiction other than Miss Mwangi (PM). It is so ordered.

Dated and delivered at Nairobi this 22nd day of September, 2006

S.E.O. BOSIRE

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR