REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Criminal Appeal 11 of 2004

FRANCIS MACHARIA GICHANGI …….... 1ST APPELLANT

JOHN MUTHIKE WANGARU …….. 2ND APPELLANT

JOSEPH KINYUA MURIUNGI ……..…..3RD APPELLANT

JORAM KINYUA NDUNGU …….. 4TH APPELLANT

AND

REPUBLIC ……...……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Nairobi (Mbogholi & Mutitu JJ.) dated 30th July 2003

in

H.C.CR.A. NOS. 149, 150 & 151 OF 1999)

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JUDGMENT OF THE COURT

This is a second appeal. There are four appellants, namely, Francis Macharia Gichangi alias Muriithi (1st appellant), John Muthike Wangaru (2nd appellant), Joseph Kinyua Muriungi (3rd appellant) and Joram Kinyua Ndungu (4th appellant). These individuals were jointly charged with three other persons whose appeals are not before us with three counts of robbery with violence contrary to section 296(2) of the Penal Code. And except for the 2nd appellant, each of the appellants separately faced an alternative count of handling stolen property contrary to section 322(2) of the Penal Code. It is clear from the record of appeal that the accused persons were not presented to the trial court on the same day. Some of the seven accused were charged under Criminal Case No. 1556 of 1997, others under Criminal Case No.1773 of 1997 and yet others under Criminal Case No. 1900 of 1997. The record of appeal is not explicit on who was charged in the first, second or the third of the three cases we have alluded to above.

The background facts to all the three robbery with violence charges are short and straightforward. On the night of 21st and 22nd April, 1997, a gang of robbers raided the home of Henry Mithamo Karigu at Kamuiru Village in Kirinyaga District. On the same night the shop of one Frederick Muchiri, at Muragara Trading Centre, and also, the shop of Ephantus Mwai Mboi at Gathuthuma trading centre both in Kirinyaga District were raided too, and several items were stolen. In the first incident a Chevrolet pick-up and Kshs.2000/= were stolen, while in the second an assortment of shop goods, an umbrella and a calculator were stolen. In the third incident like in the second, several assorted shop goods including cigarettes, Kshs.5000/= in cash, 2 lamps, torch, coat and other clothing items, among other items, were stolen. Before the robbers escaped with those items they physically assaulted persons who were in those premises. None of the robbers was identified during the said robberies.

The appellants were arrested from different places on different dates. The first appellant was arrested on 25th May 1998 at about 12 p.m. inside a certain house in a place known as Muthithi, while in the company of two people one of whom was Peter Kinyua. Inside that house a green school bag was recovered, which Nicholas Mugambi Muchiri, a student at Kianyaga High School and who was the son of Frederick Muchiri, the complainant in the second incident, identified as his. It was stolen in the course of one of the three robbery incidents.

PC Patrick Kasuki, (P.W.11) arrested Jorum Kinyua (4th appellant) on 24th April 1997, from Site Estate, Kerugoya. Kasuki testified that the 4th appellant led him to his own house from where an assortment of cigarettes, a pair of rubber shoes, a new shirt, matchboxes, among other items, were recovered. Kasuki testified that he arrested the 4th appellant with one Muthike and another person who later escaped from lawful custody.

Kasuki also arrested Joseph Kinyua (2nd appellant) from Ngurubani. This was on 25th April, 1997. An umbrella which was identified by Muchiri as one of the items stolen from him on the night of 21st /22nd April, 1997 was recovered from him. The witness also testified that the 2nd appellant led him to the house of a co-accused, Mugo Simba, from where a calculator was recovered bearing the name of F. Muchiri inscribed at the back. F. Muchiri, (P.W.8) identified the calculator as one of the properties stolen from him on the night of the robbery complained of.

At the close of the prosecution case the trial magistrate, W.N. Njage, ruled, as material, as follows:

"I found that the 1st, 2nd, 4th, 5th and 6th accused persons have a case to answer in counts No. 1, 2 and 3 as they are charged.

I hereby find that the 1st, 2nd, 4th and 5th accuseds (sic)have a case to answer in the alternative charges 1, 2, 4, 5 respectively.''

The ruling above clearly shows a misdirection. It was not proper for the trial magistrate to rule on both the main and alternative counts. The charges are framed in the alternative. The ruling does seem to us to presuppose that they are independent counts, which, in our view, is improper. In a case such as this one it is undesirable to make a finding under **section 210** of the Criminal Procedure Code on both the main and alternative counts. A general ruling is sufficient. The court may only make a specific finding in the judgment after hearing the defence case. In his defence the 1st appellant, who was the 5th accused at the trial, stated that while walking to his home from Kiandegwa Village, he was arrested by youthwingers and taken to Wamumu Police Post and later to Wanguru Police Station on the allegation that he had stolen a bag. The arrest took place on 12th May 1997, at about 8 p.m. At the time of his arrest he was accompanied by two men. Cpl. Joseph Muguna, (P.W.7) arrested him. He denied he was arrested in possession of any bag, and also that on the night of 21st /22nd April, 1997, he was

involved in the three separate robberies.

The 2nd appellant, John Muthike Wangaru, was the 6th accused at his trial. His defence was that he was arrested about one and half months after the alleged robberies, was interrogated for about 17 days before he was charged. He denied any involvement in the robberies. He also denied anything was recovered from him.

Joseph Kinyua Muriungi, was the 2nd accused. He was arrested on 25th April 1997. He denied he was involved in any robbery. He also denied anything was recovered from him. It should be recalled that the prosecution alleged and called evidence to the effect that an umbrella was recovered from him which was identified as one of the items stolen from F. Muchiri. A statement under inquiry was obtained from him in which he confessed to have participated in the three robberies, and that as his share he got the umbrella among other items. In his defence however, he denied he made that statement and stated that he was merely asked to affix his signature on some papers without being told why he was signing.

The 4th appellant, Joram Kinyua Ndungu, was the first accused. He was arrested with an assortment of shop goods. In his defence he stated that he was arrested at his cousin's house with the shop goods, but he explained that they belonged to his cousin who was hawking them about in the area. He denied he was involved in the robberies complained of.

The trial magistrate relied on the doctrine of possession of recently stolen property and the charge and caution statement of the 2nd appellant to convict each of the four appellants.

The superior court on first appeal affirmed the trial magistrate's decision, without closely analyzing the evidence as it was expected to do as a first appellate court (Peters v. Sunday Post Ltd [1958] EA 424). The appellants were aggrieved and hence these consolidated appeals.

Mrs. G.W. Murugi, Principal state counsel, conceded the appeals of the 2nd and 4th appellants, quite properly so, in our view. It is not clear from the evidence on record how and when the 2nd appellant was arrested, and by whom. The prosecution did not adduce any clear evidence to connect him to either the main or alternative counts. Had the superior court closely examined the evidence this aspect would have come out clearly. His conviction is unsupported by any clear and cogent evidence.

Likewise, in the case of the 4th appellant, although evidence was adduced to show he was found in a house with an assortment of shop goods, there was no evidence to show they were part of the goods which had been stolen in the course of the three robberies. In his case, therefore, there was no basis for invoking the doctrine of possession of recently stolen goods. The items found with him were ordinary shop goods without any special mark.

Before we go into the merits or otherwise of these consolidated appeals, if the need arises, it is important to consider two constitutional issues which have been raised on behalf of the appellants. Firstly, it was contended that the proceedings at the trial of the appellants were not conducted in a language which the appellants could understand or understand fully. It was contended that there was no interpretation and that the failure to interpret the proceedings into a language or languages the appellants could fully understand violated their constitutional right under **section 77(2)(f)** of the Constitution of Kenya.

The second issue is that it was alleged that the appellants were held in police custody for longer than 14 days in breach of the provisions of **section 72(3)(b)** of the Constitution.

Regarding the first issue, the trial court record is silent on the language the proceedings were conducted. In **Fredrick Kizito v. Republic** Criminal Appeal No. 170 of 2006, this Court authoritatively stated thus:-

"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 cetera. 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 **Albanus Mwasia Mutua v. Republic** Criminal Appeal No. 120 of 2004, this Court, after citing the case of **Swahibu Simbauni Simiyu and Another v. R**. Court of Appeal, Criminal Appeal No. 243 of 2005, rendered itself thus:

"…since the record of the magistrate did not show the language used by the two appellants, there was a violation of the appellant's constitutional rights under the foregoing section [section 77 (2)(b) of the Constitution] and the appeal was allowed. Once again, the nature and strength of the evidence brought by the prosecution in support of its charge did not really count.''

It must be recalled that the general principle of law is that as a general rule each case must be considered on the basis of its own peculiar facts and circumstances. A perusal of the record of appeal shows that throughout the proceedings before the trial court there is no indication as to the language of the proceedings. There is no indication whether the appellants or any of them understood English or swahili which are the languages in a subordinate court. The magistrate's record shows that each of the appellants acted in person and cross-examined witnesses. There was no complaint either before the magistrate or the superior court that any of them did not understand the proceedings. This issue was raised for the first time in this Court.

In the case of **Albanus Mwasia Mutua v. R**. (supra) this Court had this to say about the enforcement of constitutional provisions:

"At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the authorities we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge."

True, it is the duty of the court to enforce constitutional provisions. Constitutional provisions like any other legal provisions are enforceable on the basis of the material placed before the court. Whether or not any of the provisions of the Constitution have been violated is a question of fact. Should a court take it that there has been a violation without complaint or evidence of violation being placed before it" In certain cases violations may be obvious. In others there is a need for a complaint and the presentation of evidence to bring this out.

While, as stated above, the court has a duty to enforce constitutional provisions, there is a reciprocal duty on the part of an accused person to indicate to the court, for instance, that he is not able to understand the language of the proceedings. This does not lessen the duty of the court of being satisfied that the accused is able to follow the proceedings. **Section 77 (1) (b)** and **(f)** of the Constitution use the words ''understands'' and the phrase ''he cannot understand''.

These place an implied duty on the accused to inform the court whether or not he is able to follow the proceedings. In an appropriate case where there is no complaint at the trial this court may well infer that there was interpretation where the proceedings show the accused understood the nature of the charges against him and the evidence presented in support thereof notwithstanding absence of a note regarding interpretation.

In this case the appellants did not raise any complaint about any inability on their part to follow the proceedings at their trial or first appeal. Can it be said, in the circumstances, that there was a violation of their constitutional right to interpretation with the resultant prejudice to them in defending themselves" We earlier stated that each case has to be considered on the basis of its peculiar facts and circumstances. From the nature of their respective cross-examination of witnesses, their respective defences and submissions before the superior court, it is apparent that each of the appellants understood the charges against them and put forward defences to them. But this is a criminal case. Where as here some doubt exists as to whether or not the appellants were accorded the services of an interpreter, the doubt must be resolved in their favour. We note that like in the **Frederick Kizito,** case (supra) there was no note as to whether or not the appellants were accorded the services of an interpreter.

In the circumstances it is our judgment that the 2nd and 4th appellants were improperly convicted. We quash their respective convictions, set aside the sentences which were meted against them and order that they be set at liberty unless otherwise lawfully held.

As for the 1st and 3rd appellants considering the decision we have come to that they may not have fully appreciated the charges against them and understood the proceeding as a whole the trial against them was unsatisfactory. The evidence which was tendered show they might have committed the respective offences above. In the result we consider this to be a fit case for a retrial. Accordingly we order that the convictions entered against each of them be set aside and the sentences imposed against them in those charges be set aside. Both the appellants to be presented before a magistrate with competent jurisdiction other than W.N. Njage, SRM, for retrial. The case be mentioned before the Senior Resident Magistrate's Court Kerugoya within 14 days of this order with a view to fixing the hearing date.

Dated and delivered at Nairobi this 6th day of July 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O. BOSIRE

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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.

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