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

Criminal Appeal 280 of 2006

FRANCIS KOIKAI KATIKENYA ……..…… APPELLANT

AND

REPUBLIC ……...……..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ.) dated 13th October, 2005

in

H.C.CR.A. NO. 1181 OF 2002)

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JUDGMENT OF THE COURT

In this second appeal, the supplementary memorandum of appeal raises four main aspects, namely;

"***(1) The judgments of the trial and first appellate Courts did not comply with the provisions of section 169 of the Criminal Procedure Code (CPC).***

(2) The language of the proceedings is unclear.

(3) The appellant's rights under section 72(3)(b) o f the Constitution was violated in that he was not taken to Court within 14 days of his arrest.

(4) The superior court on first appeal did not re-evaluate the evidence, because had it done so it would have found that the items allegedly recovered from the appellant were not entered in the police occurrence book."

The appellant, ***Francis Koikai Katikenya***, was the first accused in the Senior Resident Magistrate's Court, Kibera, where he was charged jointly with six other persons with six counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The appellant faced two alternative counts of handling stolen property contrary to ***section 322(2)*** of the Penal Code. A co-accused, ***Halima Wanjira***, faced one alternative count of handling stolen property contrary to the same section of the Penal Code.

The trial commenced on *3rd December, 2001*, but there is no indication in the trial magistrate's record as to the language which was used by witnesses. The record however, shows that each accused was given an opportunity of cross-examining witnesses, and they in fact cross-examined some of the witnesses at some length. Likewise, there is no indication on record as to the language the appellant and his co-accused used in their respective defences. The appellant made a statutory statement and so did all his co-accused.

In her judgment, the trial Magistrate, Ms. Mwangi, Principal Magistate, did not note that the judgment had been delivered. Nor did she date it. In his submissions before us, Mr. Wamwayi for the appellant, urged the view that the failure to date the judgment and to show that it had been delivered offends the provision of ***section 169*** Criminal Procedure Code and renders it a nullity. Likewise he submitted that the failure to show the language the proceedings were conducted vitiated the trial and the conviction which was eventually entered against the appellant.

We pause there to consider the issue of the appellant's arrest. The appellant, according to the charge sheet, was arrested on *16th September, 2001*. He was not taken to Court until *22nd October, 2001*, a period in excess of 30 days. His arrest was entered in the police occurrence book, but it was not indicated therein that anything was recovered from him. It was Mr. Wamwayi's submission, that the long delay in presenting the appellant to Court violated the provisions of ***section 72(3)(b)*** of the Constitution which provides, inter alia, that a person facing a Criminal Charge which carries a mandatory death sentence should be brought before a Court within 14 days. There was no explanation given on this, but we note that the issue was not raised either before the trial or first appellate Court.

Mr. Kaigai, Senior State Counsel, opposed the appeal, and submitted before us that the errors which were pointed out on behalf of the appellant were curable under ***section 382 Criminal Procedure Code***. In his view, those errors did not occasion any failure of justice or cause prejudice to the appellant.

We have considered this matter in its entirety. It is clear to us that the trial Magistrate was careless in the manner she handled the case. She did not indicate in what language or languages the proceedings were conducted. Nor did she indicate whether the appellant or witnesses understood the English Language, which, is the language of the Court. A careful reading of ***Sections 197*** and ***198*** Criminal Procedure Code, clearly shows that a failure to show demonstrably, the language used in Criminal proceedings, will, in an appropriate case, this being one, vitiate the trial. True, as Mr. Kaigai submitted, the appellant was given an opportunity to and cross-examined various witnesses. However, he faced capital charges and he stands convicted of the same. It may not be possible to fathom the extent of any prejudice that might have been occasioned to him.

Having come to that conclusion, we think that the appellant's trial was unsatisfactory and we do not, therefore, need to consider the other grounds of appeal.

In the result, we allow the appeal, set aside the appellant's respective Convictions and set aside the sentence of death passed on him, and order that the appellant be retried by a Magistrate other than Ms. Mwangi, Principal Magistrate.

Dated and delivered at Nairobi this 30th day of March, 2007.

S.E.O. BOSIRE

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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