REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 95 OF 2008

CONSOLIDATED WITH

CRIMINAL APPEAL CASE NO. 96 OF 2008

FELIX KIMONYE...1ST APPELLANT

JENNIFER MUTHONI ....2ND APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(An appeal against the judgment/conviction and sentence of Mr. W.K. Koriri (PM) in Meru Criminal Case No. 2009 of 2003

delivered on 27th March 2008)

JUDGMENT

Both appellants were convicted in Meru Criminal Case No. 2009 of 2003 of the offence of assault causing actual bodily harm contrary to section 251. They were both sentenced to pay a fine. They have filed this appeal and at the hearing of the appeal indicated that the appeal against sentence was abandoned and they proceeded to argue the appeal against conviction. Even though in their appeal the appellants have raised various grounds, at the hearing of the appeal, the appellants relied on the ground:-

"The learned trial magistrate erred in law and in fact in that he did not give a fair trial to the appellants."

That ground of appeal relates to the trial court's failure to indicate the language used by the witnesses when they gave evidence. The state did not oppose the appeal. Counsel for the state in response to the

submissions on behalf of the appellant responded in the following terms:-

"We concede to the appeal on the ground that the language of the court was not indicated during the prosecution's case. There is no indication that the plea was taken. We do not wish to retrial since the trial was in 2003 and the prosecution may not successfully mount a retrial."

One of the provisions of fair trial in the Constitution of Kenya 2010 just as in the previous Constitution is that an accused person must be accorded an assistance of an interpreter without payment during trial. This requirement was clearly stated in the case **Antony Njeru Kathiari & Ano. Vs. Republic** Criminal Appeal No. 21 & 23 of 2004 where the Court of Appeal had this to say:-

*"Mr. Orinda, learned principal state counsel did not seek to support the conditions recorded against the appellants and in view of this court's previous decisions, Mr. Orinda is certainly right in conceding the appeals. Way back in 1985 this court, in the case of **Diba Wako Kiyato vs. Republic** [1982 – 1988] 1KAR 1974 held that:-*

It is fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands.

The Court in that case was relying on the provisions of section 77(2) of the Constitution of Kenya and section 198 (1) of the Criminal Procedure Code. The court said:-

The practice of recordings (sic), if not the name of the interpreter, at least the nature of the interpretation, has been standard practice in these courts for many years. For example, that which is described as the 'plea form', Form Criminal 133, contains under all the other details of the case and of the accused, a space against the word 'interpretation.' There was no compliance with either of these two statutory provisions or with the standard practice in the instant case. The magistrate made no note of the language into which the evidence of the witnesses, many of whom spoke in English or Swahili was being translated…………….."

The record of the lower court does not indicate the language used by all the seven prosecution witnesses. However, when the appellants gave their defence and their witnesses gave evidence, the language in case of each one of them was shown to be Swahili. There is no doubt that the trial court in failing to record the language used by the prosecution witnesses rendered the lower court's trial a nullity. It is for that reason that the conviction of the lower court will be set aside. In regard to whether the court should order the retrial of the appellants, the court is well guided by the principle set out in the case **Richard Omollo Ajuoga vs. Republic** Criminal Appeal No. 223 of 2003 where the Court of Appeal examined various decisions and had this to say:-

*"We have anxiously considered all the cases to which we were referred and the law on this point. In the case of **Ahmed Sumar vs. Republic** [1964] EA 481, at page 483, the predecessor to this court stated as follows:-*

It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.

The court continued at the same page at paragraph II and stated further:

We are also referred to the judgment in <u>Pascal Clement Braganza vs. Republic</u> [1957] EA 152. In this judgment, the court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts on circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.

Taking the queue from that decision, this court in the case of ***<u>Bernard Lolimo Ekimat vs. Republic</u>*** *Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-*

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

Although in my examination of the evidence presented before the lower court I formed the opinion that a retrial could successfully be mounted, I find that to order a retrial where the prosecution may not be able to trace its witnesses may lead to prejudice of the appellants. I do therefore declare the lower court's trial a nullity and do hereby quash the conviction against the appellants. I order the appellants to be released unless otherwise lawfully held.

Dated, signed and delivered at Meru this 19th day of May 2011.

MARY KASANGO
<u>JUDGE</u>