(From original conviction and sentence in Criminal Case No. 64 of 2007 of the Principal Magistrate's court at Nyahururu – T. MATHEKA, PM)

STEPHEN NGUGI KARIUKI……..1ST APPELLANT

BONIFACE NYAGA NJUE ……...…2ND APPELLANT

JOEL WAITHAKA WAMAE ……..…..3RD APPELLANT

VERSUS

REPUBLIC……..RESPONDENT

JUDGMENT

STEPHEN NGUGI KARIUKI, the 1st appellant, **BONIFACE NYAGA NJUE,** the 2nd appellant and **JOEL WAITHAKA WAMAE,** the 3rd appellant, were in Nyahururu Principal Magistrate's court charged with two counts of robbery with violence contrary to **Section 296(2)** of the **Penal Code** and two counts of gang rape contrary to **Section 10** of the **Sexual Offences Act No. 3 of 2006**. They pleaded not guilty to all the charges but after trial before the Ag. Principal Magistrate they were all acquitted of the first gang rape charge for lack of evidence but they were all convicted of the two capital robbery charges and the second and third appellants were convicted of the gang rape charge in count 4. . In respect of the capital robbery charges all the appellants were sentenced to death and in respect of the gang rape charge the second and third appellants were each sentenced to fifteen years imprisonment. They have appealed to this court against those convictions and sentences.

In his petition of appeal the second appellant contended that his constitutional right to a fair trial was flouted and that the learned trial magistrate erred in failing to fully comply with **Sections 207** and **214(1)** of the **Criminal Procedure Code** (the **CPC**). In addition to these grounds of appeal by the second appellant all the appellants also challenged their identification and contended that the identification parades were flawed; that there was no sufficient evidence to warrant their convictions and accused the trial magistrate of bias and of unfairly dismissing their defences.

We shall start with the second appellant's first two grounds which are, as it were, technical.

On the first ground the second appellant submitted that contrary to **Section 72(3)** of the **Constitution** the police detained him for 16 days before taking him to court. He said he was arrested on the 20th December 2006 but was not taken to court until 5th January 2007. The police having not explained the two days delay he said that flouted his constitutional right to a fair trial. On ground two he submitted that contrary to **Section 207** of the **CPC** the record does not show in what language the proceedings were conducted thus rendering the entire trial a nullity. He also submitted that the particulars to count 1 do not allege that PW1 was robbed of any money and yet in his evidence he claimed he was robbed of money. To harmonize that evidence with the particulars of the charge, the second appellant argued that the learned trial magistrate erred in not having the charge amended under **Section 214(1)** of the **CPC**.

As we have pointed out, all the appellants raised an issue of identification in their petitions of appeal. They all submitted that the sudden brutal attack at night without any evidence of the intensity of the light is a clear demonstration that the conditions were not favourable for a positive identification without the possibility of error. They faulted the learned trial magistrate for failing to warn herself of convicting on identification evidence in such difficult circumstances. The witnesses having pointed them out to the police officers who arrested them, the appellants dismissed the identification parades as superfluous.

The appellants also accused the learned trial magistrate of bias for dismissing the medical evidence instead of considering it in their favour.

In conclusion the appellants submitted that there was no credible evidence to warrant their convictions. They said the learned trial magistrate erred in dismissing their respective defences without evaluating them as required by **Section 169(1)** of the **CPC**. They urged us to allow their appeals.

For the state Mr. Omutelema submitted that the lantern in PW1's house and the electric light in PW2's coupled with the considerable time the rapists took enabled the two witnesses to positively identify the appellants. He urged us to dismiss these appeals.

Having perused the record we think this appeal can be disposed of on only one ground.

As we have said the second appellant submitted that their fundamental right to a fair trial was violated as the proceedings were not interpreted into a language they understood.

It is a fundamental constitutional right of each accused person to have the proceedings interpreted to a language he understands. This is how the Court of Appeal stated this point in the case of **KIYATGO V REPUBLIC, [1986] KLR 419:-**

> **"It is a fundamental right, under the Constitution of Kenya section 77(2) that the accused person is entitled without payment, to the services of an interpreter who can translate the evidence to him and through whom he can put questions to the witnesses, make his statutory statement or give his evidence. Moreover, the Criminal Procedure Code (Cap 75 section 1981) also requires that evidence should be interpreted to an accused person in a language that he understands"**.

We have perused the record and noted that interpretation into Kiswahili started at the tail end of the prosecution case when PW7 testified and during the defence case. Before then there nothing on the record to show that there was interpretation. In **Swahibu Simbauni Simiyu & Another Vs Republic Cr. App. No. 243 of 2005** where the record did not show the language used during the appellant's trial, the Court of Appeal held that that was a violation of his constitutional right under **Section 77(2)(b)** of the **Constitution** and allowed his appeal asserting that "the nature and strength of the evidence brought by the prosecution in support of its charge did not really count."

As we have said there nothing on the record to show that there was interpretation before PW7 testified. We cannot assume there was when the record is silent on that. In the circumstances we agree with the second Appellant that their constitutional right to a fair trial was violated. Consequently, we allow these appeals, quash the convictions and set aside the sentences. All the Appellants shall be set free unless otherwise lawfully held.

DATED and DELIVERED this 30th day of July, 2010.

D. K. MARAGA
JUDGE.

J. A. EMUKULE

JUDGE.