REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NOS. 67, 68 & 129 OF 2009

JOSEPH WAMBUGU NGUMI……..…….1st APPELLANT
JOHN WACHIRA THEURI…….…….2ND APPELLANT
LINCOLM MWANGI WAGARA……..….3RD APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

J U D G M E N T

Criminal Appeals No. 67/09, 68/09 and 129/09 all emanate from Embu Criminal case No. 1789/06. All 3 Appellants herein were tried and convicted and each sentenced to serve 5 years imprisonment on several counts which sentence was ordered to run concurrently. They were aggrieved by the conviction and sentences and each of them filed an appeal separately. The 3 appeals were consolidated and heard together after the Appellants said they had no objections to such a consolidation. Only 1 Appellant namely Lincoln Mwangi was represented by counsel. The 2 others were unrepresented and moved the court by way of tendering written submissions. They each raised several grounds of Appeal. Learned counsel for the state conceded the Appeal on one ground which was raised by the 1st Appellant to the following effect

"That the learned Resident Magistrate erred in law and fact when she conducted the trial against the Appellant in English language which the Appellant did not understand and without any interpretation which is infringement of the Appellants constitutional right as to fair trial as provided under Section 77(1) and 77(2)(b) of the constitution of Kenya (since repealed)."

This is a pertinent point of law which applies to all appellants because they were charged in the same proceedings. It is a point which in my considered view will dispose of this appeal and since no retrial has been asked for, then it will not be necessary for me to re-evaluate the rest of the evidence as adduced before the trial court. It will also not be necessary for me to analyze and make any findings on the other grounds of appeal raised by the Appellants.

Having perused the proceedings of the trial court, I note that on the date the pleas were taken, i.e. on 14.8.06, the proceedings show that the language used was English which was translated in to Kiswahili. It is however not indicated which of the 2 languages the Appellants were conversant with. We can only presume that the understood Kiswahili language well.

When the hearing took off on 14.8.07, the coram was silent as to what language was used. It does not indicate whether it was English or Kiswahili.

PW1 Sgt Benard Thiga is indicated as having testified in English language. It was not translated into Kiswahili. The same thing happened on 21.10.08 when PW2 testified. PW3 is said to have testified in Kiswahili and since the Appellants testified in Kiswahili language, it can be assumed that the understood his evidence.

The court nonetheless wishes to point out that the language used must be indicated in the coram or proceedings and it should never be left to presumption. The law is very clear on this issue.

It is the duty of the trial magistrate to indicate clearly the language used in the proceedings. In the case of **DEGOW DAGANE MUNROW VS REPUBLIC (Cr. App. No. 233/05)** the court of Appeal stated in part

"Of course there was right from the beginning of the trial an interpreter present in court, that is clearly shown in the record of the magistrate. What is not shown throughout the record is the language which the Appellant or the witnesses addressed the magistrate. The burden is on the trial court to show that an Accused person has himself selected the language which he wishes to speak and on which proceedings are interpreted to him. As we have repeatedly pointed out those are not mere procedural technicalities. There is first Section 198 of the CPC and that section provides:-
'198(1) Whenever any evidence is given in a language not understood by the Accused and he is present in person, it shall be interpreted to him in open court in a language which he understands.'
…..The provision shows that the question of interpretation of evidence to a language which an accused person understands is not a matter for the discretion of the trial magistrate – it must be done and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak."

Section 77(2) of the now repealed constitution commanded a court to conduct proceedings in a language that the Accused person understands.

This is an inalienable right that cannot be taken away from an accused person. The current Constitution has also embraced this right as constituting one of the ingredients to a fair trial in Article 50(2)(m) which provides:-

"Every Accused person has the right to a fair trial, which includes the right
(m) to have the assistance of an interpreter without payment if the Accused person cannot understand the language used at the trial…"

The only way a trial court can safeguard this very important right is for it to indicate from the very beginning the language which the Accused person says he truly understands and thereafter ensure that the subsequent proceedings clearly show that any other language is interpreted into that language. That way, an Accused cannot thereafter claim that the proceedings proceeded in a language that he did not understand.

This appeal therefore succeeds on that ground and I need not venture into the rest of the grounds. The appeal is allowed. The conviction is hereby quashed and the sentences meted out against each appellant are hereby set aside. The appellants be set at liberty unless they are otherwise lawfully held.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 4th day of November 2010

In presence of:- Ms. Muthoni for Ithiga for 1st Appellant, Ms. Matiru for State & all Appellants.