REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 5, 6 & 7 of 2008

ELIUD MANYEKI MWAURA …….. APPELLANT

versus

REPUBLIC…….…. RESPONDENT

Consolidated with

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 6 OF 2008

PETER IRUNGU THUO ……..…..……. APPELLANT

versus

REPUBLIC……..…….……. RESPONDENT

Consolidated with

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 7 OF 2008

GEOFFREY IRUNGU KANGETHE ……..…… APPELLANT

versus

REPUBLIC……...……. RESPONDENT

(Being appeals from the conviction and sentence of A. KIMANI NDUNGU – Principal Magistrate

in the Senior Principal Magistrate's Criminal Case No. 352 of 2007 at MURANGA)

JUDGMENT

When we began to hear the three appeals we consolidated them resulting in **ELIUD MANYEKI MWAURA** in Criminal Appeal No. 5 of 2008 being made the first appellant. **PETER IRUNGU THUO** was made the second appellant and **GEOFFREY IRUNGU KANGETHE** was the third appellant. All three of them were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. On the second count only the first appellant was charged with handling stolen goods contrary to Section 322(2) of the Penal Code. The lower court convicted the appellants as charged and sentenced them to death. The Principal State Counsel Mr. Orinda did not oppose the appeal on the basis that the lower court failed to record the language used by the prosecution witnesses. Counsel however stated that such an error did not go to the root of the case. He therefore sought for a retrial of the appellants. We have gone through the record of the lower court and it is correct as stated by Principal State Counsel that the trial magistrate in recording the evidence of the four prosecution witnesses failed to record the language in which they testify. Even at the point of taking plea the trial magistrate did not state the language understood by the appellant. The record of the lower court must show the language used by the witnesses. It is imperative for the language to be shown that is which language will be understood by the accused person. Section 198 of the Criminal Procedure Code and Section 77 (2) of The Constitution of Kenya reinforces the need to have proceedings recorded in a language understood by the accused person. That was the holding in the case of **DEGOW DAGANE NUNOW VS REPUBLIC NYR, CRIMINAL APPEAL NO. 223 OF 2005 (unreported)** where the court stated:-

"……. ***It is the responsibility of trial courts to ensure compliance with these provision; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place …."***

The learned Principal State Counsel indicated that the state would be seeking the retrial of the appellants. In the case of **AHMED SURMAR VR REPUBLIC (1964) EA** it was stated in respect of retrial:-

"***It is true where a conviction is vitiated by a gap in the evidence or other defect for which the prosecutor 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."***

Further in the case of **PASCAL CLEMENT BRAGANZA –V- REPUBLIC (1957) EA** the court accepted 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 would result. An order for retrial however should not be made where it is likely to cause an injustice on the appellant. Taking into the account the evidence presented by the prosecution in the lower court we are of the view that it would be unsafe to order a retrial. PW 1 suffered a robbery on 9th February 2007 at 9.30 p.m. He did not see the faces of the three person who robed him of his mobile phone and money. During that robbery PW 1 using a club hit one of the robbers on the face. The following day he got to know that the second appellant who was a neighbour had an injury on his face. He connected those injuries to this robbery. He reported it to the police. The second appellant on being questioned by the police he led them to the third appellant's house. Although a phone was recovered in that house it did not belong to PW 1. The two appellants led the police to the first appellant. At the home of the first appellant a recovery was made of a mobile phone and money. PW 1 was able to identify the phone as his own. He however could not confirm whether the recovered money was part of what was stolen from him. There was no evidence connecting the third appellant to the offence hereof. The only evidence that connected him was that of an accomplice that is his co-accused. That evidence needed corroboration for it to be relied upon by the trial court. In the absence of such corroboration that evidence could not be relied upon to convict the third appellant. The evidence against the second appellant was the injury suffered on his face. For reasons we cannot fathom

the second appellant was not recorded as having given evidence in the lower court in his defence. The trial magistrate recorded the evidence of one witness in defence recorded as DW 1 but the name of that witness was not recorded in the proceedings. As we sit and re-evaluate this evidence we are unable to know whether that evidence related to the first appellant or another person. The prosecution's evidence against the first appellant was the recovered mobile phone. The state failed to address us on whether that mobile phone was still in possession of PW 1 and more importantly whether PW 1 would be available to give evidence. With that coupled with the view that the evidence against second and third appellant was tenuous we find that this is not a proper case to order a retrial. To order a retrial might give an opportunity to the prosecution to present a more water tight case to the prejudice of the appellant. The judgment of the court is that the appellants appeal does succeed. The conviction against all the appellants is hereby quashed and the sentence is hereby set aside against all the appellants. We order the appellants to be set free unless otherwise lawfully held.

Dated and delivered this 11th day of May 2009

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE