



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Criminal Appeal 130, 147, 151, 152, 153, 154 & 215 of 2005**

**JOSEPH NGANGA NJENGA..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being appeal against the conviction and sentence by R. Nyakundi Chief Magistrate, in the Chief Magistrate's Court Criminal Case No. 2113 of 2004 at Nyeri)*

**CONSOLIDATED WITH**

**CRIMINAL APPEAL 147 OF 2005**

**JULIUS KIMATHI MWITI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being appeal against the conviction and sentence by R. Nyakundi Chief Magistrate, in the Chief Magistrate's Court Criminal Case No. 2113 of 2004 at Nyeri)*

**AND**

**CRIMINAL APPEAL 151 OF 2005**

**JAMES MUTUA KIMATU..... APPELLANT**

**VERSUS**

REPUBLIC..... RESPONDENT

*(Being appeal against the conviction and sentence by R. Nyakundi Chief Magistrate, in the Chief Magistrate's Court Criminal Case No. 2113 of 2004 at Nyeri)*

AND

CRIMINAL APPEAL 152 OF 2005

CHARLES KARANJA MUNGA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(Being appeal against the conviction and sentence by R. Nyakundi Chief Magistrate, in the Chief Magistrate's Court Criminal Case No. 2113 of 2004 at Nyeri)*

AND

CRIMINAL APPEAL 153 OF 2005

JOHN GITONGA MURIITHI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(Being appeal against the conviction and sentence by R. Nyakundi Chief Magistrate, in the Chief Magistrate's Court Criminal Case No. 2113 of 2004 at Nyeri)*

AND

CRIMINAL APPEAL 154 OF 2005

JOSEPH KAMAU MUNGAI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(Being appeal against the conviction and sentence by R. Nyakundi Chief Magistrate, in the Chief Magistrate's Court Criminal Case No. 2113 of 2004 at Nyeri)*

AND

CRIMINAL APPEAL 215 OF 2005

DAVID MURIUKI KARUBIA..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(Being appeal against the conviction and sentence by R. Nyakundi Chief Magistrate, in the Chief Magistrate's Court Criminal Case No. 2113 of 2004 at Nyeri)*

**JUDGMENT**

**The Appellants herein were charged** in the Lower Court with attempted Robbery with violence contrary to section 297(2) of the Penal Code. After the hearing in the Lower Court they were convicted and sentenced to death on 16<sup>th</sup> May 2005. They have all preferred appeals against conviction and sentence. As the first Appellate court, we are expected to submit the whole evidence of the Lower Court to a fresh and exhaustive examination. In so doing we must weigh the conflicting evidence and draw our own conclusion. Further in

so doing we should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses. See the case of *Okeno vs R [1972] EA 32*.

However before the court could hear the submissions of the appellants in support of the appeals the Learned State Counsel Mr. Orinda conceded to the appeal. He stated that the Lower Court's proceedings failed to indicate the language used by the prosecution witnesses. Further he stated that some witnesses were not sworn before they tendered their evidence. In respect of the evidence tendered in the Lower Court he was of the view that a retrial ought not to be ordered because the conviction of the appellants was based on what he called hypothesis. This is because the main evidence which linked the appellants to the scene of crime was a report by Safaricom on the calls that each made. He said that the report of the Safaricom was produced in court under section 77 of the Evidence Act. The appellants had asked the court to order the maker of that report to be availed for cross examination. The Learned State Counsel said that such a report not being a government report ought to have been submitted in evidence by an employee of the Safaricom namely Mary Owuor. Further the learned state

counsel said the evidence on record probably disclosed an Attempted Robbery rather than Attempted Robbery with violence. This is because the evidence on record was that there was a collision between the complainant's vehicle and another car. There was evidence that the persons in the other car threatened the complainant with a knife. The State Counsel said that it was not clear whether in the complainant's car there were cigarettes or millions of shillings. That the only evidence adduced showed that there was a car that blocked the complainant's car. That evidence on its own, the Learned State Counsel said did not show whether the complainant and his companion were to be robbed. With all these difficulties the Learned State Counsel sought that the court does not order a retrial.

We have on our own gone through the Lower Court's evidence and indeed can confirm that there are instances when the Learned Trial Magistrate failed to indicate whether a witness was sworn or not. In particular PW 1 was simply shown as follows:- **"PW 1 SAMSON NJANE STATES AS FOLLOWS"**. The witness who was the complainant did not take the oath before giving his evidence as required by the

law. Section 17 and 18 of the Oaths and Statutory Declarations Act Cap 15 provides as follows:-

**"17 Subject to the provisions of section 19, oaths or affirmations shall be made by –**

**(a) all persons who may lawfully be examined, or give evidence or be required to give, evidence by or before any court or person having by law or consent of parties**

*authority to examine such persons or to receive evidence;*

*(b) interpreters of questions put to, and evidence given by witnesses.*

**18. All oaths made under section 17 of this Act or section 151 of the Criminal Procedure Code shall be administered according to such form as the Chief Justice may by rules of court prescribe, and until any such forms are so prescribed such oaths shall be administered according to the forms now in use.”**

We have already said that the record of the trial magistrate does not show whether or not the witnesses who testified before him were sworn before doing so. That being the case it does seem that the appellants were convicted on evidence not under oath. That would be in violation of S. 151 of the

Criminal Procedure Code. The Court of Appeal in the case of *SAMUEL MURIITHI MWANGI V REPUBLIC Criminal Appeal No. 3 of 2005 (unreported)* had the following to say on the issue:-

**“To be convicted and sentenced to death on evidence which is not sworn must of necessity, be prejudicial to an accused person. In the event, we are satisfied that the trial of the appellant was a nullity because we are unable to exclude the probability of his having been convicted on unsworn evidence.”**

It was imperative for the trial court to ensure that evidence adduced by the prosecution was received under oath. Further we are in agreement with the submissions of the Learned State Counsel in respect of the production of the Safaricom Report by the Investigating Officer. Section 77(1) of the Evidence Act provides:-

**“In criminal proceedings any document purporting to be report under the hand of government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.”**

The Safaricom Report does not fit in the category of documents which can be produced under the above section. It was therefore imperative for the prosecution to have that report produced by its maker.

On examination of the Lower Court’s proceedings we also have confirmed that the Learned Magistrate failed to indicate the language used by each witness. Section 77(2) (b) and (f) of the Constitution makes provisions that every person charged with a criminal offence ought to be informed in a language he understands the nature of the offence he faces. That section provides:-

**“77 (2) Every person who is charged with a criminal offence –**

**(b) shall be informed as soon as reasonably practicable, in a language that he understands and in details, of the nature of the offence with which he is charged.**

**(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge .....**”

Similarly section 198 of the Criminal Procedure Code requires that there be interpretation for the accused in a language he understands. That section also 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.**

**(2) If he appears by an advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.”**

It is clear from the provisions set out in the Constitution and the Criminal Procedure Code that in a criminal trial the language of the trial must be understood by the accused. To that extent the trial court ought to state the language used when the evidence is adduced to demonstrate compliance with those provisions. This indeed was the holding in the case of *KIYATO VS REPUBLIC (1982 – 88) KLR 418*. In that case it was held;

***“(1) It is fundamental right, under the Constitution of Kenya section 77(2) that an 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 198(1) also requires that evidence should be interpreted to an accused person in a language that he understands.***

***2. It is the standard practice in the courts to record the nature of the interpretation used or the name of the interpreter. The trial magistrate in this case made no note of the language into which the evidence of the witnesses was being interpreted.***

***4. There had been no compliance with the Constitution of Kenya section 77(2) and the Criminal Procedure Code (Cap 75) section 198(1) in this case.”***

The Learned State Counsel submitted that this case was not suitable for retrial because there was no evidence that there was attempted robbery with violence. The Learned Counsel did not address us on the issue of availability of witnesses if a retrial was ordered. In the case of *Ahmed Sumar V Republic [1964] E.A. 481* it was stated in respect of retrial that:-

***“It is true that 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.”***

In the case of *Pascal Clement Braganza Vs. R [1957] E.A.* 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 might result. Indeed each case must depend on its own the particular facts and circumstances. An order for retrial however should not be ordered where it is likely to cause an injustice to an appellant. Having reconsidered the prosecution’s evidence we find that the particular facts of this case make it unsafe for a retrial to be ordered. PW 1 the complainant herein in giving evidence of the attack he suffered failed to state the date. His companion however stated that the attack was on 15<sup>th</sup> April 2004. That inconsistency however on its own would not lead us not order a retrial. But the act of the learned magistrate in allowing the Safaricom report to be submitted in evidence by a police

officer, in our view was prejudicial to the Appellants. It is such prejudice that we are of the view that a retrial should not be ordered.

It is clear that in view of the shortcomings of the Lower Court’s trial the appellants’ appeals against the conviction and sentence must and do succeed. The conviction of the Lower Court against all the appellants is therefore quashed and their sentences set aside. We find that we are in agreement with the Learned State Counsel in the shortcomings of the Lower Court’s trial and we therefore find that this is not a suitable case to order retrial. The appellants shall be set free unless otherwise lawfully held.

***Dated and delivered at Nyeri this 15<sup>th</sup> day of May 2008.***

**MARY KASANGO**

**JUDGE**

**M.S.A. MAKHANDIA**

**JUDGE**