**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 103 of 2005**

**RICHARD KARIUKI MWANGI ........................... APPELLANT**

**VERSUS**

**REPUBLIC ..................................................... RESPONDENT**

***(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No. 1747 of 2003 by R. N. Nyakundi – C.M.)***

**J U D G M E N T**

This is a first appeal. The appellant, **Richard Kariuki Mwangi** was charged jointly with **Duncan Mbaki Nderi alias Taliban** in the Chief Magistrate's Court at Nyeri with four counts of robbery with violence contrary to section 296 (2) of the Penal Code. The appellant and his co-accused pleaded not guilty to the charges but after full hearing, the appellant was found guilty as charged, convicted and sentenced to death as mandatorily provided by law. His co-accused was however acquitted under section 215 of the Criminal Procedure Code. The appellant was not satisfied with the subordinate court's decision and proceeded on appeal to this court.

When the appeal came up for hearing before us **Mr. Orinda**, learned Principal State Counsel conceded to the same on the ground that the language of the court and in which the witnesses testified was not stated or indicated in the court record. The proceedings were thus a nullity. He urged us to so hold with the consequence that we should allow the appeal and set aside both the convictions and sentences. However he went on to urge us to order a retrial holding that though the trial in the lower court took about one year and eight months to be concluded, the prosecution was blameless. The delay ought to be attributed to the trial court and not the prosecution. That the evidence tendered during the trial was strong as it was based on the Doctrine of recent possession. In the circumstances a retrial was justifiable.

The appellant could not countenance a retrial. He submitted that he had been in remand custody for over one year and eight months before the trial was concluded. Since then he has been in prison custody for three years. Finally he submitted that the sins of the magistrate should not be visited upon him.

The appellant and his co-accused were taken to court on 29$^{th}$ July 2003 when the charges were read over to them and they pleaded not guilty to them. The record on that day is silent as to the language in which the charges were read and explained to the appellant and his co-accused. Hearing was fixed to commence on 7$^{th}$ August 2003 in court 1. On 7$^{th}$ August 2003 the case came up for hearing but was adjourned on the application of counsel for the appellant who had just been instructed. The case was then stood over to 19$^{th}$ August 2003 for hearing. It was however not until 8$^{th}$ January 2004 that he hearing of

the case commenced. In between there had been several mentions and adjournments. On all those occasions, there is no record as to which language the court and the appellant communicated.

On the hearing date it would appear that counsel for the appellant had withdrawn from acting for the appellant. On that day the proceedings were recorded as follows:-

"**8/1/04**

**Before M. R. Gitonga – PM**

**I.P. Yusuf for prosecution**

**Court Clerk – Wambugu**

**Accused – present**

**<u>HEARING</u>**

**PW1 SWORN STATES**"

This was repeated with respect to all the five witnesses who testified before the learned magistrate. Clearly the record does not show again the language of the court and which the witnesses testified. On 25th June 2004, the appellant applied to have the case heard by another magistrate. The trial magistrate strangely acceded to the request although the appellant had not advanced any reasons why he felt that the said trial magistrate should not hear the case to conclusion. Thereafter the case was re-heard de novo by **R. N. Nyakundi**, Chief Magistrate.

On 16th August, 2004 when the matter commenced afresh before **Nyakundi C.M.**, he recorded the proceedings of the day as follows:-

"**16/8/04**

**Before R. N. Nyakundi – C.M.**

**C.I. Kandia – Court Prosecutor**

**Wanjohi – Court clerk**

**Accused present**

**COURT PROSECUTOR KADIA**

I have four witnesses bonded. They are present.

**R. N. NYAKUNDI**

**CHIEF MAGISTRATE**

**PW1 SUSAN MWIYERIA GITONGA SWORN STATES AS FOLLOWS:**

I am a resident of Kamakwa .........."

The same was repeated in respect of the eight prosecution witnesses called. Eventually he put the appellant and the co-accused on their defence. They all gave sworn statements of defence. In their respect, the record of the trial magistrate is reflected as follows:-

"**DW1 – RICHARD KARIUKI MWANGI SWORN STATES AS FOLLOWS:**

**I am a resident of Karatina ........"**

The same was repeated in respect of DW2, the co-accused.

From all the foregoing there is no dispute at all that the language of the court, and in which the witnesses testified and the appellant and his co-accused gave their statutory statements was not indicated at all or disclosed in the court record. Section 77 of the Constitution deals with provisions to secure protection of law. The pertinent provision is section 77 (2) (b) and it states as follows:-

**(2) Every person who is charged with a**

**criminal offence –**

**(a) ....................**

**(b) Shall be informed as soon as**

**reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged."**

**(c) ..........................**

**(d) ..........................**

**(e) ...........................**

**(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."**

And Section 198 (1) of the Criminal Procedure Code states:

"**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."**

Thus, in law, at the trial of an accused person, the court must ensure not only that the charge is explained to the accused in a language the accused understands but that the court is further enjoined to ensure that the evidence given during the trial is interpreted to the accused in a language the accused understands. These are legal requirements. They are constitutional rights of an accused person and cannot, in our view, be waived on the belief that the accused is presumed to understand the language of the court. As we have already stated, the trial went on in some form of language and though undisclosed in the court record and although the appellant defended himself in a language also unknown it is not in our view a reason for accepting what was wrong nor is it a reason for holding that the appellant must have comprehended the language of the court. In the case of **Jackson Leskai v/s Republic – Criminal Appeal No. 313 of 2005** the court of appeal stated:

"**It is the court's duty to ensure that the accused's right to interpretation is safeguarded and to demonstratively show its protection."**

**Mr. Orinda,** the learned Principal State Counsel, conceded the appeal on that ground. To our mind, he took the correct approach in conceding the appeal and for what we have stated above, we do agree with him entirely. Accordingly we allow the appeal, quash the conviction and set aside the sentence of death imposed upon the appellant.

The next matter we need to look into is whether to order a retrial as requested by **Mr. Orinda**. The appellant opposed that proposal and gave reasons which we have set out in the body of this judgment elsewhere. We have anxiously considered the rival arguments before us as well as the circumstances of this particular case. The court of appeal has in the past considered similar cases and in the case of **Richard Omolo Ajuoga vs Republic – Criminal Appeal No. 223 of 2003**, it considered and analysed several cases decided on the issue of under what circumstances a retrial should be ordered such as the case of **Pascal Ouma Ogolo vs Republic – Criminal Appeal No. 114 of 2006, Henry Odhiambo Otieno v/s Republic – Criminal Appeal No. 83 of 2005, Ahmed Sumar v/s Republic (1964) EA 481 at page 483** and ended up with the case of **Benard Lolimo Ekimat v/s Republic – Criminal Appeal No. 151 of 2004 (unreported)** where it stated:

"**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."**

The principle acceptable is that each case will depend on its own circumstances. In this case, it would appear from the record that on the night of 2nd and 3rd of June, 2003 robbers had a free hand in Skuta area of Nyeri town violently robbing people at will and seriously injuring some in the process. Even though we agree that a considerable time has lapsed since the appellant was apprehended and tried for the same, we are of the view, nonetheless, that the circumstances that prevailed as far as this case is concerned demand that justice be done, not only to the appellant but also to the victims of the same robberies. In our view, justice must be even handed and it must be ensured to all. No doubt there is strong evidence based on the doctrine of recent possession which was tendered during the trial. We believe that if the self same evidence was tendered at the retrial, a conviction is most likely to result.

Having carefully considered the various aspects of the case including the above plus the evidence that was before the trial court, a retrial commends itself to us and we do order a retrial of the appellant before another magistrate of competent jurisdiction other than **R. N. Nyakundi** who presided over the initial trial. Towards this end the appellant shall be produced Before the Senior Principal Magistrate's Court, Nyeri on 29th May, 2008 for his retrial to commence. Pending such appearance the appellant shall remain in prison custody.

***Dated and delivered at Nyeri this 15th May 2008***

**MARY KASANGO**

**JUDGE**

**M. S. A. MAKHANDIA**

**JUDGE**