REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 65 of 2005

ELIUD MWANGI MUNENE ……..……...……APPELLANT

VERSUS

REPUBLIC …….. RESPONDENT

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO.66 OF 2005

DICKSON WACHIRA MIANO ……..…….APPELLANT

VERSUS

REPUBLIC ……...…..……..RESPONDENT

(Form original Conviction and Sentence of the Senior Resident Magistrate's Court at Kerugoya in Criminal Case No.420 of 2003 by E.O. OBAGA – SRM)

J U D G M EN T

The two appellants jointly with four others, namely **Peter Mugo wambu, Harun Warui Karani**, **Joseph Murage Njeru** and **Kennedy Mwangi Mureithi**, were charged with the offence of robbery with violence contrary to *section 296 (2)* of the Penal Code. It was alleged that on the night of 26th September, 2002 at Kagumo Market in Kirinyaga District within the Central Province jointly with others not before court, while armed with pangas, rungus, iron bars, and axes, robbed David Nguiri Monge of 12 tins of blue band, 250 cans of Kasuku fat, 100 bars of cussion soap, one sack of sugar, 39 Satchets of Omo, 40 packets of tea leaves, 48 Stachets of Royco and cash ksh.7,000/= all valued at ksh.53,000/= and at or immediately before or immediately after the time of such robbery used personal violence to the said David Nguire Monge. Each appellant faced a separate count of handling stolen goods contrary to *section 322 (2)* of the Penal Code.

The trial of the appellants and their co-accused commenced on 27th July, 2004 before the learned Senior Resident Magistrate at Kerugoya(**E.O. OBAGA**). The prosecution called a total of 5 witnesses to testify against the appellants. The appellants and their co-accused were put on their defence. The 1st appellant made a sworn statement in his defence and called 3 witnesses. Similarly the 2nd appellant gave sworn statement of defence and called 2 witnesses.

The learned trial magistrate considered all the evidence before him and came to the conclusion that the prosecution had proved its case against the appellants on the charge of robbery with violence contrary to *section 296 (2)* of the Penal Code. He however acquitted the co-accused of the charge. He made no findings on the alternative counts. This is as it should be.

As a result of the foregoing each appellant was sentenced to death as prescribed by law.

Being dissatisfied with both conviction and sentence the appellants preferred the instant appeals to this court. The two were however consolidated with the consent of both the appellants and the learned state counsel.

When this appeal came up for hearing before us on 26th February, 2008 the appellants were unrepresented whereas the state was represented by **Ms Ngalyuka**, learned state counsel.

Ms Ngalyuka conceded the appeal on the ground that the language used by the witnesses was not stated and hence, in her view, there was a mistrial. **Ms Ngalyuka** went further and informed us that the state was not asking for a retrial.

Our perusal of the record of trial Magistrate confirms the learned state counsel's fears. The trial Magistrate did not at all endeavour to indicate what language was used by various witnesses who testified before him. The trial court's record shows that though the witnesses were sworn before they testified however, there was no indication as to what language was used.

Sample this:-

"**PW1 John Maina Mwangi (Sworn)**

I come from Kagumo market. I am a businessman…."

"**PW2 David Koori Monge:**

I come from Kagumo. I used to work as a watchman at the complainant's shop……"

The foregoing pattern was repeated in respect of all the witnesses who testified and even when it came to the appellants testifying and their witnesses as well. It has been held severally by this court and indeed the court of appeal that failure to indicate in the court record the language of the court and in which the witnesses and the accused testified renders the trial a nullity. We need not cite any authorities for this obvious proposition of law.

In view of the foregoing we are satisfied that the appellants were subjected to a mistrial. We are therefore in agreement with the learned Principal state counsel when he conceded the appeal. The learned state counsel did not seek a retrial and rightly so in our view. The evidence linking the appellants to the crime is inconsistent and incoherent. We doubt very much if a retrial was to be ordered and the selfsame evidence tendered, a conviction is likely to result.

Accordingly the appeal is allowed, the conviction quashed and the sentence of death set aside. The appellants are to be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 7th day of May, 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE