REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 407, 408 & 409 of 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 1410 of 2003 of the Senior Principal Magistrate's Court at Kiambu (S.M. Njuguna– SRM)

JOHN KUNGU KAMAU……..…..……..……...……..APPELLANT

VERSUS

REPUBLIC…….……....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 408 OF 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 1410 of 2003 of the Senior Principal Magistrate's Court at Kiambu (S.M. Njuguna– SRM)

MICHAEL STEPHEN KINGARA……..…….…..APPELLANT

VERSUS

REPUBLIC…….……....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 409 OF 2004

(From original conviction(s) and Sentence(s) in Criminal Case No. 1410 of 2003 of the Senior Principal Magistrate's Court at Kiambu (S.M. Njuguna– SRM)

SOLOMON NJOROGE KAMAU..…….…..……..APPELLANT

VERSUS

REPUBLIC…….……..……..……....RESPONDENT

J U D G M E N T

JOHN KUNGU KAMAU, **MICHAEL STEPHEN KINGARA** and **SOLOMON NJOROGE KAMAU** were jointly charged with one count of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2)** of the **Penal Code.** They were all convicted for the offence and sentenced to death as prescribed in the law.

When these appeals came up for hearing on 28th November 2006, they were consolidated to expedite the hearing since they arose out of the same trial. **Mrs. Kagiri**, State Counsel, representing the State, then addressed the court and informed us that the State was conceding to he appeal on account of a violation of **Section 77(2)** of the **Constitution** and **Section 198** of the **Criminal Procedure Code** Learned Counsel submitted that after perusing the entire court record, she found that nowhere did the trial court indicate the language of the court or that used by the witnesses as they testified.

We have perused the record of the lower court's proceedings and have confirmed that indeed the language of the court was not anywhere indicated. We agree with the learned State Counsel that the proceedings were a nullity and accordingly we set aside both the convictions and sentence. **SWAHIBU SIMIYU & ANOR vs. REPUBLIC CA No. 245 of 2005** followed.

The next issue we must deal with is whether a retrial should be ordered in this case. **Mrs. Kagiri** urged us to order a retrial on the basis that there was strong direct evidence against the Appellants. Learned Counsel submitted that the offence was committed in broad daylight and that the Appellants were well known to the Complainant. Counsel also submitted that all the witnesses would be availed for the retrial. Finally, Counsel submitted that it was in the interest of justice that the case be retried.

The 1st Appellant opposed an order for a retrial being made because the prosecution evidence on identification was not consistent. The 1st Appellant submitted that even though the Complainant alleged that he knew the 1st Appellant even by name, PW4 told the court that he was in fact the one who supplied all the names of the Appellants.

The 2nd Appellant also opposed an order for a retrial as did the 3rd Appellant. The 3rd Appellant submitted that if a retrial was ordered, it will give the prosecution an opportunity to rectify its case.

In our own evaluation of the prosecution case, we do not think that a conviction would result if a retrial was ordered and the same evidence were adduced. As 1st Appellant stated, the Complainant did not know his attackers and had the names supplied to him by PW4. PW4 claimed to have witnessed the incident and that he recognized the 1st and 2nd Appellants whom he knew before because they had robbed his mother. The distance at which he saw them was not disclosed and that was quite material. In regard to the Complainant, the Police should have conducted an identification parade to test his ability to identify his attackers since clearly he could not have sought help from PW4 to know their names if indeed he knew them fully before even by their names. The evidence of identification was not watertight as required in a case depending wholly on visual identification of the offenders. See **WAMUNGA vs. REPUBLIC NO. 20 OF 1989 (KSM)**.

An identification parade ought to have been conducted for the Complainants to identity the Appellants. See **GABRIEL KAMAU NJOROGE vs. REPUBLIC [1982-88] 1 KAR 1134**.

We find that given the circumstances of identification we ought not to order a retrial as we are satisfied that a conviction may not result. See **MWANGI vs. REPUBLIC [1983] KLR 522**. We also find as the 3rd Appellant submitted that to order a retrial will only prejudice the Appellants as it will give the prosecution an opportunity to fill gaps in their case. That militates against the order of retrial being made. See **MANJI vs. REPUBLIC 1966 EA 343.**

In all the circumstances and` facts of the case we do not find that the interests of justice requires an order for a retrial being made. See **SUMAR vs. REPUBLIC 1964 EA 481**.

We decline to order a retrial and order that all three Appellants should be set free unless they are otherwise lawfully held.

Dated at Nairobi this 1st day of February 2007.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mrs. Kagiri for the Respondent

CC: Tabitha/Eric

…….

LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE