**REPUBLIC OF KENYA**

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

**Criminal Appeal 181 of 2004**

**ROBERT MWANGI KIBUGI ……..…….. APPELLANT**

**VERSUS**

**REPUBLIC ..……. RESPONDENT**

***(Appeal from original Conviction and Sentence in Criminal Case No. 828 of 2001 of the Senior Principal Magistrate's Court at Murang'a by G. K. Mwaura – P.M.)***

***CONSOLIDATED WITH 183/04 AND 331/04***

**HIGH COURT CRIMINAL APPEAL NO. 183 OF 2004**

**EVAN KOGI KIMANI ……..…….. APPELLANT**

**VERSUS**

**REPUBLIC ...…….....…… RESPONDENT**

***(Appeal from original Conviction and Sentence in Criminal Case No. 828 of 2001 of the Senior Principal Magistrate's Court at Murang'a by G. K. Mwaura – P.M.)***

**AND**

**HIGH COURT CRIMINAL APPEAL NO. 331 OF 2004**

**HARRISON KAGWE NGURE ……..... APPELLANT**

**VERSUS**

**REPUBLIC ……...…… RESPONDENT**

***(Appeal from original Conviction and Sentence in Criminal Case No. 828 of 2001 of the Senior Principal Magistrate's Court at Murang'a by G. K. Mwaura – P.M.)***

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

**Robert Mwangi Kibugi, Evan Kogi Kimani** and **Harrison Kagwe Ngure** whose appeals have been consolidated for ease of hearing were convicted by Murang'a Principal Magistrate's Court on one count of manslaughter contrary to section 202 of the Penal Code and sentenced to life imprisonment. They

were dissatisfied with the court's finding and therefore lodged this appeal.

When the appeal came up for hearing before me **Mr. Obuo** Counsel for the appellants teaming up with **Mr. Mwilu** submitted that from the record it was not clear whether the appellants understood the language in which the proceedings of the court were conducted. He called in aid of his submission the recent court of appeal decision on the issue being the case of **Swahibu Simbauni Simiyu & Another v/s Republic, Criminal Appeal No. 243 of 2005 (unreported)**. That being the case counsel submitted that trial was a nullity. **Mr. Mugwe**, learned state counsel had no alternative in the matter other than to concede to the appeal on that technical point. Learned State Counsel agreed that the trial before the lower court was defective because the learned trial magistrate did not any where in the record indicate the language of the court or the one used by the witnesses in their testimony before it. Learned State Counsel submitted further that the Appellant was unrepresented. That as a consequence of the failure to indicate the language used at the trial, the learned trial magistrate violated the Appellants Constitutional rights under Section 77(2) and (f) of the Constitution of Kenya

is Statutory Rights under Section 198 of the Criminal Procedure Code.

I have on my part perused the record of the proceedings and have confirmed that indeed the appellants' rights both under the Constitution as well as and under the Statute aforesaid were all violated as Counsel for the 2nd appellant and indeed the learned State Counsel rightly submitted before me. In the light of the Court of Appeal decision in Swahibu Simbauni Simiyu (supra) which is on all fours with the circumstances obtaining in this case and which is binding on me, I would declare the proceedings before the trial court a nullity and set aside both the convictions and sentences.

Mr. Mugwe has requested us to order a retrial on grounds that the evidence on record is overwhelming, that though the appellants were sentenced to life imprisonment, they had only served 3 years which is not such a substantial period. Finally counsel submitted that witnesses will be readily availed if a retrial is ordered as they were all police officers.

As for the 2nd appellant, **Mr. Obuo** submitted that the period served by the appellant whilst under incarceration was substantial. Accordingly if a retrial is ordered the appellants shall suffer prejudice. Counsel further submitted that the evidence tendered in support of the charge was sketchy and if a retrial was ordered it would accord the prosecution opportunity to fill in the gaps. Counsel finally submitted that since the appellant had been in prison custody since 2001 they would suffer injustice if an order for retrial was to be made.

The 1st and 3rd appellants in their written submissions attempted to demonstrate why the evidence was insufficient to sustain a conviction. It was their submission that the witnesses who were mostly police officers were unworthy of believe, as they did not clearly say whether they were able to see the appellants positively during the attack so as to subsequently identify them. The appellants submitted further that the brevity of the attack was such that the police could not have been able to identify any of the attackers. Accordingly it would be futile to order a retrial.

I have analysed the evidence adduced before the lower court in order to form an opinion whether or not that evidence would result in a conviction if a retrial was ordered. **See Mwangi v/s Republic (1983) KLR 522**. It is my view that a conviction would most probably result if the selfsame evidence was to be tendered during the retrial. The evidence of P.W.1, P.W.2, P.W.3 and P.W.7 clearly show that they were able to recognise the appellants and their colleague during the commission of the offence. I will say no more on this lest I cloud the mind of the magistrate who might eventually preside over the retrial. I am also aware however that an order for retrial should not be made if it will cause the accused person prejudice. See **Manji v/s Republic [1966] EA 313**.

The appellants have been in continuous prison custody since September 2000 a period of roughly 7 years and though this is a long period of time I note however that an innocent life of a police officer was lost whilst on duty. There is no doubt therefore that the crime alleged against the appellants is a grave one. Apart from the issue of language, the evidence against the appellants was substantial and if it had

been received according to law a conviction might as well have been had on it. To order a retrial will not mean further delay and incarceration of the appellants as the state has assured me that the witnesses are readily available. Having carefully evaluated the evidence, I am certain that the prosecution will not have been accorded opportunity by an order of retrial to fill in gaps in their evidence and to have a second bite at their cake.` See **Ahmed Sumar v/s Republic ]1964] EA 481.**

In the premises, I would allow the appeals, quash the convictions recorded against the appellants, set aside the sentences imposed and order that the appellants be tried **de novo**. Towards this end the appellants shall be arraigned in the principal magistrate's court, Murang'a on 6th June 2007 for their retrial to commence. The retrial shall be conducted by any other magistrate of competent jurisdiction other than **G.K. Mwaura** or **F.F. Wanjiku** who presided over the initial trial. Until then the appellants shall remain in prison custody.

***Dated and delivered at Nyeri this 30th May 2007.***

**M. S. A. MAKHANDIA**

**JUDGE**