REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Criminal Appeal 136 of 2007, 137 of 2007 & 138 of 2007 (Consolidated)

GODFREY MWANGI MUIGA …....…………………. APPELLANT

Versus

REPUBLIC ………………………….……………. RESPONDENT

(Being an appeal from the conviction and sentence of A. Kimani Ndungu Principal Magistrate in the Senior Principal magistrate's Criminal Case No. 1 of 2006 at Murang'a)

Consolidated with

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 137 OF 2007

PAUL WAGUNYA GITHIRU ………..……………. APPELLANT

Versus

REPUBLIC ………………………….……………. RESPONDENT

(Being an appeal from the conviction and sentence of A. Kimani Ndungu Principal Magistrate in the Senior Principal magistrate's Criminal Case No. 1 of 2006 at Murang'a)

Consolidated with

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO 138 OF 2007

STEPHEN MIHANGO GITHIRU ………......………. APPELLANT

Versus

REPUBLIC ……………………………….………… RESPONDENT

(Being an appeal from the conviction and sentence of A. Kimani Ndungu Principal Magistrate in the Senior Principal magistrate's Criminal Case No. 1 of 2006 at Murang'a)

JUDGMENT

The three appellants herein were charged in the lower court with ***robbery with violence contrary to section 296(2) of the Penal Code***. After the trial before the lower court they were convicted and sentenced to death. They have appealed against conviction and sentence. Having perused the lower court's proceedings we have found that the learned trial magistrate did not record the language used by the witnesses. 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 that 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.

3. 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 issue of the lower court record not indicating the language was not canvassed by the state counsel for him to address his mind to the issue whether or not a retrial should be ordered. A retrial will normally be ordered as has been decided in previous cases in the following circumstances;-

(i) If original trial was illegal or defective.

(ii) If it is in the interest of justice.

(iii) If it will not occasion injustice or prejudice to the appellant.

(iv) If it will not accord the prosecution opportunity to fill up gaps in its evidence at the first trial.

(v) If upon consideration of the admissible or potentially admissible evidence a conviction may result and finally

(vi) Each case must depend on its particular facts and circumstances.

In the case of *Kahindi v Republic Criminal Appeal No. 270 of 2006* the Court of Appeal added the circumstances under which the court would consider whether to order a retrial as the period that the appellant has been in custody. Such a period should be considered and in being so considered the court should determine whether witnesses would be traced in good time to mount a successful retrial.

We have considered the evidence tendered by the prosecution. PW 1 had been drinking alcohol from 3 – 10 p.m. He stated that he had been drinking a mixture of Allsops and an alcohol called Furaha. Prosecution did not lead evidence on the level of PW 1's intoxication when the robbery took place PW 1 was alone. The prosecution therefore relied on his sole evidence in respect of the recognition. Prosecution did not lead evidence on how PW 1 was able to recognize the appellant. It is during cross examination that PW 1 said that they were security lights around where he was attacked at a distance of between 35 – 40 feet. He said that the incident took five minutes. His evidence however has to be understood in the background that he had been consuming alcohol for many hours. The question that arises in our mind is whether PW 1 was in a state of mind to properly give good judgment of who his attackers were. Although the appellants counsel argued that the prosecution should have called the wife of PW 1 in our view that witness was not essential to the prosecution's case. Having reconsidered the evidence therefore and taking into account the principles to guide us on whether to order a retrial, we find that this is not a fit and proper case to order a retrial. To order a retrial would give the prosecution an opportunity to fill in the gaps in the evidence to ensure prosecution. Accordingly we find that the appellants' appeals do succeed and we order that the conviction against each and every appellant herein be quashed and the lower court sentence be set aside. We order that all the appellants be set free unless otherwise lawfully held.

DATED AND DELIVERED THIS 21ST DAY OF OCTOBER 2008

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE