REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL APPEAL 316 OF 2004

FRANCO GITHAE WAIRIMU ….……APPELLANT

VERSUS

REPUBLIC ……..……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 328 OF 2004

DAVID WAMBUGU MWANIKI……..……..APPELLANT

VERSUS

REPUBLIC……...…….…….RESPONDENT

(Being an appeal against conviction and sentence of M. R. Gitonga (P.M.) in Criminal Case No.881 of 2004 Chief Magistrate's Court Nyeri)

JUDGEMENT

At hearing of this appeal it was consolidated with High Court Criminal appeal No.378 of 2004 filed by David Wambugu Mwaniki. This file was then ordered to be the lead file. Both appellants Franco Githae Wairimu and David Wambugu Mwaniki were charged in the lower court with robbery with violence. They were convicted by the lower court on one count and acquitted on the other for lack of evidence. Both appellants were sentenced to death as prescribed by the law.

In the record of the proceedings in the lower court it is indicated that when the matter came up for plea the learned magistrate recorded "interpretation English/Kikuyu/Kiswahili". When the trial started and throughout when the various prosecution witnesses gave evidence the record with regard to each witness states "sworn states". There were three prosecution witnesses and the recording remained the same. One cannot tell what language each of the witnesses used. For the trial court to fail to show the language of the witnesses, it was a failure to comply with the Constitutional provisions of Section 77(2) '(b)' (f) and the provisions of the Criminal Procedure Code Section 198. Section 77 provides;

"**(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**

"**(2) Every person who is charged with a criminal offence-**

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;

(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".

The Criminal Procedure Code provides in Section 198 as follows;

(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 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.

The Court of Appeal in respect of those two provisions had the following to say in the case of **Swahibu Simbauni Simiyu & another v Republic Criminal Appeal No.243 of 2005;**

"**It is abundantly clear from these provisions set out from the constitution and the Criminal Procedure Code that in a criminal trial the language of the trial must be understood by the accused person and that right extends to an advocate representing an accused person if the advocate does not understand the language of the trial; even if the accused himself understands the language of the trial but his advocate does not understand the language, the language must be interpreted to the advocate into English".**

Similarly the Court of Appeal in the case of **Kiyato v Republic (1982 -99) KAR 418** had the following to say;

"**It is a 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.**

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.

In this appeal we find that the magistrate violated the appellants' right to have the proceedings conducted in a language they understand. This court can only be guided by what is recorded by the trial magistrate.

Accordingly we are of the view that the conviction and sentence against the appellants cannot stand. We do therefore quash the conviction of the two appellants and we do hereby set aside sentences imposed.

The question we need to consider is whether the appellants will suffer prejudice if a trial is ordered. In the case of **Pascal Clement Braganza v Republic [1957] E.A. 152** the court accepted the principal that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. In our considered view in this case retrial should be ordered for it will be in the interest of justice that the case be retried. The offence occurred 3 years ago and we are of the view that the passage of three years is not too long to make it difficult to trace the witnesses. The offence was serious. There was a pistol involved. We are satisfied that the evidence recorded is sufficient to order a retrial.

The judgement of this court therefore is that the appellants' conviction by lower court is quashed and their sentence is hereby set aside. This court does hereby order that the appellants be retried for the self-same offences by the lower court. In this regard we do order that the appellants be presented to the Nyeri Chief Magistrate's court on 5th October, 2007 for mention with a view to a retrial date being fixed. Pending such appearance the appellants shall remain in prison custody.

Dated and delivered at Nyeri this 4th day of October, 2007.

MARY KASANGO

JUDGE

M. S. A. MAKHANDIA

JUDGE