



**CRIMINAL**

- **The court is under a duty to show the language used by witnesses before it.**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL APPEAL CASE NO. 9 OF 2000**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL CASE NO. 178 OF 2006**

**CRIMINAL APPEAL CASE NO. 179 OF 2006**

**CRIMINAL APPEAL CASE NO. 180 OF 2006**

**CRIMINAL APPEAL CASE NO. 181 OF 2006**

**CRIMINAL APPEAL CASE NO. 182 OF 2006**

**CRIMINAL APPEAL CASE NO. 183 OF 2006**

**CRIMINAL APPEAL CASE NO. 184 OF 2006**

M'mworia M'ikiara.....1<sup>ST</sup> APPELLANT  
Thangichia M'Imunya.....2<sup>ND</sup> APPELLANT  
M'itobi M'Ithibua.....3<sup>RD</sup> APPELLANT  
M'Tuera M'Mwambia .....4<sup>TH</sup> APPELLANT  
Kubai M'kabARANGe..... 5<sup>TH</sup> APPELLANT  
Stanley Lumumba .....6<sup>TH</sup> APPELLANT  
M'Imathi M'Ithinyai .....7<sup>TH</sup> APPELLANT

**JUDGMENT**

The consolidation of these files was by an order of this court of 19<sup>th</sup> December 2006. The 3<sup>rd</sup> accused in the lower court M'mworia M'Ikiara was made the 1<sup>st</sup> appellant in Criminal Appeal No. 178 of 2006. The 7<sup>th</sup> accused Thangichia M'Imunya was made the 2<sup>nd</sup> appellant in Criminal Appeal No. 179 of 2006. The 4<sup>th</sup> accused in the lower court M'Itobi M'Ithibua was made the 3<sup>rd</sup> appellant in Criminal Appeal No. 190 of 2006. The 2<sup>nd</sup> accused before the lower court M'Tuera M'Mwambia was made into the 4<sup>th</sup> appellant in Criminal Appeal No. 181 of 2006. The 1<sup>st</sup> accused person before the lower court Kubai M'Kabwange was made the 5<sup>th</sup> appellant in Criminal Appeal No. 182 of 2006. The 6<sup>th</sup> accused in the lower court Stanley Lumumba was made the 6<sup>th</sup> appellant in Criminal Appeal No. 183 of 2006. The 5<sup>th</sup> accused in the lower court M'Imathi M'Ithinyai was made the 7<sup>th</sup> appellant in Criminal Appeal No. 184 of 2006. It should be noted that the 3<sup>rd</sup> and 7<sup>th</sup> appellants had died by the time this appeal was heard. Accordingly, I order that criminal appeal numbers 180 of 2006 and 184 of 2006 be marked as having abated. The appellants were jointly charged before the lower court with the offence of malicious damage to property contrary to section 339 (1) of the Penal Code. The particulars of the offence stated that on the 4<sup>th</sup> March 1998 they jointly willfully and unlawfully damaged a church building the property of Methodist Church. They were all convicted as charged and were sentenced to pay a fine of Kshs. 3,000 each and in default 3 months imprisonment. They now appeal against their conviction and sentence. Although the learned counsel Mr. C. Kariuki for the appellants submitted faulting the prosecution's evidence on the identification of the appellants amongst other short comings, in my perusal of the lower court's proceedings, I found that the learned trial magistrate in recording evidence of both the prosecution and the appellants failed to indicate the language used before court. The necessary over recording the language used in court was discussed in the case **Julius Mukubio vs. Republic** Criminal Appeal Case No. 55 of 2001 where the court stated thus:-

*“When those witnesses testified, the lower court failed to indicate the language they used. Section 198 of the Criminal Procedure Code and section 77 (2) of the old Constitution of Kenya required the proceedings to be conducted in a language understood by the accused persons. This was stated in the case Antony Njeru Kathiari & Ano. Vs. Republic CRA No. 21 & 23 of 2004 where the Court of Appeal had this to say:-*

*Mr. Orinda, learned Principal State Counsel, did not seek to support the convictions recorded against the appellants and in view of this court's previous decisions, Mr. Orinda is certainly right in conceding the appeals. Way back 1985 this court, in the case of Diba Wako Kiyato Vs Republic [1982 – 1988] 1 KAR 1974 held that:-*

***It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands.”***

*The Court in that case was relying on the provisions of section 77 (2) (f) of the Constitution of Kenya and section 198 (1) of the Criminal Procedure Code. The court said:-*

***“The practice of recordings (sic), if not the name of the interpreter, at least the nature of the interpretation, has been standard practice in these courts for many years. For example, that which is described as the “plea form,” Form Criminal 133, contains under all the other details of the case and of the accused, a space against the word ‘Interpretation.’ There was no compliance with either of these two statutory provisions or with the standard practice in the instance case. The magistrate made no note of the language into which the evidence of the witnesses, many of whom spoke in English or Swahili was being translated.....”***

*The requirement to show the language of the court is also to be found in the constitution of Kenya 2010*



***order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”***

*“Taking the queue from that decision, this court in the case of **Bernard Lolimo Ekimat Vs. R.** Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-*

***There are many decision on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”***

The offence which the appellant faced before the lower court occurred in 1998. That is now 13 years ago. It is not clear if witnesses of the prosecution can be traced after such a long time. Then again to subject the appellants to a retrial after 13 years would in my view be prejudicial to the appellants. It is for that reason that I quash the lower court’s conviction of the appellants **M’Mworia M’Ikiara, Thangichia M’Imunya, M’Tuera M’Mwambia, Kubai M’Kabwange and Stanley Lumumba** and I hereby set aside the lower court’s sentence against those appellants.

***Dated, signed and delivered at Meru this 3<sup>rd</sup> day of March 2011.***

**MARY KASANGO**  
**JUDGE**