



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CRIMINAL APPEAL 253 OF 2008 & 254 OF 2008(CONSOLIDATED)**

**PETER NJUGUNA IRUNGU..... APPELLANT**

**Versus**

**REPUBLIC .....RESPONDENT**

**CONSOLIDATED WITH**

**CRIMINAL APPEAL NO. 254 OF 2008**

**JASSAN NJUGUNA NJOROGE..... APPELLANT**

**Versus**

**REPUBLIC .....RESPONDENT**

*{Appeal from Original Conviction and sentence in the Principal Magistrate's Court at Murang'a*

*in Criminal Case No. 2536 of 2006 dated 13<sup>th</sup> June 2007 By A.K. NDUNGU PM}*

**JUDGMENT**

The two appellants whose appeals we have consolidated for ease of hearing and as they arose from the same trial were charged together with one **David Mihingo Irungu** who was acquitted at the conclusion of trial with 3 counts of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged that on the 26<sup>th</sup> August, 2006 at [particulars withheld] village in Murang'a district within Central Province, jointly with others not before the court being armed with dangerous weapons namely pangas and rungas robbed **SWN** of her cash Shs. 1000/= and a mobile phone make Motorola valued at Kshs. 2000/= and immediately before the time of such robbery threatened to use actual violence to the said **S W N**. On the same date, time and in similar circumstances they also robbed **N W** and **AW** Nof Kshs. 500/= and 200/= respectively. The two were the complainants in respect of counts 1 and 3.

The appellants also face a 4<sup>th</sup> and 5<sup>th</sup> counts of rape contrary to section 3(1) (c) of the Sexual Offences Act No. 3 of 2006 respectively. That at the said time and place they unlawfully had carnal knowledge of **S W N** and **A WN** without their consent.

The two also faced alternative counts of indecent assault on a female contrary to section 11(6) of the Sexual Offences Act. No. 3 of 2006. That at the said time and place they unlawfully and indecently assaulted **S W N** and **A W N** by removing their underpants and touching their private parts.

They returned a plea of not guilty on the main as well as alternative counts and they were tried. Prosecution's case was that P.W.1, P.W.2, P.W.3 and P.W.5 were at home when a gang of people suddenly attacked them at around 10 – 11 p.m. on the material night. It was the evidence of P.W.1 that she was in bed when she heard her sister **A W (P.W.2)** screaming and calling her out. Three men then accosted her. They took her phone and Shs. 1000/= . In the process was able to identify the appellants since she had a lantern lamp on. The 1<sup>st</sup> appellant threatened her with a panga and ordered her to remove her clothes. He then ordered her to bend. He thereafter proceeded to rape her from behind. P.W.1 was able to see the 2<sup>nd</sup> appellant as well as he dragged her sister to the same room and raped her on her bed. The robbers stayed on for about 1 hour. They thereafter left and the matter was reported to police. P.W.1 was subsequently examined and a P3 form filled. Her P3 which was produced in evidence confirmed that she had indeed been a victim of raped. At a subsequent identification parade following the arrest of the appellant she managed to pick the 1<sup>st</sup> appellant. On cross examination P.W.1 stated she had in the process of robbery and raped managed to note that the 1<sup>st</sup> appellant had dark skin and a long nose. This was apparent even in court. She added she also picked out the 2<sup>nd</sup> appellant in the parade.

P.W.2 testified that she was dragged to where P.W.1 was by the 2<sup>nd</sup> appellant and ordered to remove her pant. When she refused she was slapped and her pant forcefully removed and raped by the 2<sup>nd</sup> appellant in the presence of P.W.1. Her Kshs. 300/= was also taken. She saw the 2<sup>nd</sup> appellant through the light of a torch which he had placed on a table but did not switch off as he raped her. That she managed to pick out the 2<sup>nd</sup> appellant at a police identification Parade later.

P.W.4 arrested the appellants following a tip off from informers. By then the complainants had been treated and P3 forms filled. P.W.4 produced both P3 forms. In both P3 forms there was evidence of forceful penetration of the victims. P.W.6 did identification parades for appellant and they were placed.

On being placed on their defences the appellants gave unsworn statements and called no witnesses.

The 1<sup>st</sup> appellant stated that he was just arrested for no apparent reason and P.W.1 given opportunity to see him before the identification parade. The 2<sup>nd</sup> appellant testified that he worked at Siakago till 2<sup>nd</sup> September 2006. On 3<sup>rd</sup> September 2006 Police officers went to his home and arrested him.

The learned magistrate having carefully evaluated and analyzed the evidence tendered by the prosecution and also the defence was persuaded that the appellants were guilty as charged. Accordingly he convicted them and sentenced them to the only permissible sentence, death. The appellants were dissatisfied with the conviction and sentence, hence these appeals. In their petitions of appeal the appellants have faulted their convictions on weak prosecution evidence lack of identification and wrongful rejection of their otherwise valid defences.

At the hearing of the appeal, **Mr. Mukura** learned Senior State counsel conceded to the appeal on the grounds that the record of the trial magistrate did not show the language in which the witnesses testified. **Mr. Mukura** further submitted that it was a case of mistrial therefore and urged us to so find. Further **Mr. Mukura** , nonetheless sought for a retrial claiming that the evidence tendered was overwhelming as the appellants were positively identified. A conviction therefore was likely to result in the event of a retrial. Some of the complainants were ruthlessly raped. Ends of justice will thus be best served by an order of retrial. No prejudice will be occasioned to the appellants as they were convicted only in June 2007.

In response, the appellants much as they were in agreement with **Mr. Mukura** on the reasons for conceding to the appeal, nonetheless they were opposed to an order for retrial. They based their objection in their written submissions which they had filed in court earlier. We have carefully read and

considered them.

We have scrutinized the record of the trial magistrate and found that when the trial commenced on 12<sup>th</sup> September 2006 it was not recorded in what language the proceedings were being conducted, though there was an interpreter. The appellants were unrepresented throughout the proceedings. All the witnesses who testified are recorded Thus:-

**P.W.1 Adult female/male sworn states.**

The language of the court and in which the witnesses testified is not indicated. However the assumption here is they must have testified in English or Swahili. These are the official languages of the subordinate courts. However there is no basis for making such an assumption. In any event even if we were to make such assumptions we cannot also assume that the appellant understood either of the two languages.

The record further shows that the appellants cross-examined the witnesses, but the language used is not indicated. The appellants then gave unsworn evidence but here again it is not shown what language was used.

As we have said, there is no reason for us to presume that the appellant spoke and understood the language in which they are recorded to have answered the charge and conducted their defences. On the question of language the court of appeal in the case of **Degow Nunow V Republic, Cr. Appeal No. 233 of 2005(UR)** had this to say:-

*“Of course there was right from the beginning of the trial an interpreter present in court, that is clearly shown in the record of the magistrate. What is not shown throughout the record is the language which the appellant or the witnesses addressed the magistrate .....*

*On this aspect of the matter, the burden is on the trial court to show that an accused person has himself selected the language which he wishes to speak and in which proceedings are interpreted to him. As we have repeatedly pointed out, those are not mere procedural technicalities. There is, first section 198 of the Criminal Procedure code and that section 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 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 went further to say in the judgment:-

*“The provisions show that the question of interpretation of evidence to a language which an accused person understands is not a matter for the discretion of the trial magistrate – it must be done and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak. Section 77 of the Constitution is in relevant parts, in these terms:-*

*“77 (2) Every person who is charged with a criminal offence.....*

*(a) .....*

*(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 in the trial of the charge.”*”

The court then continued:-

*”It is the responsibility of the trial courts to ensure compliance with those provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place”.*

On this ground alone therefore we must allow the appeal.

**Mr. Mukura** has urged us to order a retrial. Of course we have jurisdiction to make such an order. However the law is pretty settled as to the circumstances under which an order for retrial can be made. In the case of **Benard Lolimo Egimat V Republic Cr. Appeal number 151 of 2004 (UR)** the court of appeal observed:-

*“..... there are many decisions on the question of what appropriate case would attract an order for retrial but on the main, the principal that has been acceptable to court 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 interest of justice require it...”*

This principal was followed in the recent decision of the court of appeal, in the case of **Julius Karuga v Republic, Criminal appeal number 189 of 2000.**

No doubt that the evidence marshalled by the prosecution during the trial in the subordinate court was overwhelming. If the self same evidence was to be led at the retrial, we are convinced a conviction may result. From the record apart from the thugs robbing their victims, they also went out of their way to compound their heinous act by raping some of the victims. In the premises the ends of justice would be well served by an order of retrial. The appellants have been in custody since 3<sup>rd</sup> September, 2007. This is a short time. Accordingly no prejudice will be occasioned to the appellants in the event of a retrial. The state has assured us that it will readily avail witness if a retrial is ordered. Thus there will be no delay in the prosecution of the appellants in the event of a retrial

Everything considered we think that this is a fit and proper case for a retrial. In those circumstances we allow the appeal and set aside both convictions and sentences imposed on the appellants. However we do not order for their immediate release. Instead we order that they be held in prison custody until 14<sup>th</sup> may, 2009 when they shall be presented before the Senior Principal Magistrate’s court, Murang’a for their retrial to commence before a magistrate of competent jurisdiction other than the one who presided over the initial trial.

**Dated and delivered at Nyeri this 7<sup>th</sup> day of May 2009.**

**MARY KASANGO**

**JUDGE**

**M.S.A. MAKHANDIA**

**JUDGE**