REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 181 of 2005 & 182 of 2005 (Consolidated)

DAVID KITUEKU KIROHE …….....…….. APPELLANT

Versus

REPUBLIC ……..…… RESPONDENT

(Being an appeal from the conviction and sentence of

M. R. Gitonga Principal Magistrate in Chief Magistrate's

Criminal Case No. 5461 of 2003 at NYERI)

Consolidated with

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 182 OF 2005

DANIEL KARONJI WAHOME …....…….. APPELLANT

versus

REPUBLIC ……..…….. RESPONDENT

(Being an appeal from the conviction and sentence of

M. R. Gitonga Principal Magistrate in Chief Magistrate's

Criminal Case No. 5461 of 2003 at NYERI)

JUDGMENT

The appellants were charged with ***robbery with violence contrary to section 296(2) of the Penal Code.*** They were convicted as charged and both were sentenced to suffer death as prescribed by the law. Both were aggrieved by the conviction and sentence and have preferred their respective appeals. At the hearing, both appeals were consolidated. In considering these two appeals we have found that the lower

court failed to indicate the language of the court. That being the case the trial before the lower court becomes a nullity and on that basis the appeal will succeed. The court of appeal in considering situation where the record did not show the language of the court stated in ***Criminal Appeal No. 11 of 2004 (NRB) Francis Macharia Gichangi & 3 others vs Republic;-***

"***Regarding the first issue, the trial court record is silent on the language of the proceedings were conducted. In Fredrick Kizito Vs Republic Criminal Appeal No. 170 of 2006, this court authoritatively stated thus:-***

In the matter before us, while, by inference, we think that the appellant was possibly allowed the services of an interpreter, in absence of a note that effect, we entertain a doubt that that was so. It is a matter which has caused us much anxiety more so considering that the appellant has a sentence of death hanging over his head. This and several other cases we have handled before, show the grave danger inherent in the failure by the trial court to record the essential details in proceedings before it, for instance, the name of the officer trying the case; the prosecutor and his rank; the court interpreter or clerk and the language or languages of the proceedings; the language used by each witness; that judgement was pronounced; the date thereof and in whose presence et cetera. These are as important as the evidence and form part of the fair process of justice, the omissions of which might affect an otherwise sound conviction."

In ***Albanus Mwasia Mutua vs Republic Criminal Appeal No. 120 of 2004,*** the same court, after citing the case of ***Swahibu Simbauni Simiyu and Another v R.*** *Court of Appeal* ***Criminal Appeal No. 243 of 2005****,* rendered itself thus:

"***Since the record of the magistrate did not show the language used by the two appellants, there was a violation of the appellant's Constitutional Rights under the foregoing section (Section 77(2) (b) of the Constitution) and the appeal was allowed. Once again the nature and strength of the evidence brought by the prosecution in support of its charge did not really count."***

With that in mind we need to consider whether to order for a retrial since the lack of language in the record of the lower court renders that trial to be a nullity. A case in point is ***Criminal Appeal No. 221 of 2006 (KSM) CISSE DJIBRILLA vs Republic*** in which the court of appeal stated:-

"***In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."***

The evidence against the appellant before the lower court was given by PW 1. We have reexamined that evidence and we find that on the basis of it a retrial can be successfully mounted. To order a retrial will not give an opportunity to the prosecution to fill gaps in our view. Accordingly the appellants' appeal against conviction and sentence does succeed. The conviction of both appellants is hereby quashed. The sentence against both appellants is hereby set aside. We order the appellant to be retried before Chief Magistrate's court at Nyeri. In that regard this matter shall be mentioned in that court on 16th October 2008. In the meantime the appellants shall remain in prison custody until then.

Dated and delivered at Nyeri this 2nd day of October 2008.

MARY KASANGO

JUDGE

M.S.A. MAKHANDIA

JUDGE