



**IN THE COURT OF APPEAL
AT NYERI**

CRIMINAL APPEAL 99 OF 2008

PETER MATHIA KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Kasango, J.) dated 22nd May, 2008

in

H.C.C.R.A. NO. 127 OF 2005)

JUDGMENT OF THE COURT

The appellant, **Peter Mathia Kamau** was tried and convicted by the Principal Magistrate at Muranga, with the offence of robbery with violence contrary to **Section 296 (2)** of the *Penal Code*. The particulars of the charge were that on 25th October 2001, at Maragi village in Muranga District jointly with another already before the court and while armed with offensive weapons namely, timber, robbed one **Jemino Mwangi Gitau** of one quarter ($\frac{1}{4}$) kilogramme of meat, a packet of tea leaves and cash Kshs.550/=, all to the aggregate value of Kshs.694/=. The appellant immediately thereafter wounded the said **Jemino Mwangi Gitau**.

The appellant was sentenced to death and appealed to the superior court against both conviction and sentence. That court, in a judgment delivered on 22nd May 2008, dismissed that appeal thereby paving way for this second appeal to this Court.

The appeal to this court is premised on two grounds of appeal which remained after Miss. Mwai, learned counsel for the appellant consolidated all the grounds of appeal into two. The first of the two grounds is that the second appellate court was wrong in placing reliance on the identification by a single witness while the first ground is that **Section 77 (2) (f)** of the repealed Constitution was breached in relation to the appellant by the Principal Magistrate's court because the appellant was denied the services of an interpreter to enable him follow and participate in the trial.

It was also submitted that the learned Judges of the superior court did not notice that the trial Magistrate failed to indicate the name of the interpreter and the nature of the interpretation required. We would at the outset draw attention to **Section 77 (2) (f)** of the repealed Constitution which lays down that a person charged with a criminal offence shall be permitted to have, without payment, the assistance of an interpreter, if he does not understand the language used at the trial. It is clear to us therefore, that for an accused person to come under the sub-section, there must be some evidence

that he does not understand the language to be used at the trial.

It is not apparent from the record that the appellant had intimated to the trial court, his inability to understand the language to be used at the trial. To the contrary, there is evidence that the appellant suffered no such disability, in that he was able to and he cross examined the prosecution witnesses. It is also clear from the subsection that while an obligation exists for the court to permit the accused to have the services of an interpreter, we see no requirement for the court to indicate the language used by witnesses at the trial. The relevant witnesses such as PW1 and PW2 gave their evidence in Kikuyu language. The appellant himself made his unsworn statement in the same language.

We now turn to the submission by Miss. Mwai, learned counsel for the appellant that though the complainant said he could recognize the appellant, he however, did not make his report of the attack the next morning to the Police. We would draw attention to three matters with regard to this submission. Firstly, it was a fact that the complainant was, as a result of the attack, admitted and remained in hospital for unusually long period of time. Secondly, it was also in evidence that the appellant had disappeared from the locality where the crime was committed. Thirdly, the complainant could not report to the Police the attack upon him because, according to the evidence on record, the complainant was in a lot of pain. That condition was confirmed by a clinical officer called to testify for the prosecution. The clinical officer stated that when the complainant was admitted in hospital, he was subconscious and unstable. Those who attacked and robbed him had set him on fire when they thought he had recognized them.

We are satisfied that the complainant had satisfactorily explained why he had not reported the attack to the Police the next day following the attack on him by the appellant. We accordingly see no justification for interfering with the learned Judges' decision and we therefore dismiss this appeal in its entirety.

Dated and delivered at Nyeri this 29th day of October, 2010.

R. S. C. OMOLO

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JUDGE OF APPEAL

M. OLE KEIWUA

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR