



**IN THE COURT OF APPEAL  
AT NYERI  
Criminal Appeal 228 & 234 of 2006  
BETWEEN**

**STANLEY KARIMI KAGO  
CHARLES KAGO WANJOHI ..... APPELLANTS**

**AND**

**REPUBLIC ..... RESPONDENT**

**(Appeal from a judgment of the High Court of Kenya at Nyeri (Khamoni & Okwengu, JJ.) dated 31<sup>st</sup>  
May, 2006**

**in**

**H.C.CR.A. NOS. 204 & 205 OF 2002)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is a second and final appeal by **Charles Kago Wanjohi** and **Stanley Karimi Kago**, the appellants, who were convicted on 23<sup>rd</sup> April, 2002 by the Kerugoya Principal Magistrate, Mr. W. N. Njagi, for the offence of robbery with violence contrary to **Section 296 (2)** of the *Penal Code* and sentenced to death, as by law required.

Their first appeal to the superior court (Khamoni, Okwengu, JJ.) was dismissed. The concurrent facts established by the two courts below were that on the night of 18<sup>th</sup> October, 2001 and the early morning of 19<sup>th</sup> October, 2001 at about 1.20 a.m. a gang of robbers struck at an estate known as Kimari Estate in Kerugoya town and robbed and injured several people living in the estate.

There were four houses that were ransacked, and the appellants were charged with four counts of robbery with violence. The lower court heard evidence from nine witnesses. **Peterson Kinyua Mwangi** (Mwangi) (PW1) testified that on the night of 18<sup>th</sup> October, 2001, three men broke into his house. One of them who was armed with an axe hit him on the forehead, and stole Shs.1,000/= from him. His wife **Tabitha Wacheru Kinyua** (Tabitha) (PW2) managed to escape through a rear door, and found police officers already on their way to the estate. Upon arrival at the house, police officers saw the two robbers attempting to escape and ordered them to surrender. They failed to do so, and the police opened fire, and killed two robbers instantly. Meanwhile, one robber remained in Mwangi's house, while the shooting was going on outside. He was later apprehended, as was another robber, who pretended to be "dead" near his two dead comrades who had been shot earlier. These other two robbers were arrested, and some crude weapons such as an axe, metal bar, bows and arrows and a

quiver were also recovered from the scene. Also recovered from the two robbers were cash and a Seiko 5 wrist watch, all belonging to the victims.

When put on their respective defences, the appellants denied the offences in unsworn statements and claimed that they were arrested as they innocently headed to their respective homes.

The trial court rejected the defences put forward and proceeded to find the two appellants guilty as charged. It stated as follows:

**“I find overwhelming evidence that the two accused did attack and rob the four complainants on the mature (sic) date jointly with others not before the court. During the robbery, they were armed with dangerous and offensive weapons. During the robbery the accused committed violence on the complainant and died (sic) before PW1 Peterson Kinyua Mwangi. They were sufficiently identified during the robbery. The two accused were arrested and handed (sic) at the scene of the robbery. Two of their colleagues were shot dead by police during the robbery. In this case, I find that the charges facing the accused persons have been proved beyond any reasonable doubts”.**

The superior court similarly accepted the evidence adduced by the prosecution witnesses and rendered itself as follows:

**“In their defences each Accused denied having committed the offence and claimed to have been innocently (sic) arrested whilst on their way home.**

**In his judgment the trial magistrate found that all the 4 complainants who live in the same area were robbed. She also found that the police shot dead two of the robbers and that the 2<sup>nd</sup> Appellant was apprehended from PW1’s house by PW1 who handed over the 2<sup>nd</sup> Appellant to the police, whilst the 1<sup>st</sup> Appellant was arrested within the same compound. The trial magistrate therefore rejected the defence of the Appellant that they were innocent passer-by (sic). He also found that the robbers were armed with dangerous weapons and that one of the complainants was injured during the robbery. He therefore convicted both the Appellant (sic) of all the 4 counts of robbery with violence and sentenced each to the mandatory death penalty in respect of each count”.**

Being aggrieved by that decision, the appellants are here for their second and final appeal. That being so, by dint of **Section 361 (1) (a)** of the *Criminal Procedure Code*, only issues of law (and not facts) can be addressed at this stage. The appellants filed their respective, and almost identical, home-made grounds of appeal, raising both points of law as well as facts. However, in a supplementary memorandum of appeal filed on their behalf by their learned counsel, Mr. Njuguna Kimani, the appellants raised only one ground of appeal as follows:

**“1. The learned Honourable Judges erred in law in failing to appreciate that the Trial Court erred in law in failing to indicate what language was used by PW1, PW2, PW4, PW5, PW6, PW7, PW8, PW9 including the Appellants in the entire proceedings before the Trial Court thus arriving at a wrong decision. Prejudice and miscarriage of justice was occasioned to the Appellants”.**

At the hearing before us, Mr. Kimani abandoned all grounds of appeal previously filed by the appellants in their home-made memoranda, and relied only on the above ground relating to failure on the part of the lower court to indicate the language used in court by various witnesses. He argued that had the superior court re-evaluated the evidence on record, it would have noticed that this omission by the lower court resulted in a miscarriage of justice, and in denying the appellants the right to a fair trial as provided for in the just-repealed Constitution of Kenya. He relied on the case of **Samuel Murithi Mwangi vs. R** (*Criminal Appeal No. 39 of 2005 – Nyeri*) in asking that the appeal be allowed.

Mr. J. Kaigai, the learned Principal State Counsel for the State, argued that the appellants had fully and actively participated in

the proceedings; had cross-examined witnesses; had suffered no prejudice; and had not raised this issue before either of the two courts below.

We have examined the record and confirmed that indeed the trial court did not record the language used when eight of the nine prosecution witnesses testified. The only occasion when the language is indicated is when the 3<sup>rd</sup> prosecution witness testified. However, at the commencement of the trial the record shows the following:

**“DATE 30.10.01  
MAGISTRATE W. N. NJAGE PM  
PROSECUTOR IN CHARGE IP Gichangi  
CC Ben  
INTERPRETATION ENG/KISWAHILI  
Accused Present”.**

Thereafter, although the language used in respect of eight witnesses is not indicated, the record shows that the coram, including the court clerk (CC) was the same throughout the trial. It is the court clerk’s function, among other things, to interpret the language where necessary. The record shows that Ben, the court clerk, was present throughout the trial. The record also shows that the appellants cross-examined every witness, and at no time complained about their inability to understand the language. They fully participated in the trial, and did not even raise this issue in their first appeal before the superior court. Clearly, this is an afterthought, and although it is their right to raise a point of law at any stage of the litigation, we are unable to discern any prejudice caused to them by reason of this failure on the part of the trial court. There is clearly no miscarriage of justice here. The case of Samuel Murithi Mwangi (supra) relied on by them is of no assistance to them as it concerned the omission to record whether the witness was sworn before giving evidence in court. The law requires that every witness in a criminal case be examined upon oath (see **Section 151 Criminal Procedure Code**). However, there is no law that requires that the court record the language used by every witness. Of course, it would be desirable to do so, but not mandatory. And here, in this case before us, we are unable to discern any prejudice or miscarriage of justice caused by reason of this omission.

Accordingly, and for reasons outlined, we find that there is no merit in this appeal, and we dismiss the same.

**Dated and delivered at Nyeri this 29<sup>th</sup> day of October, 2010.**

**R. S. C. OMOLO**

.....  
**JUDGE OF APPEAL**

**M. OLE KEIWUA**

.....  
**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....  
**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR