REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

Criminal Appeal 306 & 305 of 2006

MBAE MARIJANI

TIMOTHY KIMANI……..……..APPELLANTS

AND

REPUBLIC……..……..……..……..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at

Meru, (Lenaola Sitati, JJ) dated 12th October, 2006

in

H.C.CR.A. NOS. 15 & 155 OF 2005)

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JUDGMENT OF THE COURT

The two appellants, *TIMOTHY KIMANI MUCHIRI* (first appellant) and *MBAE MARIJANI* (second appellant) were tried and convicted by *A.N. Kimani*, Senior Resident Magistrate, Chuka, Meru of robbery with violence contrary to *Section 296(2)* of the Penal Code and each sentenced to death. They were dissatisfied with both conviction and sentence and appealed to the superior court *(Lenaola and Sitati, JJ)* who dismissed their appeals on 12th October, 2006. They have now appealed to this Court, citing several points of law but mainly that the proceedings in the trial court were:-

"*defective for failure by the trial court to indicate the language in which the witnesses and the appellants testified before it and as to whether the interpretations if any, were done or not*".

The evidence on which the appellants were convicted was that *Joseph Waweru (PW1*) was at his home on 24th April, 2004 at about 12 a.m. His dog barked and he came out to check, but found nothing, so he went back to the house. At about 2 a.m. his door was hit with stones and it gave way. He saw many torches outside and three people entered the house and ordered him to sit down. They demanded money and a mobile phone. One had a panga, and another a crowbar. They beat him and took away his sweater, two pangas, an axe, bucket and binocular, all valued at Kshs.3,300/-. He recalled that the

attackers were shinning torches as they looked for valuables in the house, and he saw them with the aid of their torches, and identified them as people he had known before. He referred to the 1st appellant, as a "boy who grew up as I watched," and the second appellant as "the boy who used to visit his uncle who lives near me." He did not know the 3rd suspect. He reported the matter Chuka Police Station. The police visited his home and collected a stone which was used for breaking the door. He told the police "*who the robbers were"*. The police had a dog which led them to the house of the 1st appellant where the 2nd appellant was also found. They were both arrested and subsequently charged. The 3rd suspect was not traced

Ruth Wambui Waweru (PW3) was the wife of PW1. She recalled the night of 24th May, 2002, at about 12 a.m. when she too heard dogs bark outside their house, and PW1 went out and returned saying that he saw nothing. At about 2 a.m. again she heard noise and she screamed. Almost immediately the bedroom door was hit and three people entered the room and hit her husband as they demanded money. The attackers had torches which they shone all over the house. PW3 saw them with the aid of the torches. Immediately they left, PW1 sent a Good Samaritan to report the incident to the police who visited the house the same night. They had a police dog. PW1 & 2 named their attackers. The dog followed the scent which led them to the house of the first appellant from where both appellants were arrested.

It was *James Mwathi Mutegi, (PW4*), who assisted PW1 & 3 by calling the police using his mobile telephone, and *Dr. Peter Chacha (PW2)* of Meru South District Hospital examined PW1 and found him with a swelling on the head, a small cut on the left hand and tenderness on the left thigh. He assessed the injuries as "harm" and completed a P3 form which he produced in court as an exhibit.

P.C. John Kanjora, (PW5), was the investigating officer. He went to the house of PW1, the complainant, where he recovered a stone, which he learnt was used for breaking the doors. He noted that the items in the house were disturbed, and also observed that both the main door and an inside door were broken. The appellants who had already been arrested were subsequently charged.

The appellants denied the offence in their sworn statements in defence before the trial Magistrate, who nevertheless rejected them and found that the prosecution had proved the charge against each appellant beyond reasonable doubt, and convicted and sentenced each to death.

As already stated, their first appeals were dismissed by the superior court, hence this second appeal.

When the appeal came before us for hearing, *Mrs Ntarangwi*, learned counsel for both appellants submitted that the proceedings were defective as the trial Magistrate did not record the language of the court throughout the trial. She relied on several decisions of this Court in urging this point, particularly the case of *DEGOW DAGANE NUNOW V REPUBLIC CR. APPEAL NO. 233 OF 2005 (unreported)* where the Court said in part:-

"*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".*

Mrs. Ntarangwi urged the court to allow the appeals of both appellants as evidence relating to their arrest with the aid of a police dog was doubtful since the dog trainer did not give evidence in the trial court. Here again she relied on this Court's decision in the case of *KENNEDY MAINA V REPUBLIC (Criminal Appeal No. 140 of 2005) (unreported),* where the Court found the evidence of a dog handler to be worthless as it was not preceded by an inquiry as to the "*training and antecedents of the dog*". She asked the Court not to order a retrial as the appellants have been in custody for about four years and it would not be in the interest of justice to take them through the ordeal once more. She referred us to this Court's decision in the case of *BENARD LOLIMO EGIMAT V REPUBLIC (Criminal Appeal NO. 151 of 2004)* where the court stated:-

"*There are many decisions on the question of what appropriate case would attract an order of a retrial but on the main, the principle 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 interests of justice require it".*

This principle was followed in a recent decision of this Court, in the case of *JULIUS KAUNGA V REPUBLIC* Criminal Appeal No. 189 of 2000.

In reply to the submissions, learned Principal State Counsel *Mr. Charles Orinda* conceded that there were problems in the appeal as the proceedings in the trial court did not show the language in which the trial was conducted. He submitted further that because of this and other problems in the proceedings, he did not ask for a retrial.

We have scrutinized the record of the trial Magistrate and found that when the trial commenced on 28th June, 2004 it was not recorded in what language the proceedings were being conducted, though there

was an interpreter. The appellants who were unrepresented are recorded to have answered the charge thus:-

"*Accused 1: It is not true"*

"*Accused 2: It is not true*".

The assumption here is that they understood the English language, but they have both denied that they do.

The record further shows that they cross-examined the witnesses, but the language used is not indicated. Each appellant gave sworn evidence and was cross-examined by Inspector Kunga, but here again, it is not shown what language was used.

Though this complaint was not raised by the appellants in the superior court, it is a point of law and we must address it. As we have said, there is no reason for us to presume as the superior court did, that the appellants spoke and understood the language in which they are recorded to have answered the charge and conducted their defence. On this ground alone, we must allow the appeals.

The issue of the dog handler not having been called as a witness was raised as a ground of appeal by the appellants in the superior court in their first appeal but that court did not consider it and thus failed in its duty on first appeal to correctly apply the decision in *OKENO V R* [1972] EA 32, in which the predecessor of this Court authoritatively set out the duty of the first appellate court.

On the matter of retrial, we note that the charge brought against the appellants dates back to 2004. It was of a grave nature and the superior court dismissed their appeals on 12th October, 2006. *Mr Charles Orinda*, learned Principal State Counsel, did not ask for a retrial, as he may have problems, given the manner in which the proceedings were conducted in the trial court. In those circumstances we allow the appeals, quash the convictions and set aside the sentences imposed on the appellants, and order that each appellant be released forthwith, unless otherwise lawfully held.

DATED and DELIVERED at NYERI this 16th day of MAY, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR