REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Criminal Appeal 303 of 2005

JOHN IRUNGU ……...…… APPELLANT

AND

REPUBLIC …….…….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya

Nairobi (Lesiit & Ochieng, JJ) dated 9th November, 2004

in

H.C. Cr. Appeal No. 1123 of 2001)

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JUDGMENT OF THE COURT

This is a second and last appeal. The appellant, John Irungu, was charged in the Chief Magistrate's Court at Makadara with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that:

"On the 6th May of 2000 at the Junction of Mombasa Road and Imara Daima murram Road jointly with others not before the court being armed with a pistol robbed Caroline Kalande Otingo of a motor vehicle Reg. No. KAC 578X Peugeot 205 and cash Ksh.7,000 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Caroline Kalande Otingo."

The appellant pleaded not guilty to the charge but after full hearing, he was found guilty as charged, convicted and sentenced to death as mandatorily provided by law. He was not satisfied with the subordinate court's decision and proceeded on appeal to the superior court. The superior court dismissed the appeal and upheld both the conviction and sentence pronounced by the subordinate court. The appellant was still not satisfied and hence this appeal before us.

The brief facts that were before the trial court and the superior court as can be deciphered from the record were that the complainant, Caroline Kalande Otingo (PW 1) (Caroline) was at the relevant time working as a catering officer with Kenya Airways. On 6th May 2000 at 5.00 a.m., she was on her way to work from Imara Daima. She was driving her motor vehicle KAC 578X Peugeot 205. As she approached Mombasa Road junction, she slowed down and came to a complete stop. She heard a tap on

the left window. Before she could check properly, there was another tap on the right window. On checking both sides she saw two men with guns. They gestured her to open the door. Out of fear of being shot, should she refuse to do so, she opened the co-driver's door and her door. The two thugs entered into the vehicle. She was then squeezed in the middle of these two people. Two other men entered through the rear door. One of the men got onto the steering wheel and they drove off joining Mombasa Road to City Cabanas. They went for a short while and then took the road to Automobile Association Offices. The last two men into the car had nothing in their hands and Caroline did not know them. On reaching near Automobile Association Offices, they branched towards the slums and suddenly stopped. By that time, Caroline had been pushed to the rear seat at the back of the vehicle. As they stopped, suddenly each of them came out of the vehicle and ran away. Caroline did not know why they stopped and alighted, but before they did so and as they were still in the vehicle, just about to run out of the car, one of them took Ksh.7,000 which belonged to Caroline and which was in her handbag which was under the left front seat. They ran in different directions, but behind Caroline's vehicle, there was a motor vehicle owned by Automobile Association. It was being driven by Leonard Gachoki Kanuri (PW 2) (Leonard) along AA Road which branches off North Airport Road. His vehicle was a Datsun Pick Up and he was heading for head office near Mukuru Kwa Njenga. He testified that he saw a white Peugeot motor vehicle moving at very high speed and in a suspicious manner jumping over bumps in an unusual way. He suspected that the driver could be a thief. He increased the speed of his vehicle behind that vehicle. He, at the same time, put on the siren and full lights in an attempt to scare the other driver in case he was a thief. That vehicle belonging to Caroline stopped at Mukuru after AA tarmac. Leonard saw four people emerge from the vehicle and run off. A lady (whom he later came to know as the owner of the vehicle – Caroline) remained in that vehicle. He drove the vehicle fast in the rough road chasing two of the men who were in his sight. When he reached near the houses, he stopped his vehicle, came out and gave chase on foot while at the same time screaming as he called for help. People came out and together, they arrested the appellant. Members of the public wanted to lynch the appellant but Leonard pleaded with them to spare the appellant's life. They took the appellant to where Caroline and her vehicle were. She identified the appellant as one of the thieves and told Leonard and the public that the appellant and others who had ran away had car-jacked her and robbed her of her Ksh.7,000. The appellant was taken to an Administration Police Camp but they were referred to Embakasi Police Station where Pc Reuben Sigelei (PW 3) (Pc Reuben) received the appellant from Caroline, Leonard and members of the public. Pc Reuben rearrested the appellant and after full investigations, he was charged as stated above. We may add here for what it is worth that the appellant was searched both by Leonard and Reuben but nothing was recovered from him.

In his defence, the appellant stated that he was a tout along Embakasi Road. On the material date, he was on his way to the petrol station to take a matatu from there. While intending to cross the road, he saw a small vehicle which was on high speed. He nonetheless crossed the road and continued walking on the other side when he was suddenly hit and he fell down. One person asked people to stop beating him. That person took him to his vehicle which was an Automobile Association vehicle and he was taken to Embakasi Police Station. He claimed he was assaulted and interrogated on a matter he did not know. Later, he was taken to court. Thus he denied the offence.

The above were the brief facts that were before the subordinate court and the superior court. The appellant in his original memorandum of appeal raised seven grounds of appeal. However, later, an advocate was assigned to him by the Court as is the practice in all such appeals. That firm of advocates filed two supplementary memorandum of appeal. The first one was filed on 5th March 2007 and that contained two grounds of appeal while the second supplementary memorandum of Appeal was filed on 21st March 2007. That is the supplementary memorandum of appeal relied on by Mr. Mutua, the learned counsel for the appellant, in his address to us. The grounds in that supplementary memorandum of appeal were three and they were:

"**1. That the 1st Appellate Court Judges erred in law by failing to find that the appellant was not provided with an interpreter contrary to section 198(1) CPC and section 77(2) of the Constitution of Kenya.**

2. That the learned 1st Appellate Court Judges erred in law by failing to observe that section 85(2)

and section 88 of the CPC was not complied with.

3. That the learned 1st Appellate Court Judges erred in law by failing to analyse and re-evaluate the evidence on record exhaustively".

We will discuss the last ground first. Mr. Mutua, the learned counsel for the appellant in his submission on that ground stated that the subordinate court and the superior court, in their consideration of the entire case, did not observe that there was no proper light at the scene of the incident and throughout for purposes of proper identification of the appellant. In his view, had the two courts analysed and evaluated the evidence as is required by law, they would have come to a different conclusion as to the identification of the appellant. On our reading of the judgment of the learned Principal Magistrate (W.A. Juma) it is clear that she was at all times alive to the need for proper identification of the appellant before she could find him guilty of the offence and the question as to what light there was for proper identification never escaped her mind. She stated in her judgment immediately after summing up the evidence before her as follows:

"**I would first want to point out matters which are in dispute and these are matters which feature both in the prosecution and defence case.**

First the alleged incident and the arrest of the accused person was on the morning of 6/5/00. It was time when people had started walking."

That is clearly a reference to time and availability of light. Later she stated in evaluating the rest of the evidence:

"**As the day dawned, more and more light came of (sic) and the witnesses were in a good position to identify the suspects they had opportunity to see."**

From the above, we are not in any doubt that the learned Principal Magistrate analysed and evaluated the evidence before her particularly as to the light and concluded that there was enough light for purposes of proper identification as is required by law. What about the superior court? That court considered at length the appellant's submission on the question of identification together with the authorities that the appellant referred them to such as the case of **Cleophas Otieno Wamunga vs. Republic – Criminal Appeal No. 20 of 1989** and it also considered the evidence of Caroline and even reproduced part of it where it stated that it was dawning and the sun was rising so she saw the appellant clearly after they branched off at AA. That analysis and evaluation accorded this case by the superior court complied with what is required of the superior court on first appeal as is spelt out in the case of **Okeno vs. Republic (1972) EA 32**. We see no merit in this ground of appeal.

The next ground we will now discuss is that ground that seeks to have the trial before the Principal Magistrate declared a mistrial on account that an unqualified person namely a police constable participated in the prosecution of the case. That is the second ground of appeal in the supplementary grounds. The law is now well settled that only an advocate of the High Court of Kenya or a police officer not below the rank of an acting inspector of police may be appointed to be a public prosecutor. In the well known case of **Elirema & another v. Republic [2003] KLR 537**, this Court stated:

"**For one to be appointed as a public prosecutor by the Attorney General, one must be either an advocate of the High Court of Kenya or a person (sic) a police officer not below the rank of an Assistant Inspector of Police. We suspect the rank of Assistant Inspector must have been replaced by that of an Acting Inspector but the Code has not been amended to conform to the Police Act. Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity. We now do so with the result that all the convictions recorded against the two appellants must be and are hereby quashed and the sentences are set aside."**

In that case, Kamotho and Gitau were both corporals. They took active part in the prosecution of the

appellants and the court as is indicated above nullified their trials. In this case the record shows that on 25th June 2001, the case came up for mention before the learned Principal Magistrate and the prosecutor was Pc Wanjohi. Nothing in our view turns on that as that was only a mention date and the prosecutor did not play any role in furtherance of the prosecution of the case other than being present when the case came up for mention. That was the only point raised before the superior court and its decision on it was plainly right. Its attention was apparently not drawn to the attendance of another unqualified person immediately after judgment was delivered and when sentence was being considered. We are not certain what the superior court may have decided on that aspect had its attention been drawn to it. Be that as it may, on the date of the judgment, the record reads as follows:

"**Court: Judgment read in open court dated 30th October 2001 and signed by me in the presence of accused, Pc. Marubu for Republic and Court Clerk – Zipporah.**

W.A. Juma (Mrs)

PM

30.10.01.

Prosecutor: I have not received records of accused.

He may be treated as a first offender.

Mitigation - I urge court to consider the period I have been in custody.

Court - I may make many considerations in the matter but it will not affect sentence in any way. The law has been laid down what ought to be done in the given circumstances.

Order - Accused is sentenced to suffer death as is provided for by the law. Right of appeal within 14 days explained.

W.A. Juma (MRS)

PM

30/10/01."

It will be clear from the foregoing that the unqualified prosecutor, Pc Marubu took a small inconsequential part in the case at the end before sentence was pronounced. We say inconsequential part because all he told the court was that the appellant should be treated as a first offender. This was after the hearing upto the end of the entire case. As the learned Magistrate also observed, the offence before her was one in which a death sentence was mandatory such that whatever the prosecution said would not in any way interfere with her duty to mete out that sentence. Much as we feel the Magistrate was wrong in declining to "make other considerations" such as considering that the appellant was a first offender, his age and other antecedents as the same may be important later when other authorities come to consider whether or not the sentence of death should be commuted, nonetheless, the part played by the prosecution in this particular case before the sentence was pronounced did not in any way prejudice the appellant. We are not to be seen to lay down any other legal principle distinguishing, in any way, **Elirema's** case (supra). All we are saying is that as concerns this particular case, the part played by the unqualified prosecutor was nominal and it was after the entire prosecution had been done such that it did not affect the prosecution. We observe that in the **Elirema's** case (supra), this Court set out what it viewed as the role of a prosecutor and stated thus:

"**In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provision of the Constitution and the Code, there must a prosecutor (sic) either public or private, who must play the role of deciding what witnesses to call, the order in which these witnesses are to**

be called and whether to continue or discontinue the prosecution. These roles cannot be played by the trial court, for if it does so, there could be a serious risk of the court losing its impartiality and that would violate the provisions of section 77(1) of the Constitution."

In this case, a qualified prosecutor had played the roles that the prosecution needs to play as stated in the **Elirema's** case (part of which we have reproduced above) and all the unqualified prosecutor did was to tell the Magistrate after judgment was delivered that the appellant could be treated as a first offender and that the police had not received his records. In our considered view, we do not think that role, unprejudicial as it was to the appellant, amounted to unqualified prosecutor taking part in the prosecution of the case and we would not declare the trial a nullity on that score. We reiterate that this decision is only confined to the circumstances of this case. We do so because, there may well be cases and they are many where the prosecutor's remarks may make a difference in the sentence to be awarded such as cases where the courts have jurisdiction to award any sentence including conditional discharge upto a maximum prison sentence. In such cases, there may well be a case for suggesting that an unqualified prosecutor should not take part even upto that level. We leave such situations to the discretion of the court when they arise.

The last point we need to discuss, is the most agonising one and that is the first point raised in the supplementary memorandum of appeal namely that the appellate court erred in law by failing to find that the appellant was not provided with an interpreter contrary to **section 198(1)** of the Criminal Procedure Code and **section 77(2)** of the Constitution of Kenya. First, the record and its contents.

The appellant was first taken to court on 11th May 2000 when the charge was read over to him and he pleaded not guilty to the charge. The record on that day is silent as to the language in which the charge was read and explained to the appellant. Hearing was fixed to commence on 18th July 2000 in Court 3. On 25th May 2000, the case came up for mention. It was again mentioned on 9th June 2000, 23rd June 2000 and on 7th July 2000. On 18th July 2000, the case came up for hearing but was again adjourned as the trial Magistrate was unwell. It was fixed for hearing on 26th September 2000 and was mentioned on 19th July 2000, 2nd August 2000, 16th August 2000, 30th August 2000 and 13th September 2000. On all those dates, there is no record as to which language the court and the appellant communicated. On 26th September 2000, the case came up for hearing. The appellant was represented by a counsel who applied for adjournment. The learned Magistrate made an order adjourning the case and ordered that it be taken to court 1 for reallocation on the same day. Later it was realised there was a confusion and the learned Magistrate rescinded the order for adjournment and ordered the case to proceed. Thereafter, the proceedings read as follows:

"**Court – Accused reminded of charge in Kiswahili. File placed aside (sic).**

4.50 p.m.

Coram as before

Court – Case will not be reached.

Accused – I am not good in English or Kiswahili. I need a Kikuyu interpreter.

Order Reallocation in Court 1 on 27.9.2000. Kikuyu interpreter on hearing date. Remanded in custody."

Thereafter, the case came up on several occasions for hearing and mention but it was not heard on any of those dates till 15th February 2001 when the hearing proper started. On that date, notwithstanding that an order had been made for a Kikuyu interpreter to be provided pursuant to the appellant's complaint that he was not good in English or Swahili, the record shows that the appellant was reminded of the charge in Kiswahili. The hearing then proceeded and throughout the entire proceedings, there is no indication that a Kikuyu interpreter was ever availed and no evidence is available that the appellant was at any time

given an opportunity to present his case in a language he was conversant with which was Kikuyu language. The first witness, Caroline gave evidence in Kiswahili. The second witness, Leonard also gave evidence in Kiswahili whereas the third witness, Pc Reuben gave evidence in English. The appellant gave his defence in Kiswahili. The plea by the appellant that he was not good in English and Kiswahili languages and the order that a Kikuyu interpreter be provided at the time of hearing the case seemed to have been forgotten. Unfortunately, the appellant also did not help in the matter by reminding the trial court of its order made before the trial proper began.

When the matter was raised on appeal in the superior court, that court addressed itself on it as follows:

"**Finally, the appellant submitted that the entire trial was conducting (sic) in a language that he did not comprehend very well. The record of the proceedings shows that on 26th September 2000, the appellant requested the trial court to get him a Kikuyu interpreter – when making that application, the appellant said he was not very conversant with either English or Kiswahili. In response to that application, the court directed that a Kikuyu interpreter be made available at the trial. That notwithstanding, the proceedings at the trial were conducted in Kiswahili.**

The learned State Counsel concedes that the appellant had sought a Kikuyu interpreter, but did not have one, during his trial. However, Ms Mwenje submits that the record indicates that the appellant participated effectively in the trial. From our reading of the manner in which the appellant participated in the cross examination of the prosecution witnesses, we are inclined to accept the contention of the respondent that the appellant was able to comprehend the language in which the trial was conducted. We believe that he comprehended the language sufficiently because he even gave his own defence in Kiswahili. We therefore believe that the appellant was not prejudiced by the fact that the trial was conducted in Kiswahili, instead of through a Kikuyu interpreter. But we must emphasize that if it had appeared to us that the appellant did not comprehend the proceedings sufficiently, we would have declared the trial a nullity, and then considered order for retrial.

We feel obliged to mention here that as far as possible, the trial courts should ensure that trials were conducted in the language which the accused says he is most conversant with. But in the same view, we could expect that if an accused person did not comprehend the ongoing proceedings, due to incapacity to understand the language of the court, it was also incumbent on him to inform or remind the court of his incapacity.

In this particular matter, we have noted that the appellant did conduct his appeal in Kiswahili. That fact has helped us arrive at the conclusion that the appellant did understand the proceedings during his trial."

Thus, the superior court was alive to the problem of an accused person taking part in his case when he does not comprehend the language of the court, but in this case, it felt that because the appellant conducted the cross-examination of the witnesses in Kiswahili and also gave his defence in Kiswahili, he comprehended the language and therefore the trial was not vitiated because of that. We note that the superior court did not make a specific finding that the appellant was not telling the truth when he applied for a Kikuyu interpreter on grounds that he was not good in Kiswahili or English, neither is there a specific finding that the trial court, in ordering that a Kikuyu interpreter be availed to the court at the time of the appellant's trial, was not in error. In our view, the trial court must have made that decision which became an order of the court only after being convinced that that application for a Kikuyu interpreter was founded upon good reasons. The superior court had the duty to find out why that order was not complied with and the effect of non compliance.

Lastly, the superior court did not consider that the appellant was not represented at the time of the hearing of his case which meant that he needed to be thoroughly conversant with the court language. However, back to the law. **Section 77** of the Constitution deals with provisions to secure protection of law. The pertinent provision is **section 77(2) (b)** and it states as follows:

(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 at the trial of the charge"

And **section 198(1)** of the Criminal Procedure Code states:

"**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."**

Thus, in law, at the trial of an accused person, the court must ensure not only that the charge is explained to the accused in a language the accused understands but the court is further enjoined to ensure that the evidence given during the trial is interpreted to the accused in a language the accused understands. These are legal requirements. They are constitutional rights of an accused person and cannot, in our view, be waived on belief that the accused understands the language of the court particularly when the accused has stated, like the appellant did state in the case before us, that he was not good in English or Kiswahili. Further, as we have stated, in this case, a competent court had ordered that interpretation be availed at the trial of the appellant. Court orders must be obeyed and more so by the same courts that make them. We have no reason on record as to why the trial court reneged on its order to have a Kikuyu interpreter for the accused at his trial. We take judicial notice that the trial took place at Makadara in Nairobi where Kikuyu interpreters are readily available and if not at Makadara, then at the Law Courts or Milimani Commercial Courts or Kibera Court. As we have stated, that the trial went on in Kiswahili and the appellant defended himself in Kiswahili is not in our view a reason for accepting what was wrong nor is it a reason for holding, as the superior court did, that the appellant comprehended Kiswahili language. We think what the appellant meant when he applied for a Kikuyu interpreter was that though he could speak some Kiswahili or English, he did not know enough of both languages for purposes of comprehending what would be going on in a court room during the hearing of his case. In the case of **Jackson Leskai vs. Republic – Criminal Appeal No. 313 of 2005** this Court stated:

"**It is the Court's duty to ensure that the accused's right to interpretation is safeguarded and to demonstratively show its protection."**

Mr. Kaigai, the learned Senior State Counsel, conceded the appeal on that ground but asked for a retrial. In our mind, he took the correct approach in conceding the appeal and for what we have stated above, we do agree with him and of course with Mr. Mutua, the learned counsel for the appellant. We allow the appeal, quash the conviction and set aside the sentence of death imposed upon the appellant.

The next matter we need to look into is whether to order a retrial as requested by Mr. Kaigai. Mr. Mutua opposed that proposal submitting that in the circumstances of this case where the appellant has been in custody on account of this case for 8 years, it would not be just and fair to the appellant to order a retrial. We have anxiously considered the rival arguments before us as well as the circumstances of this particular case. This Court has in the past considered similar cases and in the case of **Richard Omolo Ajuoga vs. Republic – Criminal Appeal No. 223 of 2003**, it considered and analysed several cases decided on the issue of under what circumstances a retrial should be ordered such as the cases of **Pascal Ouma Ogolo vs. Republic – Criminal Appeal No. 114 of 2006**, **Henry Odhiambo Otieno vs. R. –**

Criminal Appeal No. 83 of 2005, Ahmed Sumar vs. Republic (1964) EA 481 at page 483 and ended up with the case of **Benard Lolimo Ekimat v. R – Criminal Appeal No. 151 of 2004 (unreported)** where it stated:

"**There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts 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."**

The principle acceptable is that each case will depend on its own circumstances. In this case, although the charge is serious, none was injured. Though the appellant was said to be in company of others who had guns, he had no gun. Indeed, it would appear to us that Leonard, in his heroic and selfless urge to help Caroline, saved a situation which could have developed into more catastrophic incidence. The appellant has been in custody since he was arrested on 6th May 2000. The mistake ending in this appeal being allowed was not a prosecution's mistake but a court's mistake. We feel that considering all the circumstances of this case, it would not be in the interest of justice to order a retrial.

The upshot of the foregoing is that the appellant is set free forthwith unless he is otherwise lawfully held. These are the orders of this Court.

Dated and delivered at Nairobi this 4th day of May, 2007.

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR