



IN THE COURT OF APPEAL OF KENYA PEAL AT NYERI

CRIMINAL APPEAL 21 & 23 OF 2004

ANTONY NJERU KATHIARI 1ST APPELLANT

JOHN MUGO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nyeri (Juma & Ombija, JJ) dated 8th October, 2003 In H.C. Cr. Appeal Nos. 379 & 358 of 2000 Nos. 64, 66 & 380 of 2001)

JUDGMENT OF THE COURT

The two appellants before us, namely Antony Njeru Kathiari and John Mugo Njeru were tried and convicted on a total of six counts of robbery with violence contrary to **section 296 (2)** of the Penal Code and upon their so being convicted by the Senior Resident Magistrate at Kerugoya (W. N. Njage, Esq.) they were each sentenced to death as provided by the law. They unsuccessfully appealed to the High Court (Juma & Ombija, JJ) which dismissed their appeals on 8th October, 2003. They now come before us by way of a second appeal. Mr. Orinda, learned Principal State Counsel, did not seek to support the convictions recorded against the appellants and in view of this Court's previous decisions, Mr. Orinda is certainly right in conceding the appeals. Way back in 1985 this Court, in the case of **DIBA WAKO KIYATO V. REPUBLIC** (1982-1988) 1 KAR 1974 held that:-

“It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands.”

The Court in that case was relying on the provisions of **section 77(2) (f)** of the Constitution of Kenya and **section 198 (1)** of the Criminal Procedure Code. The Court said:-

“The practice of recordings (sic), if not the name of the interpreter, at least the nature of the interpretation, has been standard practice in these courts for many years. For example, that which is described as the “plea form,” Form Criminal 133, contains under all the other details of the case and of the accused, a space against the word ‘Interpretation.’ There was no compliance with either of these two statutory provisions or with the standard practice in the instant case. The magistrate made no note of the language into which the evidence of the witnesses, many of whom spoke in English or Swahili was being translated. -----”

In the appeal before us, the record of the trial magistrate runs into some sixty-six or so typed pages. There is absolutely no record as to what language the two appellants spoke. On the day of the plea, it is

not shown if there was an interpreter present in court and into what language the proceedings were being interpreted. The assumption must be that the appellants spoke to the magistrate directly in either English or Swahili which are the official languages in the subordinate courts. It is not shown anywhere in the record what languages the witnesses gave their evidence in and if the appellants understood such language or whether it was being interpreted to them. It is not even shown what language the appellants themselves addressed the magistrate in. It is a matter of serious regret and concern to us that the magistrate adopted such a casual approach when trying the appellants on very serious charges which resulted in their being sentenced to death. The failure by the trial magistrate to keep a record of at least the name of the interpreter and the nature of the interpretation was a serious defect in the trial and must render the convictions of the appellants unsafe and unsustainable. Mr. Orinda conceded the appeal on that ground.

The charges against the appellants were alleged to have arisen on the night of 17th/18th August, 1998, some nine years ago. It would accordingly, be an exercise in futility to order a retrial after so many years. The appellants have been in custody since the date of their arrest in 1998. Mr. Orinda, once again, did not ask us to order a retrial. He was right in taking that stand.

We accordingly allow the appeals of the two appellants, quash all the convictions recorded against each one of them, set aside the sentences of death and order that each of them shall be released from prison forthwith unless held for some other lawful cause. Those

shall be our orders in the consolidated appeals.

Dated and delivered at Nyeri this 2nd day of November, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.