REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL NO. 243 OF 2005

1. **SWAHIBU SIMBAUNI SIMIYU**
2. **GEORGE WANYAMA WANDERA …..…………......….………. APPELLANTS**

AND

REPUBLIC …………………………………………….……………..…. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Bungoma (Sergon & Kariuki, JJ) dated 21st May, 2004 in

H.C.Cr. Appeal Nos. 143 & 144 of 1997)

****

JUDGMENT OF THE COURT:

In this appeal, both Mr. Karanja, learned counsel for both appellants, and Mr. Musau, the Senior Principal State Counsel representing the respondent Republic, are agreed that the appeals ought to be allowed. We respectfully agree with them.

The two appellants, Swahibu Simbauni Simiyu and George Wanyama Wandera were tried on various charges in the court of the Senior Principal Magistrate (Indeche, Esq.) at Bungoma. The appellants were acquitted on all counts, save for the third count which was one of attempted robbery with violence contrary to **section 297(2)** of the Penal Code. That charge, upon conviction, carries a mandatory death penalty and as the appellants were convicted on it, each of them was sentenced to death. The appellants appealed to the High Court, but the appeals to that court were dismissed by its judgment dated 21st May, 2004. That being so, the only issues that the Court can consider are issues of law and the first ground of law raised by Mr. Karanja was the language used in the Magistrate's Court and that issue is raised in connection with **section 77(2) (b) and (f)** of the Constitution of Kenya. Those provisions state:

> "**77(2) Every person who is charged with a criminal offence –**
>
> **(b) shall be informed as soon as reasonably practicable, in a language that he understands and in details, of the nature of the offence with which he is charged.**
>
> **(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** of the Criminal Procedure Code Chapter 75 Laws of Kenya 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 an 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."

It is abundantly clear from these provisions set out from the Constitution and the Criminal Procedure Code that in a criminal trial the language of the trial must be understood by the accused person and that right extends to an advocate representing an accused person if the advocate does not understand the language of the trial; even if the accused himself understands the language of the trial but his advocate does not understand the language, the language must be interpreted to the advocate into English.

In **KIYATO V. REPUBLIC (1982 – 88) KAR 418** the facts were that Kiyato was convicted in a magistrate's court of the offence of robbery with violence contrary to **section 296(2)** of the Penal Code and was sentenced to death. His appeal to the High Court was dismissed and he appealed to the Court of Appeal.

In both appeals, Kiyato maintained that at his trial, though he had asked the court for the assistance of a Borana interpreter, the interpreter used by the court was a Somali. As a result, he argued, he did not follow the proceedings in the trial court and this had occasioned him a serious miscarriage of justice. It was held:

"**(1) It is a fundamental right, under the Constitution of Kenya section 77(2) that an accused person is entitled without payment, to the services of an interpreter who can translate the evidence to him and through whom he can put questions to the witnesses, make his statutory statement, or give his evidence. Moreover, the Criminal Procedure Code (Cap 75) section 198(1) also requires that evidence should be interpreted to an accused person in a language that he understands.**

(2) It is the standard practice in the courts to record the nature of the interpretation used or the name of the interpreter. The trial magistrate in this case made no note of the language into which the evidence of the witnesses was being interpreted.

(3) There had been no compliance with the Constitution of Kenya section 77(2) and the Criminal Procedure Code (Cap 75) section 198(1) in this case."

The appeal was allowed. The case of **ABDALLA V. REPUBLIC [1989] KLR 456** was also to the same effect.

What happened in the appeal now before us? The trial of the appellants opened before Mr. Indeche on 28th November, 1996 when the plea was taken. The prosecutor is shown as Chief Inspector Mokano and the court clerk's name is also shown as Catherine. The record for the date shows:

"**Charge read over and explained:**

Accused 1: Count 1: not true

Count 2: not true

Count 3: not true

Count 4: not true

Count 5: not true

Count 6: not true.

Accused 2: Count 1: not true

Count 2: not true

Count 3: not true

Count 4: not true

Count 5: not true

Count 6: not true.

PLEA: Not guilty.”

The trial then commenced with the first witness giving his evidence in Swahili. There is nothing in the record of the magistrate to indicate that the appellants understood Swahili. Two witnesses gave evidence that day and as both Mr. Karanja and Mr. Musau rightly pointed out to us, each appellant asked very few questions. The trial resumed on 5th February, 1997 when virtually all the witnesses testified with some giving evidence in Swahili and others in English. Once again each appellant asked very few questions and when they were finally put on their defence, each appellant is shown to have addressed the court, it being recorded:-

“**ACCUSED 1 SWORN STATES.”**

…………………………………**.**

“**ACCUSED 2 UNSWORN STATES.”**

…………………………………**..**

Once again, it is not shown what language each appellant used so that from the record of the magistrate it is really not possible to say each spoke in English or in Swahili and whether each of them understood whatever language was being used. We find it incredible that this could have happened in the court of a Senior Principal Magistrate. Clearly there was not the slightest attempt to comply with the provisions of the Kenya Constitution or the Criminal Procedure Code. On that basis alone, the appeals must be allowed. Mr. Musau did not ask us to make an order for retrial, taking into account the time that has lapsed.

Accordingly, we allow the appeal of each appellant, quash the conviction recorded against each one of them, set aside the sentence of death and order that each of them be released from prison forthwith unless otherwise held for some other lawful cause.

Dated and delivered at Kisumu this 31st day of March, 2006.

R.S.C OMOLO

………………………

JUDGE OF APPEAL

S.E.O BOSIRE

………………………**..**

JUDGE OF APPEAL

P.N. WAKI

…………………………..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR