



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 68 OF 2016

BETWEEN

FARAHAT IBRAHIM AHMED1ST APPELLANT

IBRAHIM KHATAB MUSTAFA2ND APPELLANT

SAAD ALYELDIN SAMY3RD APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 574 of 2016 at Chief Magistrates Court at Kisumu, Hon.W.K. Onkunya, SRM dated on 10th November 2016)

JUDGMENT

1. The appellants, who are Egyptian nationals, **FARAHAT IBRAHIM AHMED, IBRAHIM KHATAB MOUSTAFA and SAAD ALYELDIN SAMY**, were charged before the subordinate court with two counts under the *Kenya Citizenship and Immigration Act, 2011*. The 1st count was that they were engaging in employment without being authorized to do so by a work permit or pass contrary to **section 53(1) (m)** as read with **section 53(2)** of the *Act*. The particulars of the charge were that on 10th November 2016 at Manyatta Arab area within Kisumu County, being Egyptian nationals, they were found engaging in hawking household items in the name of Al Mostafa Trade without being authorized by a work permit or pass in contravention of the *Act*.

2. The 2nd count was that they failed to comply with conditions imposed by a visa contrary to **section 53(1)(l)** as read with **section 53(2)** of the *Act*. The particulars were that on 10th November 2016, at Manyatta Arab area within Kisumu County, being Egyptian nationals, they were found to violate their visa conditions not to engage in business by accepting to hawk household items for Al Mostafa Trade without being authorized by a work permit or pass in contravention of the *Act*.

3. The appellants were convicted on their own plea of guilty and fined Kshs. 10,000/- each in default 3 months imprisonment on each count. They now appeal to this court against the conviction and sentence based on the petition of appeal dated 15th November 2016. The thrust of the appellants' case was the learned trial magistrate erred in law and in fact in presiding over and entering a plea of guilty when using a purported translator who was not competent or satisfied as such by the court. Counsel argued that the trial magistrate had a duty to satisfy herself that translator was competent to undertake translation services before subjecting the appellants to proceedings conducted in an unfamiliar language. Counsel submitted

that in view of the deficiency of the translator, the plea of guilty was not unequivocal and the proceedings were illegal.

4. Counsel for the respondent, submitted that the charge and elements thereof were read to the appellants in a language which they understood and that they pleaded guilty. He further submitted that after the conviction, the appellants were given the opportunity to offer mitigation which they did. He maintained that the conviction was therefore proper and sentence legal.

5. The right of an accused to understand the charges and evidence against him is protected by **Article 50(2) (m)** of the Constitution which provides that *every accused person has the right to a fair trial which includes the right, “to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”* In addition **section 198(1)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** provides that, *“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.”*

6. This principle has also been the subject of judicial comment. In ***Diba Wako Kiyoto v Republic [1986] KLR 48***, the Court of Appeal held as follows;

[I]t is a fundamental right of an accused charged with a criminal offence to have the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands.....

7. The importance of the language of the trial was recognised in the seminal case of ***Adan v Republic [1973] EA 445, 449*** where the court observed as follows;

The courts have always been concerned that an accused person should not be convicted on his own plea unless it was certain that he really understand the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously grievous where the accused is unrepresented, is of limited education and does not speak the language of the court.

8. The issue raised in these proceedings is whether the interpreter was competent and qualified. To meet the demands of **Article 50(2)(m)** of the Constitution, the court has a duty provide a competent and qualified translator. This requirement is simple enough where the translator is employed by the Judiciary as the competence and qualifications are part of the terms of service. In this case though, the translator was sourced by the Directorate of Immigration and Registration of Persons. The duty of the court in such circumstances is to conduct an examination to ascertain the qualifications, competence, experience and ability of the translator to provide such services and therefore satisfy itself that the person is a competent and qualified translator. The record does not show that the trial court conducted an examination of the translator to satisfy itself that the translator was qualified and competent to undertake this duty. This requirement is particularly acute where the translator is sourced by the party to the case and not the court itself.

9. For the reasons I have given, I am not satisfied that the plea of guilty was unequivocal. I therefore quash the conviction and sentence.

10. The appellants shall appear before the Chief Magistrates Court for the taking the plea on **14th December 2016**. The fine already paid shall be deemed to be the cash bail. In addition, the appellants shall continue abide by the terms given by this court pending the trial before the subordinate court.

DATED and DELIVERED at KISUMU this 13th day of December 2016

D.S. MAJANJA

JUDGE

Mr Kimanga instructed by Kimanga and Company Advocates for the appellants.

Mr Ruto instructed by the Directorate of Immigration and Registration of Persons for the respondent.