



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL APPEAL NO.34 OF 2012 CONSOLIDATED WITH HIGH COURT

CRIMINAL APPEAL 70 OF 2012

SAMUEL GITHUA NGARI1ST APPELLANT

MARY NJOKI NJOGU2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in criminal case number 423 of 2011 in the Senior Resident Magistrate's court at Baricho – Hon. J.N. Mwaniki m(P.M.)

JUDGMENT

SAMUEL GITHUA NGARI and **MARY NJOKI NJOGU**, the two appellants herein were tried and convicted on a charge of being in possession of papers of forgery contrary to **Section 367(a)** of the **Penal Code**.

It was alleged that on the 28th day of June 2011 at Kagio township in Kirinyaga West District within central province, jointly without lawful excuse or authority , the appellants had in their possession 980 papers intended to resemble and pass as special paper such as is provided and used in making bank notes.

Upon conviction, the appellants were sentenced to five (5) years imprisonment.

Aggrieved by the conviction and sentence, they filed this appeal through the firm of Ikahu Ngangah and Company Advocates. In the eight grounds of appeal embraced in the memorandum of appeal, the appellants raised several broad issues which can be summarised as follows:-

1. That the learned trial magistrate erred both in law and in fact by convicting the appellants on the basis of evidence which was on the whole contradictory and failed to meet the legal threshold of proof beyond reasonable doubt.
2. That the learned trial magistrate erred in law by failing to take into account the defence provided by the defence which was not challenged by the prosecution.
3. That the learned trial magistrate erred in law and in fact by making a finding that the third party reported in the daily nation on two occasions was later arraigned in court in criminal case no.421 of 2011 at Baricho in the absence of evidence to that effect.
4. That the learned trial magistrate erred in law and in fact by imposing on the appellants a sentence

which was excessive in the circumstances of the case.

When the appeal came up for hearing, Mr Ngangah learned counsel for the appellants made oral submissions in which he introduced another aspect of the appeal not covered in the grounds of appeal.

He submitted that the charge as framed in the charge sheet was defective as it did not disclose the offence created by **Section 367(a)** of the **Penal Code**.

Counsel submitted that according to the clear wording of that provision of the law, an offence can only be committed if a person without lawful authority or excuse makes, uses or knowingly has in his custody special paper used for the making of bank notes. According to him, mere custody of such papers as alleged in the charge sheet was not an offence.

Mr Ngangah also took issue with the language used in the conduct of the proceedings in the lower court.

He submitted that though the learned trial magistrate had indicated in the record that the appellants understood the kikuyu language, the prosecution witnesses testified in the English language which was in some instances translated into the Swahili language which is not the language the appellants had indicated they understood. This, he added, violated the appellants constitutional right to fair hearing.

Finally, learned counsel submitted that the evidence tendered by the arresting officers who were the prosecution's key witnesses was fraught with contradictions which when considered alongside the defence provided by the appellants raised reasonable doubts whether or not the appellants had committed the offence as alleged which doubt ought to have been resolved to their benefit.

M/S Macharia, learned state counsel on behalf of the state conceded to the appeal. She submitted that the record indicated that PW1 testified in the English language without interpretation and PW3 and PW4 testified in the same language translated into the Swahili language. And that since it was indicated that the appellants understood the kikuyu language, this led to a miscarriage of justice.

She also conceded that the evidence tendered by the prosecution had discrepancies and that it was insufficient to prove the charges against the appellants beyond reasonable doubt. She therefore urged the court to allow the appeal.

I have gone through the court record and considered the grounds of appeal as well as the submissions made on behalf of the appellants and the state.

I have also re-evaluated the evidence tendered before the trial court as I was required to do, this being a first appeal. See

- **OKENO VS REPUBLIC (1972) EA 32**
- **NJOROGE VS REPUBLIC (1989) KLR 313**

Having looked at the charge sheet, I with respect disagree with Mr. Ngangah's submission that the charge as framed was defective for not disclosing any of the offences envisaged under **Section 367(a)** of the **Penal Code**.

I find that it is in fact true that the particulars supporting the charge in this case do not disclose that the appellants knowingly had in their possession 980 papers meant to resemble and pass as ksh.1,000 bank currency notes but in my view, the omission to include the word "knowingly" did not render the charge defective. This is because in law, possession connotes knowledge and therefore it was not necessary in my opinion for the prosecution to include the word "knowingly" in the particulars of the charge in order to disclose the offence charged. I am therefore persuaded to find that the charge as drafted was proper and it was not defective as alleged.

Turning to the issue of language, the record shows that on the date the appellants took their plea, the learned trial magistrate put it on record that the charge had been read and explained to the appellants in the kikuyu language as this is the language they understood. However, when PW1 and PW2 testified, they did so in the English language and there is no indication that the language was translated into the appellants preferred language.

PW3 and PW4 similarly testified in the English language which was translated into the Swahili language. There is no indication that the appellants also understood the Swahili language.

A reading of **Section 198** of the **Criminal Procedure Code** and **Article 50(2)(M)** of the **Constitution** leaves no doubt that interpretation of court proceedings to an accused person to a language that he fully understands is an important and essential component of a fair trial.

The fact that **Article 50(2)(M)** of the **Constitution** specifically provides that an accused person who does not understand the language used in a trial be accorded free interpretation services means that interpretation to a language understood by an accused person is a constitutional and fundamental right meant to ensure that an accused person understands the proceedings and is therefore accorded a fair hearing in a criminal trial.

It is important to note at this juncture that the right to a fair trial is absolute in the sense that under **Article 25** of the **Constitution**, it is one of those rights and fundamental freedoms that cannot be limited.

In ***DIBA WAKO KIYOTO VS REPUBLIC (1986) KLR 48***, the Court of Appeal held as follows;

“it 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.....”

In the circumstances, it is imperative for the trial court to demonstrate through the court record that either the proceedings were conducted in a language which the accused person indicated he understood or if a different language was used, that it was interpreted to the language he understood.

In this case, it is apparent from the court record that the appellants had indicated to the trial court that they understood the kikuyu language and this must be why on plea day, the learned trial magistrate indicated on that the charge had been explained to the appellants in the kikuyu language as it is the language they understood.

However, in the course of the trial, the witnesses testified in the English language without interpretation and when interpretation was provided, it was done in the Swahili language which was different from the language the appellants had indicated they understood.

I therefore find merit in both counsel’s submissions that failure to interpret the proceedings particularly the evidence offered by key prosecution witnesses into a language understood by the appellants went against the constitutional requirement of a fair trial and as submitted by the learned state counsel, it may have led to a miscarriage of justice.

I am alive to the fact that the appellants were represented by counsel in the course of the trial but this in itself did not absolve the trial court from the responsibility of ensuring that the appellants personally understood the proceedings from the beginning to the end.

Besides, my analysis of the evidence on record leads me to the conclusion that the contradictions in the testimonies of PW1 and PW2 regarding how the appellants were allegedly found in possession of the papers meant to pass as bank notes when compared to the entirety of the appellants’ defence in which it was contended *inter alia* that the papers were actually in the possession of a third party who ran into the 1st appellant’s house and placed them on a table and who was not arrested and jointly charged with the appellants raised a reasonable doubt in the prosecution’s case whether or not the appellants were actually

found in possession of the said papers as alleged. And as correctly submitted by Mr Ngangah, the benefit of such doubts should have been accorded to the appellants.

For the above reasons, I am satisfied that the appellants' conviction in this case was not safe and the state counsel was right in conceding to the appeal.

I consequently allow the appeal, quash the appellants' convictions and set aside the sentence. The appellants are to be set at liberty forthwith unless otherwise lawfully held.

C.W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 17th DAY OF JANUARY 2014 in the presence of :-

The appellant

Mr Sitati for the state

Mbogo court clerk