IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.602 OF 2010

BERTHOLD CLEMENS SCHOLLHORN-APPELLANT

VERSUS

REPUBLIC----------RESPONDENT

(AN APPEAL AGAINST THE JUDGMENT, CONVICTION AND SENTENCE IMPOSED BY MRS. G.L. NZIOKA, (SPM), IN CRIMINAL CASE FILE NO.4810 OF 2009 AT KIBERA LAW COURTS DATED 22/10/2010)

JUDGMENT

The appellant herein, Berthold Schollhorn Clemens, was on 18/10/2010 convicted of the offence of trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. He was sentenced to a prison term of life imprisonment. In addition to the prison term a fine of Ksh 27,894,400/ was imposed.

The particulars of the offence were that on the 26th day of October, 2009 at Jomo Kenyatta International Airport in Kenya within Nairobi area, the appellant, Berthold Clemens Schollhorn, jointly with others not before the court trafficked by conveying 2324.2 grammes of Narcotic drugs namely COCAINE with an estimated value K.sh 9,296,800/= in contravention of the provision of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994.

The prosecution case as gleaned from the record of proceedings is that on 26th day of October, 2009, PWI and another officer were on duty at Unit One at the International Departures at Jomo Kenyatta International Airport. They were profiling passengers departing for Istanbul on Turkish Airline flight number TK 1130. While acting on a tip off, they intercepted a male passenger at the Turkish Airline Check-in counter. The officers introduced themselves as police officers and requested to examine the passenger's passport. He gave them a German passport number A 157155 in the names of Bethold Clemens. He also gave them air ticket number 2353601675693.

The passenger allegedly carried two bags; a big red suitcase and a grey briefcase. The police officers escorted him to the anti-narcotics unit offices and interrogated him. A body search on him yielded nothing. His suitcase was searched and found to contain his personal effects only. The appellant was requested to open his briefcase and he did so. After he emptied the contents, the weight of the briefcase was found to be suspicious and upon further checking, it was found to have a false attachment on both the upper and lower sides. The false attachments were opened and brownish polythene paper bags were found which were suspected to contain a narcotic drug. The two recovered paper bags were seized and the accused was issued with a seizure notice, a copy of which was availed to him. He acknowledged receipt of the seizure notice. The appellant was accused and was subsequently charged. The suspected substance was taken to the government analyst and found to be cocaine, a drug under the Narcotics and Psychotropic Substance (Control) Act No. 4 of 1994.

Originally, the appellant had proffered 7 grounds of appeal. The eighth paragraph in his grounds of appeal was a request to be furnished with a certified copy of the trial proceedings to enable him to craft more firm grounds. In addition he wished to be present during the hearing of his appeal.

Supplementary grounds were filed by Mochere and Co, his Advocates on record for this appeal. During the hearing of the appeal, Mr. Nyamiaka from the aforementioned firm told the court that he was relying entirely on the supplementary grounds and the submissions he had made thereon .

The grounds are;

1. That the learned trial magistrate erred in law by convicting and sentencing the appellant by relying on proceedings that offended Section 77, 2 (b), (c) and (f) of the retired Constitution of Kenya and Section 198(1) of the Criminal Procedure Code.
2. That the learned trial magistrate erred in law and infact by convicting and sentencing the appellant on a judgment not supported by the charge sheet.

The learned counsel for the appellant stated section 77,2(b),(c) and (f) of the retired constitution provides as follows;

77(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)Shall be given adequate time and facilities for his defense

(d) (e) ……

And

(f) Shall be permitted to have without payment the assistance of an interpreter if he can not understand the language used at the trial of the charge.

Mr. Nyamiaka submitted that the above provisions had been now buttressed by Article 50 of the current constitution. Again, section 198(1) of the Criminal Procedure Code required that whenever any evidence was given in a language not understood by an accused present in person, such evidence should be interpreted for him in open court in a language he understood.

He pointed out that when the appellant took his plea on 26/10/2009, he indicated to the court that; “I understand little simple English” , He submitted that “little means little” and does not measure up to the standard required by law.

He further submitted as follows: On 25th October 2009 an interpreter was availed, but did not interpret as reflected by the record. On 6/11/2009, the interpreter was present but his name was not indicated. On 20/11/2009, it was indicated that the interpretation was English/Kiswahili and there was no German interpreter. On 27/11/2009 the interpretation is indicated as English/Kiswahili/German but the interpreter was not present. On this day the appellant complained about his lack of proper understanding of the language saying: “I don’t understand English. I require interpreter.” However in the afternoon, after an interpreter was availed the trial magistrate noted as follows: “I realize that the interpreter is not too conversant with the German language and therefore the proceedings can not go on”

Counsel further submitted that on 12/3/2010, when two crucial witnesses, PW3 and PW4, gave evidence, the record indicates that the interpretation was English/Kiswahili. There was no interpretation into German at all. Counsel submitted that the evidence of PW3 and PW4 and the exhibits produced by these

witnesses, to wit, exhibits 15, 17 and 18 should be expunged from the record. As this action violated the trial beyond repair, the appeal ought to be allowed in the interest of the justice, counsel submitted.

Counsel also had something to say about how the trial court handled the appellant's plea. From the record, the appellant took the first plea on 26/10/2009 when he told the court that: "I understand little simple English." The second plea was taken on 15/2/2010 in English. On this occasion the trial magistrate said " I have read all the charges to the accused person and I have realized that he is not following the proceedings well. I therefore order the case to be stood over to 24th February, 2010". The third plea was taken on 24th February, 2010, in the presence of a German interpreter.

Counsel submitted that the trial court handled the proceedings haphazardly without due regard to the constitutional rights of the appellant. He further submitted that arising out of the inconsistent and irregular interpretation of the proceedings, the trial in the lower court was fatally flawed and a nullity.

In support of the appellant's submissions, the following authorities were proffered:

1. John Irungu- vs.-Republic, Criminal

Appeal No 303 of 2005 (CA, Nairobi).

2. Bishar Abdi –vs.-Republic, Criminal Appeal No 57 of 2008 (CA, Nairobi)

2. Cisse Djibrilla vs. Republic, Criminal Appeal No 221 of 2006, (CA, Kisumu)

Miss Omollo for the respondent opposed the appeal. The conspectus of her submissions with regard to the 1st ground of appeal was that the appellant fully participated in the proceedings, the issue of interpretation was well handled and that no injustice was occasioned to the appellant. With regard to the 2nd ground of appeal she submitted that if there was any defect in the charge sheet, it was inconsequential, did not prejudice the appellant and was curable by the invocation of S 382 of the Criminal Procedure Code.

At this juncture, I will first deal with the first ground of appeal.

I have perused the record of the trial proceedings. I have considered the appellant's grounds of appeal and the submissions there on. I have also considered the response made by the respondent.

I have noted that right from the word go, there were many lapses in as far as interpretation to the appellant into a language that he understood was concerned. After carefully studying the record of proceedings, I confirm that the lapses pointed out by the appellant existed. But the most egregious one occurred on 12/3/2010, when two crucial witnesses were allowed to give evidence without according to the appellant his statutory and constitutional right to have the proceedings interpreted into German for him. I agree with the appellant that the conduct of his trial in this manner fatally injured the integrity of the proceedings in totality. I agree with the appellant that the serious affair of interpretation was addressed during the trial in the lower court in a haphazard manner. The whole approach to this issue was veritably handled in a higgledy-higgledy and nonchalant manner. On many occasions, there was no interpreter. At one point, the court found out that the interpreter was not sufficiently conversant with the German language.

I wish to allude to another matter apposite to the issue of interpretation. This concerns the interpretation to German from Kiswahili. Whereas it was clear that the interpreter may have had insufficient command of the English language, as evidenced by his being sworn in English, there was no intimation from the record of the proceedings that he had sufficient command of the Kiswahili language even though the record indicates that the interpretation from Kiswahili was done. I, however, do not find this one aspect crucial to my final determination in this appeal.

I find the 3 authorities proffered by the appellant relevant to the circumstances of this case. They are all Court of Appeal Authorities. In John Irungu vs. Republic (Supra), the Court of Appeal said: "…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 stated, like the appellant did state in the case before us, that he was not good in English or Kiswahili".

In this case, the appellant had made it clear that he was not comfortably conversant with the English language. He asked for an interpreter. On some occasions an interpreter was availed. On other occasions the proceedings were not interpreted. The worst of these occasions was when crucial witnesses, PW3 and PW4, gave evidence and produced exhibits in court without the court according the appellant interpretation services.

The fundamental rights of an accused person must be respected at all times during trial. As the Court of Appeal in Ndegwa versus Republic, KLR,1985 at page 537 said:

"No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of commonsense is to be sacrificed, violated or abandoned when protecting the liberty of the subject. He is the most sacrosanct individual in the system of our legal administration."

I find it necessary to mention another issue that has caused me concern. As I have already started, the appellant, before he had obtained the services of an advocate in this appeal, had filed 7 grounds of appeal. Article 20(4)(b) of the Constitution of Kenya, 2010, requires that in interpreting the Bill of Rights, a court, tribunal or other authority shall promote the spirit, purport and objects of the Bill of Rights. My perusal of the record of the proceedings shows that the appellant was given a record of proceedings that had not been interpreted from English to German. In the promotion of the spirit of, purport and objects of the Bill of Rights, I am of the view that the proceedings should have been interpreted in to a language that the appellant understood. It is noted that the appellant filed his appeal, after the Constitution of Kenya 2010 had been promulgated. I deem the record of proceedings to be the type of information envisaged by Article 50(3) of the Constitution. To the extent that the apposite record of proceedings had not been interpreted into German, the appellant had suffered injustice

Article 27(1) of the Constitution of Kenya requires that every person be accorded equality before the law. It also requires equal protection and benefit of the law. Article 27(2) clarifies that equality includes the full equal enjoyment of all rights and fundamental freedoms. The language of the constitution does not circumscribe equality and freedom from discrimination in such a manner that they are to be enjoyed by Kenya citizens only. The Constitution uses the words "every person" and this invariably includes the appellant.

To buttress the inviolability of the right to a fair trial, Article 25 of the Constitution lists this right among the four fundamental rights that must not be limited.

After giving careful attention to the question of interpretation, I find that the appellant's Constitutional rights as was enshrined in section 77,2 (b),(c) and (f) of the retired Constitution were trodden upon during the trial court proceedings. These rights are, after the promulgation of the Constitution of Kenya, 2010, buttressed and sanctified by Article 50 of the new Constitution: I, therefore, quash the appellant's conviction and set aside his sentence. Obviously the fine imposed upon the appellant is also set aside.

I do not find it necessary to consider the appellants second ground of appeal.

Having quashed the appellant's conviction and having set aside the sentence and the fine imposed upon him, I find myself facing a veritable conundrum. What then happens? Do I release the appellant or do I order a retrial?

I need not reinvent the wheel. I will rely on the case of Bernard Lolimo Ekimat Versus Republic, Criminal Appeal No 151 of 2004(UR) in which the court of Appeal said:

"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 of retrial should only be made where interests of justice require it"

In the present case, the appellant was arrested on 26th October, 2009. He was convicted and sentenced on 18th October, 2010. He has been incarcerated in one form or another for over 4 years. The record of proceedings indicates that he is a sick man who has even been admitted to Kenyatta National Hospital while in prison. There is also a report from Kenyatta National Hospital dated 24/12/2009 showing that he has been taking anti-retroviral drugs.

After carefully considering the above factors, I have decided that the interests of justice tilt against an order of retrial.

The appellant is released and is at liberty unless otherwise lawfully held.

Dated and signed at Nairobi this 2nd day of November, 2013.

PETER MUCHOKI NJOROGE

JUDGE

Delivered in open court this 10th day of December, 2013 in the presence of:

PETER MUCHOKI NJOROGE

JUDGE