REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL CASE NO. 136 OF 2010

PETER LEPOSO NKAAI ……. APPELLANT

VERSUS

REPUBLIC ……...…….. RESPONDENT

(An appeal against the judgment of the Hon. P. Ngare SRM in Chuka Principal Magistrate's Court in Criminal Case No. 1185 of 2007 delivered on 29th June 2010)

JUDGMENT

The appellant Peter Leposo Mkaai was charged with four counts before the Principle Magistrate Court at Chuka. He pleaded not guilty to all counts. After trial, he was convicted on three counts. He was convicted on count No. 1 of stealing contrary to section 275 of the Penal Code. He was convicted on count 2, that is, the offence of attempting to obtain money by false pretences contrary to section 313 as read with section 389 of the Penal Code. He was also convicted on count 4 which was the offence of personating contrary to section 282 of the Penal Code. He was acquitted of count 3 which was the charge of forgery contrary to section 349 of the Penal Code. On being convicted, he was sentenced in respect of count 1 to 2 year's and on count 2 to 3 years' imprisonment and 4 years imprisonment on count 4. All those sentences were to run concurrently. He has appealed to this court against his conviction and sentence. When the appeal came for hearing before me the appellant's learned counsel Mr. B Gitonga failed to address himself to the lower court's failure to record the language used by PW1 to PW3. Even the state in conceding to the appeal failed to address itself to the same. In my perusal of the lower court's proceedings, I found that PW1 and 2 gave evidence on 15th September 2008. PW3 gave evidence on 7th April 2009. That evidence was recorded when Kenya was governed by the former constitution. In the former constitution just like the constitution of Kenya 2010 one of the tenets of fair trial is the provisions of an interpreter at no costs to the accused person. Section 77 of the former Constitution provided as follows:-

"(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) ……

d) ***……..***

e) ***……***

f) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used in the trial of the charge …….”

With that provision in mind, the trial court needed to indicate the language used by the witnesses. As can been seen the requirement of the provision of an interpreter is mandatory. The conformity with that section as well as section 198 of the Criminal Procedure Code should be evident in the proceedings of a criminal trial. Section 198 of the Criminal Procedure Code provides:-

“…….. 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…….”

The requirement to provide an interpreter for the accused has been the subject of various decisions before the courts. The Court of Appeal in the case **Degow Dagane Nanow vs. Republic,** Criminal Appeal No. 223 of 2005 at Nyeri (unreported), stated thus:-

“……It is the responsibility of trial court to ensure compliance with these provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place……..”

“*The Court of Appeal also made a similar observation in the case of* ***Jackson Leskei vs. Republic,*** *criminal Appeal Case No. 313 of 2005 (unreported):-*

“……..By entrenching in the constitution the right of interpretation in a criminal trial the framers of the Constitution appreciated that it is fundamental for an accused person to fully appreciate not only the charge against him but the evidence in support thereof. It is then that it can be justifiably said that an accused person has been accorded a fair hearing by an independent an impartial court. It is the court’s duty to ensure that he accused’s right to interpretation is safeguarded and to demonstratively show its protection……”

“Further the Court of Appeal on the subject in the case of ***Antony C. Kibatha vs. Republic*** *Criminal Appeal No. 109 of 2005 (unreported) had the following to say:-*

*“****…….We do not think we could ever improve on that statement of the law concerning the fair trial provisions under section 77 of the Constitution. A court can only demonstratively show that the rights of an accused person under section 77 have been protected if its record shows that that has been the case……..”***

The failure to record the language used by PW1 to 3 renders the trial before the subordinate court to be a nullity. The learned counsel for the appellant and the respondent did not address the court on the retrial of the appellant. The Court of Appeal in the case **Fatehali Manji vs. The Republic**[1966] E.A. on retrial had this to say:-

“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily

follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

The appellant as stated before was acquitted on count 3 where he was charged with the offence of forgery contrary to section 349 of the Penal Code. According to the trial magistrate that count failed before the banking slip allegedly signed by the appellant got lost after it had been submitted in evidence. It should be noted that all the counts that the appellant faced were of the same transaction where the prosecution sought to prove that the appellant stole PW1's national identity card and attempted to withdraw money from PW1's account using that identity card. The banking slip that the appellant allegedly filled in the alleged attempt to withdraw the money was lost by the court before the judgment of the lower court was delivered. I am in agreement with the learned trial court magistrate that count 3 could not be proved in the absence of that banking slip. Similarly, as correctly argued by counsel for the appellant, in the absence of that banking slip, count 2 could not be proved. It will be recalled that count 2 was the offence of attempting to obtain money by false pretences contrary to section 313 as read with section 389 of the Penal Code. The only evidence of such attempt could only be found in the banking slip that disappeared from the court file. I am of the view that the appellant should be retried on count 1 and 4 only. The evidence on record in my view if subjected to retrial would lead to a conviction. As stated in the case **Mwangi vs. Republic** [1983] KLR by the Court of Appeal on retrial the court should consider in ordering retrial whether a conviction will result. The court in that case held as follows:-

"A retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."

I am of the view that in respect of count 1 and 4 the admissible evidence would lead to conviction of the appellant of those counts. With that in mind, I make the following orders in this judgment:-

1. The conviction of the appellant on count 2 of the offence of attempting to obtain money by false pretences contrary to section 313 as read with section 389 of the Penal code is hereby quashed.

2. The sentence on count 1, 2 and 4 are hereby set aside.

3. The conviction of the appellant on count 1, that is, stealing contrary to section 275 of the Penal Code and the conviction on count 4, that is, personating contrary to section 382 of the Penal Code are hereby set aside.

4. I hereby order that the appellant be retried on count number 1 and 4 at the principal Magistrate court at Chuka by any other magistrate except C.N. Ndubi Resident Magistrate and M.N. Morage Resident Magistrate.

5. Whilst the appellant awaits his retrial I order that he be held in custody at the G.K. Prison Meru and to be presented before the principle Magistrate Court Chuka on 7th June 2011 the mention of his case with a view to being retried on count 1 and 4.

Dated, signed and delivered at Meru this 19th day of May 2011.

MARY KASANGO
JUDGE