



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUSIA**

**CRA NO.23 OF 2008**

***(Appeal arising from original BSA PM CR. NO.1119 of 2005)***

**BENSON ODUOR OJOO.....APPELLANT**

**~VRS~**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant Benson Odour Ojoo was convicted by Busia Principal Magistrate of two counts of robbery with violence contrary to section 296 (2) and sentenced to death. He lodged this appeal against conviction and sentence.

The petition of appeal brings out three main ground.

- a) *That there was no positive identification.***
- b) *That the evidence was contradictory and incapable of sustaining a conviction.***
- c) *That the language used was not recorded.***

The state counsel Mr. Okeyo conceded to the appeal on grounds that during plea, the court did not record which language was used.

On perusal of the proceedings, we agree with the learned state counsel that the language of the court or any interpretation thereof is not shown on the proceedings of 06/06/2005 when the plea was taken. This is in contravention with section 72 of the former Constitution which was in force during the time of the trial and section 198 of the Criminal Procedure Code. Failure to record the language of the court makes it apparent that the court did not inquire into the language the Appellant understood in order to ensure the charge was read and explained in that language. This omission leads to the conclusion that the Appellant did not understand the charges against him. It is of no useful purpose that he said “**yes**” or “**no**” to the charges.

The proceedings indicate that the language used by all the witnesses when they testified was not indicated. The record shows there was a court clerk present during the trial but it is not known whether he

did any interpretation or not and in what language. The Appellant may not have understood or followed the proceedings. This omission of recording the language and using the language understood by the Appellant is a violation of the Appellant's constitutional right which renders the proceedings null and void. We hereby declare these proceedings void for all intents and purposes. For this reason we need not deal with the other grounds of appeal.

The State Counsel did not apply for a retrial. We suppose the reason is that this matter is an old one. The case was registered in court in June 2005 and the trial was concluded on 17/03/2006. It is not clear when the appeal was lodged. It cannot be in 2008 as the file number suggests since it was more than two years after the trial. We heard this appeal and judgment is due in March 2011. The Applicant has been in incarceration for about 6 ½ years which is a long period. A retrial would therefore not serve the interests of justice of this appeal.

The appeal is successful and the conviction and sentence are hereby set aside. The Appellant is set at liberty unless otherwise lawfully held.

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**D. A. ONYANCHA**  
**JUDGE**

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**F. N. MUCHEMI**  
**JUDGE**

Judgment dated and delivered on the 9th day of June 2011 in the presence of the Appellant and State Counsel Mr Okeyo.

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**D. A. ONYANCHA**  
**JUDGE**