



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 112 OF 2009

LESIIT, J

HUSSEIN GURACHA DIMA APPELLANT

- VERSUS -

REPUBLIC RESPONDENT

From the original conviction and sentence of Isiolo Resident Magistrate Hon. Mr. C.O. OWIYE

JUDGMENT

The appellant Hussein Guracha Dima was convicted for assault causing actual bodily harm contrary to Section 251 of the Penal Code. He was sentenced to be detained at the President's pleasure.

When the appeal came up for hearing, the learned State Counsel submitted that the State was conceding to the appeal on a technicality. Mr. Kimathi urged that the learned trial magistrate did not indicate the language of the court throughout the proceedings; further the court did not indicate the language used by PW1, 2 and 3 to testify in court; and further that PW4 and 5 were shown to have spoken in Kiswahili but that there was no indication whether there was any interpretation. Besides, Mr. Kimathi urged, the record shows that the appellant asked one or two questions to each of the witnesses except PW2 whom he did not cross examine. The learned State Counsel doubted that the appellant followed the proceedings. Mr. Kimathi said that the state would not urge for a retrial.

The appellant had nothing to say.

I have considered this appeal. I have confirmed from the record of the proceedings that what Mr. Kimathi submitted was correct. Both the language of the court and the language used by the witnesses to testify was not indicated, except in the case of PW4 and 5. Before this court the appellant did not understand English or Kiswahili, and I had to get a Borana interpreter to communicate with him.

Section 198(1) of the Criminal Procedure code stipulates:

“198. (1) 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 appellant in this case was denied a legal right to interpretation of evidence in a language which he understands. That rendered the proceedings defective and a nullity.

There is a more serious procedural defect in those proceedings. I noted that after the case was heard and judgment delivered, the learned trial magistrate required the appellant to give his mitigation before sentence. The appellant then made the following remark:

“MITIGATION

The prison is meant for human beings even the judge can be sent to prison”

The court on hearing this remark ordered the appellant to be taken for psychiatric examination before sentence. The report of the mental status of the appellant indicated, according to the trial magistrate, that the appellant was mentally unstable. The learned trial magistrate proceeded to sentence the appellant to be detained in prison at the pleasure of the President.

The mental report presented to the learned trial magistrate before this court. It shows:

“ He has no insight to his sickness and therefore not fit to stand court proceedings. He is a case of schizophrenia. He is a known mental patient over a period of his life time, in and out of the mental ward, having been managed at Isiolo and in Mathare Hospital”.

It is obvious from the report that the appellant was unfit to stand trial, most likely even at the plea stage. That means the court should have tried him in accordance with Section 162 to 167 of the Criminal Procedure Code. It is only after invoking the procedure of trial in case of lunacy can the court make the special finding of guilty but insane. Then can the court order that an accused be detained under the President’s pleasure.

The learned trial magistrate realized that the appellant was of unsound mind at the stage of sentence in that case he ought to have complied with the provision of Section 167(a) of the Criminal Procedure Code which stipulates as follows:

“67(a) in cases tried by a subordinate court, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the President’s pleasure; but every such order shall be subject to confirmation by the High Court”

The learned trial magistrate had no jurisdiction to pass the sentence ordered in this case. Had he the jurisdiction the learned trial magistrate after passing the sentence should have sent the file to the High court for confirmation. The section puts it thus

“..... It shall order that the accused to be detained during the President’s pleasure; but every such order shall be subject to confirmation by the High court.” (Emphasis is mine)

In conclusion the learned trial magistrate flouted the procedural provisions of the Criminal Procedure Code by failing to provide interpretation of the evidence to the appellant and Secondly he failed to invoke the provisions relating to procedure in case of lunacy as provided under the code. Thirdly he exceeded his jurisdiction in sentence he passed. For non compliance with both procedures, the proceedings were defective, null and void. Accordingly I set aside both the conviction and sentence.

A court has to consider whether to order a retrial of

“In the case of Ahmed Sumar Vs. Republic (1964) E.A. 481, at page 483,

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.

The Court continued at the same page at paragraph II and stated further:-

“I am also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.

The appellant has been in prison serving sentence since 28th January, 2009, a period of 2 (two) years and 7 (seven) months. A person convicted for assault under Section 251 of the Penal code is liable to imprisonment for 5 (five) years. More importantly, the offence is a misdemeanor which means other options of punishment should be considered especially where the accused is a first offender as in this case.

I find that the interest of justice will not require a retrial to be ordered in this case. Such an order will only cause suffering and prejudice to the appellant. I decline to order a retrial and order that the appellant be released forthwith unless otherwise lawfully held.

Dated signed and delivered at Meru this 28th day of July 2011

**J. LESIIT
JUGE**