



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA

CRA NO.13 OF 2006

(Appeal arising from PM BSA CR. NO.13 of 2006)

NOAH ECHOPATA EKARANITI :::::::::::::::::::: APPELLANT

~VRS~

REPUBLIC :::::::::::::::::::: RESPONDENT

JUDGMENT

The Appellant Noah Ochapati Ekranja was convicted of an offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to death. He appealed against the judgment of Busia Principal Magistrate delivered on the 17th February 2006.

The grounds contained in the petition of appeal are that the ingredients of the offence were not proved; that there was lack of positive identification and that the court relied on hearsay evidence.

The State counsel Mr. Okeyo conceded to the appeal. He submitted that the language used in court by the witnesses was not recorded. He prayed for an order of retrial arguing that the prosecution had sound evidence in this case. In the same breath the State Counsel recognized the delay in the trial of the case.

We have perused the court record. When the plea was taken the language used was not recorded. Nine prosecution witnesses testified in this case. The court did not record the language used by the witnesses. Article 49 (1) of the Constitution requires that an accused person be informed of the charge in a language that he understands. The proceedings shall be conducted in the language of the court with an interpreter available to translate the proceedings in the language the accused understands.

The trial magistrate failed to do this important duty of inquiring from the accused persons the language they understood. The charge must have been read in a certain language but it is not known which one. The witnesses testified in languages not recorded by the court. In that case, it is not possible to tell whether the accused persons understood the charge and the proceedings. It is the constitutional right of the accused to understand the proceedings. In this case, we find that the magistrate erred in law by failing to record the language used in court. The convictions and sentences founded on the illegality relating to language cannot stand. We hereby set aside the conviction and sentence.

On the issue of retrial, we have perused the evidence on record. The evidence is sound and supports the charge. However, the Appellant was charged on the 16th December 2004 and convicted on 17/02/2006 which was about one year. This appeal was filed out of time with leave on 17/07/2006. The

appeal was heard by us on 29/6/2011 and judgment herein scheduled for 6/10/2011. the total period for the trial and the appeal translates into seven (7) years. It is really a long period of incarceration. It is our considered opinion that an order for retrial will not serve the interests of justice. The State Counsel did not tell us whether the witnesses would be available. We believe that if the retrial is ordered, the prosecution has a challenge of tracing the witnesses who testified about seven (7) years ago. Some of them may not be alive today.

For these reasons, we decline to order trial. The Appellant has spent a long time in custody which is equivalent to a seven year imprisonment sentence.

The Appellant is hereby set at liberty unless otherwise lawfully held.

D. A. ONYANCHA
JUDGE

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 9th day of November 2011 in the presence of the Appellant and the state counsel Mr. Okeyo.

JUDGE