



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
HCCRA NO.13 OF 2008

FELIX ODHIAMBO OOKOAPPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G E M E N T

The appellants Felix Odhiambo Ooko and Joseph Owino Otieno were convicted by Busia Principal Magistrate of two counts of robbery with violence contrary to Section 296 (2) of the Penal Code and sentenced to suffer death in the manner authorized by the law.

In the petitions of appeal, the appellants raise the following grounds:

- (a) that the charge was defective;**
- (b) that the language used by witnesses PW1, PW2 and PW3 to testify was not recorded;**
- (c) that Section 200 (3) of the Criminal Procedure Code was not Complied with;**
- (d) that the accused persons were not properly informed of the charges on arrest;**
- e) that identification was not positive;**
- f) that the alibi defence was not considered;**
- g) that the judgement was not signed as required by Section 169 (l) of the Criminal Procedure Code.**

The State Counsel conceded to the appeal on grounds that the language of the witnesses was not indicated.

We have perused the charge and evidence in view of the issues raised on appeal and made several observations. The charge contains all the ingredients of the offence in full compliance with Sections 295 and 296 (2) of the Penal Code.

During the taking of the plea, there was an interpreter who translated the charge and all its elements from English to Kiswahili. There is no doubt that the court inquired into the issue of what language the appellants understood well. When all the six witnesses testified, the court omitted to record the language used. The appellants had raised the case of PW1, PW2 and PW3 in his appeal. Our observation is that the failure to record the language applies to all the prosecution witnesses. Section 198 of the Criminal Procedure Code makes it a statutory requirement that the court records the language used by the witnesses, the accused persons or any other person who appears before it.

Section 198 provides:

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.**
2. **If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.**
3.
4. **the language of the High Court shall be English, and the Language of a subordinate court shall be English or Swahili.**

In the case before us, the court clerk was present in court when all the six (6) witnesses testified. However, the language used is not known and neither is there any indication of any interpretation having taken place. The accused persons were not represented during the trial. Each of them briefly cross-examined some of the witnesses. However, it remains a mystery as to what language was used and whether the accused persons understood the proceedings. Failure to record the language used amounts to breach of a statutory requirement and denial of the right of the accused persons. Section 198 was meant to ensure that proceedings are understood by the accused persons in order to guarantee a fair trial to the appellants. In the circumstances which was prejudicial to them.

The plea was taken by Mr. W.N. Nyarima Principal Magistrate who also heard the first witness. The proceedings were taken over by one Mr. A.O. Osodo Principal Magistrate on 11/09/06. The proceedings of the day do not show that any directions were taken by the court in accordance with Section 200 (3) of the Criminal Procedure Code. The Section provides:

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right

It is a statutory requirement that the succeeding magistrate informs the accused of his right to demand that any witness who has testified be resummoned and reheard. The answer given by the accused must be recorded. It is the compliance with this section that gives the succeeding magistrate the authority to proceed with the case started by the predecessor. Failure to comply with this mandatory provision denies the accused of his right under the law. Section 200 (4) is instructive in the event of non-compliance. It provides that where the High Court is of the opinion that the accused was prejudiced by the non-compliance with the Section, it may “set aside the conviction” and “may order a retrial” We rely on Court of Appeal **Criminal Appeal no.15 of 2007 Erick Omondi Gor vs Republic** where the effect of non-compliance was emphasized. From the nature and circumstances of this case, we come to a conclusion that the accused persons were prejudiced. The proceedings are rendered null and void by the non-compliance.

It is our considered opinion that where Section 198 and 200(3) have not been complied with the end result is nullification of the proceedings. It will therefore serve no useful purpose at this stage to go into the other issues raised on appeal. The proceedings are hereby declared null and void for non-compliance with the law.

The State Counsel did not apply for retrial in this case. The matter was left to the good sense of the court to decide. The plea was taken on the 11th September 2006 and the trial completed on 21st February 2008. This was a period of over one (1) year. The appeal was filed towards the end of February 2008. It has taken over three (3) years to hear and determine the appeal. The total period of incarceration is about five (5) years. If this case is sent for trial, it may take quite a while to dispose which would continue putting the accused persons to greater anxiety and agony. It would also be difficult to trace the prosecution witnesses who testified about five (5) years ago. We find this case not suitable for retrial.

The convictions and sentences are hereby set aside. The two appellants are hereby set at liberty unless otherwise lawfully held.

D.A. ONYANCHA
J U D G E

F.N. MUCHEMI
J U D G E

Judgement dated and delivered on the 8th day of November 2011 in open court and in the presence of the appellants and the State Counsel.

F.N. MUCHEMI
J U D G E