REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 38 OF 2008

LESIIT J.

MARGARET KATHURE MUTHINE ….....……APPELLENT

VERSUS

REPUBLIC …….…….....…….REPONDENT

JUDGMENT

The Appellant was convicted by the Maua SPM court of grievous harm contrary to section 234 of the Penal Code. She was sentenced to five years imprisonment. It is against that conviction that she now appeals to this court.

The appeal was urged by Mr. Murithi on behalf of the appellant and Mr. Mungai the learned State counsel on behalf of the State. The state conceded the appeal on a technicality that the language used by the witnesses to testify was not indicated in the record of the proceedings. That ground was among eight grounds of appeal relied upon by the advocate for the appellant as cited in the petition of Appeal dated 27th March, 2008 and the Supplementary Petition of Appeal dated 2nd June 2011.

I have looked at the record of the proceedings, both typed and handwritten copies. Both sets of proceedings are similar. The learned trial magistrate failed to indicate the language used by each of the witnesses to testify in this case.

Mr. Murithi in his submissions urged that the appellant did not understand the proceedings as they were in the Kiswahili language which she does not understand. Counsel did not refer to the law he was invoking to raise this point. Neither did the learned State Counsel. Section 98 of the Criminal Procedure Code provides:

1) Where the officer who has served a summons is not present at the hearing of the case, and where a summons issued by a court has been served outside the local limits of its jurisdiction, an affidavit purporting to be made before a magistrate that the summons has been served, and a duplicate of the summons purporting to be endorsed in the manner hereinbefore provided by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

This section goes hand in hand with article 50 (2) (m) of the Constitution 2010 which provides for fair

trial for accused persons as follows:

"(2)Every accused persons has the right to a fair trial, which include:-
(m) To have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."

Looking at the proceedings of the lower court, the appellant asked at most one question to all the witnesses. It is likely that she did not follow the proceedings. The prosecution cannot be heard to challenge that fact since it is clear that the language used by the witnesses were not discussed. It may be if she followed the proceedings the outcome of the case could well have been different in the circumstances the proceedings of the lower court were defective null and void. Accordingly I do set the conviction and sentence aside.

The issue is whether to order a retrial. The principles which trust be had in mind before a court determines that point are now well established.

There are various decisions of the Court of Appeal relating to the principles the court should apply when ordering for a retrial which the Court of Appeal made mention of in **Richard Omollo Ajuoga Vs. Republic** H.C. Criminal Appeal No. 223 of 2003. They are as follows:-

*"**In the case of Ahmend Sumar Vs. Republic (1964) E.A. 481, at page 483, the predecessor to this court stated as follows:-***
"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:-

"We are 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.

Taking the queue from that decision, this Court in the case of Bernard Lolimo Ekimat Vs. Republic Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-

"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

I have considered that the appellant served one years imprisonment out of the five years she had been imprisoned to serve. The appellant was convicted in 2008 and served the 10 months imprisonment that year. That is now 3 years ago. To require the appellant to go through a retrial will in my view cause hardship to the appellant. That is likely to prejudice the appellant especially bearing in mind that the appellant was not to blame for the mistake which occurred in the lower court proceedings.

I find that the interests of justice do not require a retrial to be ordered in this case. I decline to order a retrial.

Those are my orders.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF DECEMBER, 2011

J. LESIIT
JUDGE