REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Criminal Appeal 51 'A' of 2006

DAVID NYONGESA OKHWATENGE.....APPELLANT
~VRS~
REPUBLIC .....RESPONDENT
JUDGMENT

The Appellant, David Nyongesa Okhwatenge was convicted by Bungoma Senior Principal Magistrate of the offence of grevious harm contrary to section 234 of the Penal Code and sentenced to seven (7) years imprisonment. In his petition of appeal, the Appellant avers that the language used by the court while taking plea is one that he did not understand. Secondly, that the court failed to appreciate that the accused and the complainant were son and father and that the harsh sentence imposed would create animosity in the family. It was argued that the plea was not unequivocal and that a plea of not guilty ought to have been entered.

The appeal was opposed by the state on both conviction and sentence. Mrs. Leting, the state counsel argued that the court record shows that the court used English language which was interpreted to the accused in Kiswahili. The sentence of seven (7) years imprisonment was reasonable given that the offence calls for a maximum sentence of life imprisonment.

I proceed to examine the issues raised in this appeal. On the language used, the proceedings of 13.11.2006 read as follows:

> ***"Coram: K. Ngomo SPM***
> ***Pros: IP Tabani***
> ***CC: Dan***
> ***Interpretation-English/Kiswahili***
> ***Charge read over and explained to the accused who replies:***
> ***Accused: It is true."***

It is clear that the record does not indicate the language used to read and explain the charge to the Appellant. The indication of ***"English/Kiswahili"*** is ambiguous and does not show which of the two languages between Kiswahili and English the court used. There is no record of whether the court inquired from the Appellant what language he understood. Such an inquiry would have assisted the court to determine the language of reading and explaining the charge.

> ***"Section 77 (2) of the Constitution provides:***
> ***Every person who is charged with a criminal offence:***
> ***a) shall be presumed to be innocent until he proved or has pleaded guilty:***
> ***b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;***
> ***c) shall be given adequate time and facilities for the preparation of his defence;***
> ***d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;***
> ***e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and***
> ***f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.***
> ***And except with his own consent the trial shall not take place in his absence unless he so***

conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence."

The issue of interpretation in criminal trials is also provided for in section 198 of the Criminal Procedure Code which states:

"Section 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 issue of language is a Constitutional issue which questions the validity of the entire trial owing to the alleged transgression of the relevant provision aforequoted. The failure by the court to comply with the provisions of section 77 (2) renders the proceedings *void ab initio*. For this reason, I declare the proceedings of 13/11/2006 null and void. I therefore set aside the conviction and sentence. The other grounds argued will not be dealt with for the reason that they are founded on invalid proceedings.

The Appellant was convicted on 13/11/2006 and has now served for about three and half (3 ½) years. This is a good case for retrial provided it is fast tracked in order to avoid delay. I therefore order retrial to be done within seven (7) days before the Chief Magistrate, Bungoma.

F. N. MUCHEMI
JUDGE

Judgment dated and delivered on the 16th day of June, 2010 in the presence of Mr. Luchivia for Areba for the Appellant and the State Counsel Mrs. Leting and the Appllant.

F. N. MUCHEMI
JUDGE