REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Application 33 of 2006

DANIEL MURITHI ..... APPELLANT

VERSUS

REPUBLIC ..... RESPODENT

(From the original conviction and sentence of Kimani PM in Criminal Case No. 433 of 2005 at Principal Magistrate's Court Marimanti delivered on 15th March 2006)

JUDGMENT

The appellant was charged before Principal Magistrate Marimanti with the offence of defilement of a girl contrary to Section 144 (1) of the Penal Code and with an alternative charge of indecent assault contrary to Section 144 (2) of the Penal Code. Those two sections have since been repealed since the enactment of the Sexual Offences Act. The appellant was convicted on the main count and sentenced to 14 years imprisonment. He has now presented this appeal against conviction and sentence. When the appeal came for hearing, the state conceded to the appeal because the learned magistrate had failed to state the language in which the witnesses gave evidence. The Court of Appeal in the case **Antony Njeru Kathiari & Ano. Vrs. Republic** Criminal Appeal Case No. 21 & 23 of 2004 on the issue of language in a criminal trial had this to say:-

"Way back in 1985 this court, in the case of Diba Wako Kiyato Vs. Republic [1982 – 1988] 1 KAR 1974 held that:-

It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands.
The Court in that case was relying on the provisions of Section 77(2) (f) of the Constitution of Kenya and Section 198 (1) of the Criminal Procedure Code. The Court said:-
The practice of recordings (sic), if not the name of the interpreter, at least the nature of the interpretation, has been standard practice in these courts for many years. For example, that which is described as the "plea form," Form Criminal 133, contains under all the other details of the case and the accused, a space against the word "interpretation." There was no compliance with either of these two statutory provisions or with the standard practice in the instance case. The magistrate made no note of the language into which the evidence of the witnesses, many of whom spoke in English or Swahili was being translated....."

In this case, the learned trial magistrate did not indicate the language used by all the prosecution witnesses and even the language used by the appellant in his defence. Such failure renders the trial a nullity and accordingly, the conviction by the lower court will be quashed and the sentence against the appellant will be set aside. The state however sought the appellant to be retried. Learned state counsel Mr. Kimathi stated in seeking retrial that the lower court's evidence was overwhelming and could secure conviction. The appellant when asked to respondent to that request said that he did not oppose the retrial. I however formed the opinion that he did not understand what the state counsel had applied for. On the issue which the court should consider when ordering a retrial was well considered in the case **David Kiplagat Bunei Vs. Republic** Criminal Appeal No. 370 of 2006 where the Court of Appeal had this to say:-

"We have considered the past decisions of this court which includes the decision in the case of Richard Omolo Ajuoga Vs. Republic Criminal Appeal No. 223 of 2003, in which several past cases were considered and fully analyzed as to what circumstances need to be considered before a retrial is ordered. We have considered the decisions in the case of Pascal Ouma Ogolo Vs. Republic Criminal Appeal No. 114 of 2006 (unreported), Henry

Odhiambo Otieno Vs. Republic Criminal Appeal No.83 of 2005 (unreported) and the case of Bernard Lolimo Ekimat Vs. Republic Criminal Appeal No. 15! of 2004 (unreported). In the Ekimat Case it was stated:-

There are many decisions on the question of when appropriate case could 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."

Having regard to what consideration the court should have in ordering retrial, I have looked at the lower court's evidence and I find that it would not be sufficient to secure a conviction without the prosecution having to adopt other evidence to ensure that conviction. The complainant stated that the incident occurred at 10pm. She stated that at the time she was in the latrine which seemed to be apart from the main house. She said that the appellant entered the latrine. He had a torch. He hit her on the hand and held her by the neck. He then took her behind the latrine and raped her. The complainant did not state how she identified the appellant in the dark. She however stated that the appellant fled when her father PW3 opened the door of their house. PW3 stated that he found the appellant hiding in the farm. Although he stated that the appellant's shoe was found in the compound of the house, there was no further evidence adduced to identify that shoe as belonging to the appellant. PW3 said that on opening the door to the main house he saw the complainant and also saw the appellant's bicycle. He then saw the appellant squatting in the firm. He noted that the appellant's trousers were not up. This witness did not also tell the court how at that hour at about 10pm he managed to recognize the appellant. Although he stated that he saw the appellant in the farm, the appellant was not arrested that night. In re-examining the evidence of the lower court, I find that the evidence on the recognition of the appellant was not satisfactorily explained. The complainant and PW3 stated that they knew the appellant prior to the incident. That however did not lessen the need of both indicating how they identified the appellant in the night. The lack of satisfactory evidence on recognition leads me to find that this is not a fit and proper case to order retrial. A retrial would lead to prejudice of the appellant. The court will therefore not accede to the state request for retrial. The judgment of the court is that the lower court's conviction of the appellant is hereby quashed and the sentence of the lower court is hereby set aside. The court orders the appellant to be set free unless he is otherwise lawfully held.

Dated and delivered at Meru this 26th day of July 2010.

MARY KASANGO
JUDGE