



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA  
Criminal Appeal 147 of 2009**

*(Appeal arising from KIMILILI SRM CR. NO.1520 of 2009)*  
JOY NYONGESA..... APPELLANT

~VRS~

REPUBLIC ..... RESPONDENT

**JUDGMENT**

The Appellant Joy Nyongesa appeals against conviction and sentence by the Senior Resident Magistrate Kimilili for the offence of giving false information to a person employed in the public service contrary to section 129 (a) of the Penal Code. She was sentenced to two (2) years imprisonment.

Mr. Wanyama for the Appellant argued the appeal. Firstly, he raised the issue of the language used by the court which was not understood by the Appellant. It is the Appellant's case that her rights were violated contrary to section 77 of the constitution. The counsel submitted that the court ought to have dealt with the issue of perjury if at all it existed during the trial of the case. The Appellant felt that it was wrong to invoke the normal criminal process for such an issue. The prosecution did not adduce any evidence of age of the victim to prove the Appellant was wrong.

The State Counsel Mrs. Leting conceded to the appeal on all aspects. The proceedings of 19/10/2009 show that there was interpretation in English/Kiswahili. The court did not clearly indicate which of the two languages the Appellant understood and which one was used in court. It is an established principle that the mere indication of “*English/Kiswahili*” is ambiguous and does not show which language the court used. The court has a duty to inquire from the accused the language he understands. As the plea is taken, the court must record that the charge is read and explained to the accused in a language which he says he understands. The language must be named as English, Kiswahili or as the case may be. The court herein failed to comply with the Constitutional provisions of section 77 (2) (b) of the Constitution. The facts were read to the Appellant in a language he did not understand. The conviction was based on facts read to the accused in the same manner. It would be correct to conclude that the Appellant did not understand the charge nor the facts. Non-compliance with section 77 (2) (b) renders the proceedings null and void. It is my finding that the proceedings of Senior Resident Magistrate Kimilili of the 19/10/2009 are *void ab initio*. The appeal is allowed.

In the event that I am proved wrong on appeal I wish to look at the other two grounds. The ingredients of the offence of giving false information are as follows:

- a) ***It must be proved that the complainant or person named must be an officer employed in the public service.***
- b) ***That the accused knowingly gave false information to the officer.***

The charge names one P.C. Salome as the complainant. The facts do not explain who Salome was. It can only be assumed that she was a police officer because of the other particulars of the charge. The appellant is said to have recorded a false statement to the effect that she was 17 years and informed the court in her testimony that she was 19. The prosecution ought to have availed an age assessment report to prove the age of the Appellant. This would have assisted the court to determine whether she was aged 17 or 19 years. The court was wrong to convict on the charge whose only issue was age without establishing the age. I agree with the Appellant’s counsel that the Appellant would have been dealt with in court under the law regarding offences relating to the administration of justice. It was wrong to subject her to criminal proceedings.

The facts presented to court did not disclose an offence under section 129 of the Penal Code. The sentence imposed on the complainant of the two (2) years imprisonment was too punitive in the circumstances. The maximum sentence under section 129 is three (3) years. The court ought to have considered a non-custodial sentence or a fine given the circumstances of the offence.

In effect, the conviction on the said facts was a misdirection on part of the court. The conviction and sentence imposed thereon has no legal basis. I quash the conviction and set aside the sentence.

**F. N. MUCHEMI  
JUDGE**

Judgment dated and delivered on the 14<sup>th</sup> day of July, 2010 in the presence of the Appellant, her counsel Mr. Wanyama and the State Counsel Mrs. Leting.

**F. N. MUCHEMI  
JUDGE**