



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL APPEAL CASE NO. 247 OF 2008

JOHN MURIITHI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal against the judgment of Mr. M.R. Gitonga SPM at Isiolo in S.P.M. Criminal Case No. 769 of 2008 delivered on 26th day of November 2008)

JUDGMENT

This is yet another appeal we are dealing with which trial was conducted before M.R. Gitonga SPM where the said learned magistrate failed to record the language used when witnesses testified. The appellant was charged before the SPM Court Isiolo with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. Trial commenced before SPM M.R. Gitonga on 22nd July 2009. Out of all the prosecution witnesses who testified the learned magistrate did not indicate the language used by them. Article 50 of the Constitution provides that every accused person has the right to a fair trial which includes the right:-

“50 (M) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

Similarly, under section 198 (1) of the Criminal Procedure Code, the requirement of provision of an interpreter is stated. That section provides:-

“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 he understands.”

Bearing those two provisions in mind, the Court of Appeal in the case **Degow Dagane Nunow Vs. Republic NYR**, Criminal Appeal No. 223 of 2005 (unreported) had this to say:-

“.....It is the responsibility of trial courts to ensure compliance with these provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place.....”

That case clearly shows that the trial court has a duty to indicate in the proceedings compliance with those provisions. The learned state counsel did not address us on the failure of the trial court to record the language of the court. As we sat to consider this judgment, it occurred to us that the learned trial magistrate had failed to comply with those provisions. We therefore do not have the benefit of the learned state counsel's insight whether we should order a retrial. Having failed to record the language of the court, we do declare the lower court's trial a nullity. In considering whether to order a retrial, we place reliance on the case **Bernard Kariuki & 4 others Vs. Republic** Criminal Appeal No. 433 of 2007. The Court of Appeal in considering whether to order a retrial had this to say:-

“In Muiruri Vs. Republic [2003] KLR 552, this court held that as a general rule, whether a retrial should be ordered or not must depend on the circumstances of the case and will only be ordered where the interests of justice require it, and if it is not likely to cause injustice to the appellant. The court also held that the nature of the defects in the original trial, the length of time which has lapsed since the arrest and arraignment of the appellant, who was responsible for the mistake leading to the order setting aside the conviction and sentence, and the nature of the evidence the prosecution is likely to rely on in support of the charge are also important factors to consider. These factors are not necessarily exhaustive. Each case has to be considered on the basis of its peculiar factors and circumstances.

It is only through a trial that it will be demonstrated that justice has been done both to the deceased's family and the appellants. In the circumstances of this case whether or not the evidence on record will be sufficient to sustain conviction is outweighed by the public interest to demonstrate that justice has not only been done but has been seen to be done.”

In our case, the offence occurred in April 2008. We have looked at the prosecution's evidence and we are of the view that if a retrial was

mounted, a conviction will more than likely follow. We hereby therefore declare the trial before M.R. Gitonga SPM a nullity. We quash the conviction of the appellant and set aside the sentence of the court. We order that the appellant be retried before the Isiolo magistrate's Court by any other magistrate other than M.R. Gitonga SPM. For that purpose, this case shall be mentioned before Isiolo Magistrate's Court on 16th November 2010 with a view to the court giving date for the retrial of the appellant. In the meanwhile, we order the appellant to be detained in custody.

Dated and delivered at Meru this 29th day of October 2010.

LESIT, J.
JUDGE

KASANGO, M.
JUDGE

Read, signed and delivered at Meru this 29th day of October, 2010.

In The Presence Of:

Kirimi/Mwonjaru Court Clerks
Appellant Present
Mr. Kimathi For the State

LESIT, J.
JUDGE

KASANGO, M.
JUDGE