



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 46 of 2007

PATRICK NZIOKI MUASA.....1ST APPELLANT

APPELLANT KIVUVA MUTUA2ND

APPELLANT NICHOLAS WAMBUA MULINGE..... 3RD

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 3201 of 2004 of the Chief Magistrate's Court at Machakos by S.A. OKATO – Senior Resident Magistrate)

J U D G M E N T

The appellants, **PATRICK NZIOKI MUSASA**, **KIVUVA MUTUA** and **NICHOLAS WAMBUA MULINGE** were convicted for the offences of robbery with violence contrary to section 296 (2) of the Penal Code.

Patrick Nzioki Muasa was convicted on two counts; Kivuva Mutua was convicted on 3 counts; whilst Nicholas Wambua Mulinge was convicted on one count. They were each then sentenced to death.

In the appeal to this court, the appellants challenged both their convictions and their sentences.

When the appeals came up for hearing, they were consolidated. Thereafter, the learned state counsel informed the court that he was conceding the appeal. His reason for conceding the appeal was that there were procedural defects which occurred during the trial, and which resulted in a mistrial. In particular, the state did concede that there was no evidence to show that the proceedings were interpreted into the languages understood by the appellants.

On their part, the appellants emphasized that there had been several challenges on the issue of the language used during the trial. For instance, after **PW 2** testified in Kikamba, there was no cross-examination. Mr. Ondieki, the learned advocate for the appellants submitted that the absence of any cross-examination implied that the appellants did not understand the proceedings.

Thereafter, **PW 4** also testified in Kikamba, but was not cross-examined.

Later, **PW 6** and **PW 8** both testified in English, but there is no evidence of any translation of the said evidence.

On our part, we have noted that **PW 1**, too, did give her evidence in Kikamba. Thereafter, she was cross-examined by both the 2nd and 3rd accused.

Although the appellants asserted that **PW 2** was not cross-examined, that is not borne out by the facts on record. Both the 2nd and the 3rd accused persons did cross-examine **PW 2**.

Similarly, **PW 3** was cross-examined by the 2nd accused. The said cross-examination took place after **PW 3** had testified in Kikamba.

PW 4 was also cross-examined by the 2nd and 3rd accused, after she had testified in Kikamba. The same happened in respect of **PW 5**.

PW 6 testified in English, but was not cross-examined by any of the appellants.

PW 7 gave his testimony in Kiswahili, after which he was cross-examined by the 2nd and 3rd accused.

Finally, **PW 8** testified in English. He was then cross-examined by the 2nd and 3rd accused.

In effect, the 1st accused did not cross-examine any of the prosecution witnesses. To our minds, that is a strange phenomenon, considering that the said accused was expressly stated as having been identified at the various scenes of crime. We therefore find that there is a real possibility that the failure by the 1st accused to cross-examine any of the eight prosecution witnesses was attributable to his inability to follow the proceedings.

We also note that when the plea was taken, the charge was read and explained to the accused persons in Kiswahili. The court records show that the three accused persons understood Kiswahili; that is what the learned trial magistrate indicated on 9th November 2005.

Having noted that the accused persons understood the Kiswahili language, the trial court ought to thereafter have ensured that the evidence was either tendered in Kiswahili, or if tendered in any other language, the said evidence ought to have been translated into Kiswahili.

Section 198 (1) of the Criminal Procedure Code provides as follows;

“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.”

In this case, the appellants had indicated, at the outset, that they understand Kiswahili. Yet 5 prosecution witnesses testified in Kikamba, and another 2 witnesses testified in English, without any interpretation into Kiswahili.

In **ABDALLA VS REPUBLIC [1989] KLR 456**, the Court of Appeal said;

“This court has recently held that it is a fundamental right of an accused charged with a criminal offence to have the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands. See Diba Wako Kiyato V Republic Criminal Appeal No. 100 of 1985, section 77 (2) of the Constitution and section 198 (1) of the Criminal Procedure Code. The record of the trial court alludes to interpretation in Kiswahili but does not state that there was any clerk or interpreter in court; only the presence of the Magistrate the prosecutor and the accused are

recorded. The record lends credence to the Appellant's complaint that there was no interpretation of the proceedings to him in a language that he understands though the record has indications that he may have followed the gist of the proceedings. In the circumstances, there was a breach of the appellant's constitutional and fundamental right, which is fatal to the proceedings..."

Clearly therefore, even though it may appear that the 2nd and 3rd accused persons did understand the gist of the proceedings, that does not excuse the failure by the trial court to afford them their right to interpretation. The said failure renders the proceedings before the trial court a mistrial.

We therefore find that the learned state counsel was right to have conceded the appeal. Accordingly, the appeal is allowed; the convictions of all the 3 appellants are quashed, and the sentences are set aside.

However, as the evidence on record appears to be sufficient to sustain a conviction; and because the incidents giving rise to the charges against the appellants occurred just over 5 years ago, we have formed the considered opinion that the interests of justice demand a retrial. Accordingly, it is hereby ordered that the appellants shall be retried as soon as possible. However, the retrial shall be presided over by any magistrate other than Hon. S.A Okato SRM (as he then was)

Dated, Signed and Delivered at Machakos, this 23rd day of September 2009.

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ISAAC LENAOLA

FRED A. OCHIENG

JUDGE

JUDGE