



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 190 & 187 of 2007

ALBINO LOKINYI APPELLANT

CRIMINAL APPEAL NO. 190 OF 2007

AMAKAI AKADAR APPELLANT

VERSUS

REPUBLIC RESPONDENT

(An appeal from the judgment of M.R. Gitonga Ag SPM Isiolo in SRM Criminal Case No. 364 of 2006 delivered on 16th January 2009)

JUDGMENT

Both appellants were charged in the lower court with the offence of robbery with violence contrary to section 296(2) of the Penal Code on count 1 and on count 2 with the offence of rape contrary to section 140 of the Penal Code. They also faced an alternative charge of indecent assault on a female contrary to section 143 of the Penal Code. After trial, they were convicted on the 1st and 2nd count and were sentenced to death in respect of count 1 whilst the sentence for the 2nd count was held in abeyance.

In our consideration of this appeal, it occurred to us that the learned trial magistrate had failed to indicate the language of the court. Four witnesses testified in the lower court and in respect of each one of them, there was no indication of the language they used before court. The learned state counsel in his argument stated that the language of the court was indicated when the charges were read to the appellant. That is correct. On the 10th March 2006 when the plea was taken, the court indicated that the charges were read to the appellant in Kiswahili. But we dare say that that does not suffice for the requirement that the proceedings are conducted in a language in which the appellants understand. The only thing that can guide us on whether the trial court complied with the provisions of section 198 of the Criminal Procedure Code and the requirement of the Constitution Act section 77. The only guide we have is the record of the proceedings at the lower court. Through out the proceedings of the lower court, the learned trial magistrate simply noted "Sworn states." The records did not thereafter show in what language any of the witnesses gave evidence.

It has often been said and it is worth repeating that courts are courts of record. The lower court's record is the only guide that we have as we consider this appeal and the manner in which the trial proceeded. The lower court as any other court handling criminal matters is required to show the language used by the

prosecution witnesses. This is the requirement under section 198 of the Criminal Procedure Code which is in the following terms:-

“198. (1) Where 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,

(2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.

(4) The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili.

The requirement for an interpreter being provided in a criminal trial in a language which the accused persons understands is a mandatory requirement. Its compliance cannot be left to conjecture. The compliance of that requirement needs to be recorded in the court proceedings. The Constitution also places the same requirement in a criminal trial. This is to be found in Section 71(1) (2) (b) and (f). It is in the following terms:-

“77. (1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence:

(a)

(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)

(d)

(e)

(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.”

The Court of Appeal has considered those provisions in the case of **Degow Dagane Nanow Vr. Republic** Criminal Appeal No. 223 of 2005 at Nyeri (unreported) and had this telling observations:-

“.....it is the responsibility of trial court to ensure compliance with these provisions. Trial courts are not only obliged to ensure compliance with the 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...”

The Court of Appeal also made a similar observation in the case of **Jackson Leskei Vr. Republic**, Criminal Appeal No. 313 of 2005 (unreported)

“.....By entrenching in the Constitution the right of interpretation in a criminal trial, the framers of the constitution appreciated that it is fundamental for an accused person to fully appreciate not only the charge against him but the evidence in support thereof. It is then that it can be justifiably said that an accused person has been accorded a fair hearing by an independent and impartial court. It is the court’s duty to ensure that the accused’s right to interpretation is safeguarded and to demonstratively show its protection.....”

Further, the Court of Appeal on the subject of language had in the case of **Antony C. Kibatha V. Republic, Criminal Appeal No. 109 of 2005** (unreported) this to say:-

“.....We do not think we could ever improve on that statement of the law concerning the fair trial provisions under section 77 of the Constitution. A court can only demonstratively show that the rights of an accused person under section 77 have been protected if its record shows that that has been the case.....”

The lower court failed to meet the requirements of the law and of the above cases in failing to indicate the language of the court. As we stated before we were only able to note that failure when we sat down to consider our judgment on this appeal. As a consequence, the learned state counsel did not address us on whether or not to order for a retrial. A retrial will normally be ordered as has been decided in previous cases in the following circumstances:-

- (1) If original trial was illegal or defective,**
- (2) If it is in the interest of justice,**
- (3) If it will not occasion injustice or prejudice to the appellant,**
- (4) If it will not accord the prosecution opportunity to fill up gaps in its evidence at the first trial,**
- (5) If upon consideration of the admissible or potentially admissible evidence a conviction may result and finally,**
- (6) Each case must depend on its particular fact and circumstances.”**

We find that the lower court’s trial is vitiated by the trial magistrate’s failure to show that the appellants were provided with an interpreter as required. On the issue of retrial we are aware that when the appellants appeared before the lower court they were being retried. But that as it may be, we are of the view that the interest of justice would best be served by the appellants being retried because of the serious nature of the charges they faced. The justice of the victim as much as the justice of the appellants need always to be considered. In this case, the complainant a wife and a mother was dragged out of her house and raped when the robbery took place and this was in the presence of her children and her husband. It is because of that that we order for a retrial. The judgment of the court is:-

- 1. The appellant’s appeal is allowed and the conviction of the lower court is hereby quashed and the appellant’s sentence is hereby set aside.**
- 2. We hereby order that the appellants be retried by the principle magistrate court at Isiolo by any other magistrate other than M.R. Gitonga. The matter shall be mentioned in a court on 14th December 2009 in that court and in the meanwhile, we order the appellants to be kept in custody.**

Dated and delivered at Meru this 20th day of November 2009.

MARY KASANGO

JUDGE

M.J.A. EMUKULE

JUDGE