REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU
Criminal Appeal 208 of 2009, 209 & 203 of 2007

MOHAMED NOOR ABDULLAHI …………………… APPELLANT

CRIMINAL APPEAL NO. 209 OF 2007

ROBERT NANTE LOCHAKAI …………………….. APPELLANT

CRIMINAL APPEAL NO. 203 OF 2007

JULIUS THURANIRA MUGAMBI …………………. APPELLANT

(An appeal against the judgment of the Hon. Mr. M.R. Gitonga S.P.M. in criminal case No. 345 of 2007delivered on 13th December 2007)

JUDGMENT

The three appellants were tried together in the lower court and we have therefore consolidated their appeals. They were all charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code in count 1 and count 2. The 2nd and third appellants were charged with the offence of gang rape contrary to Sexual Offences Act No. 3 of 2006. The 2nd and 3rd appellants were charged with an alternative charge of indecent assault to adult contrary to section 11 contrary to Sexual Offences Act No. 3 of 2006. After trial before the lower court, all the appellants were convicted on the first and second counts. The 3rd appellant was convicted on the 3rd count while the second appellant was convicted on the alternative count. They have all filed their appeal against conviction and sentence.

As we began to consider their appeal, we found that the learned trial magistrate had failed to record in the proceedings the language used by the prosecution witnesses when they gave evidence. This is an issue that arose as we sat to consider the appeal. It does seem that even the learned state counsel was not aware of this failure when he argued the appeal. 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 Section 77 of the Constitution is the record of the proceedings at the lower court. Through out the proceedings of the lower court, the learned trial magistrate in respect of each witness 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 and which is understood by an accused person. 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 provision of 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 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 the 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 threshold of the law in the above cases in failing to indicate the language of the court. The learned state counsel did not address us on this issue. As we stated before we were only able to note that failure when we sat down to consider the judgment of this appeal. As a consequence, the learned state counsel did not address us on whether or not to order for 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.

In the case of <u>Hahindi Vrs. Republic</u> (Criminal Appeal No. 270 of 2006) the Court of Appeal added circumstances under which the court would consider whether or not to order a retrial, such as the time when the applicant has taken with the period that the appellant has spent in custody. In addition to such period, the court should also determine whether witnesses would be traced in good time to mount a successful retrial. In this case, the appellants have been in custody since March 2007. That is a period of just 2 years. We are of the view that that period they have been in custody is not so long as to likely to cause prejudice to them. We have considered the evidence of the prosecution and in our view if a retrial is ordered, the prosecution will not have an opportunity to fill up gaps in the evidence. In our view, the evidence on record could lead to a conviction of the appellants. Accordingly, our judgment is in the following terms:-

1. The conviction of the lower court of all the appellants is hereby quashed and their sentence is set aside on all counts.

2. We hereby order the appellants to be retried at Isiolo Magistrate Court by another magistrate other than M.R. Gitonga SPM.

3. This matter shall be mentioned on 14th December 2009 at Isiolo Magistrate's court for the purpose of hearing dates being fixed. Until then, the appellants shall be held in custody.

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

MARY KASANGO

<u>JUDGE</u>

M.J.A. EMUKULE

<u>JUDGE</u>