



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 46 of 2006

RICHARD GATHEE NGECHU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the judgment of P.C. Toroley,

Senior Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 487 of 2006 at Karatina)

JUDGMENT

The Appellant was charged with wearing uniform issued by Forest Department without authority contrary to Section 9(1) (d) of the Forest Act Cap 385. On the second count he was charged with trespassing in a private land contrary to Section 3(1) of the Trespass Act Cap 294. After trial the learned magistrate convicted the Appellant and sentenced him to five years on count I and one year on count II. The Appellant has brought his appeal against conviction and sentence. This is the first appeal. In deciding this appeal I am guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see *Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570*).*”**

The evidence against the Appellant in the lower court was given by two Forest Department employees who said that they arrested the Appellant on 29th April 2005 at 11.30p.m. They said that they found him dressed in the Forest Department uniform and that he seemed to be hiding himself. The uniform was exhibited before court. In his defence the Appellant stated that he was authorized to graze his animals in the forest. He produced licenses issued by the Forest Department in this regard. The learned magistrate believed the evidence of the prosecution and rejected the defence of the Appellant. What seems to be of concern to me as I review the lower court's case is that the learned magistrate failed to indicate the language used during the trial. It is pertinent to note that the Appellant did not cross examine the witnesses in depth considering the defence he offered. Courts are expected to keep a record of the proceedings. The record which is kept during the proceeding is the only guide when an appeal is being considered. The court was required to adhere to the provisions of section 198 of the Criminal Procedure

Act. That section 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 which he understands.....”

The requirement of the provision of an interpreter during criminal trials in a language in which accused understands is a mandatory requirement and its compliance ought to be reflected in the record of the court proceedings. It cannot be a matter of conjecture. Section 77 of the Constitution also provides as follows:-

“(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 in the trial of the charge.....”

The need to adhere to the provisions of the criminal procedure code and the constitution as stated herein before were subject of the court of appeal decision in the case of *Degow Dagane Nanow v Republic, Criminal Appeal No. 223 of 2005 at Nyeri (unreported)*, 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 v 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 an 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 in the case of *Antony C. Kibatha v Republic, Criminal Appeal No. 109 of 2005 (unreported)* has the following 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’s record as stated before fails to meet the requirements set out herein before. What the court now requires to consider since the trial of the lower court is nullified by that failure is whether a retrial should be ordered. A retrial will normally be ordered as has been decided in previous cases in the following circumstances;-

- (i) *If original trial was illegal or defective.*
- (ii) *If it is in the interest of justice.*
- (iii) *If it will not occasion injustice or prejudice to the appellant.*
- (iv) *If it will not accord the prosecution opportunity to fill up gaps in its evidence at the first trial.*
- (v) *If upon consideration of the admissible or potentially admissible evidence a conviction may result and finally*
- (vi) *Each case must depend on its particular facts and circumstances.*

In the case of ***Kahindi v Republic Criminal Appeal No. 270 of 2006*** the Court of Appeal added the circumstances under which the court would consider whether to order a retrial as the period that the appellant has taken in custody. Such a period should be considered and in being so considered the court should determine whether witnesses would be traced in good time to mount

a successful retrial. The evidence adduced in the lower court was that the Appellant was wearing uniform of the Forest Department without authority. In his defence the Appellant stated that he had purchased that uniform. He even gave a receipt showing the repair he carried out to his army boots. In respect of the charge of trespass the Appellant gave receipts of the Forest Department allowing him to graze in the forest. The learned magistrate rejected those receipts but in my view those receipts should have been considered because they clearly emanate from the Forest Department. Having reconsidered the lower court trial I am of the view that a retrial should not be ordered. In the end the Appellant’s appeal against conviction and sentence does succeed. The Appellant is hereby set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 24th day of June 2008.

MARY KASANGO

JUDGE