



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO.25 OF 2006

GODFREY GITONGA.....APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No.3864 of 2004 by R.A.A. OTIENO – SRM)

J U D G M E N T

The appellant before me, namely **Godfrey Gitonga** was tried and convicted on one count of Defilement of a girl contrary to *section 145 (1)* of the Penal Code and upon so being convicted by the Senior Resident Magistrate at Nyeri (**R.A.A. OTIENO, SRM.**) he was sentenced to 15 years imprisonment. Being aggrieved, the appellant lodged the instant appeal through **Messrs Peter Muthoni & Company Advocates**. When the appeal came before me for hearing, **Ms. Ngalyuka**, Learned State Counsel, did not seek to support the conviction recorded against the appellant on the grounds that the only witness was the complainant who did not know the appellant before the commission of the offence. The complainant attended the identification parade and was unable to pick out the appellant. The conviction of the appellant was thus unsafe. On his part **Mr. Muthoni**, learned counsel for the appellant applauded the state's move. However, he also added that the whole trial of the appellant was a nullity as the language of the court and in which the trial was conducted was not indicated in the court record.

I have perused the court record and certainly **Mr. Muthoni** is right in this regard. In my view the fate of this appeal should turn on this aspect of the trial. Way back in 1985 the court of appeal in the case of **Diba Wako Kiyato V Republic (1982 – 1988) 1 KAR 1974** held that:-

“It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands.”

The court in that case was of course relying on the provisions of *section 77(2) (f)* of the Constitution of Kenya and *section 198 (1)* of the Criminal Procedure Code. The court went on state that:-

“The practice of recordings (sic), if not the name of the interpreter, at least the nature of the interpretation, has been standard practice in these courts for many years. For example, that which is described as the “plea form,” Form Criminal 133, contains under all the other details of the case and of the accused, a space against the word “interpretation.” There was no compliance with either of these two statutory provisions or with the standard practice in the instant case. The magistrate made no note of the language into which the evidence of the witnesses, many of whom spoke in English or Swahili was being translated.....”

The appeal was accordingly allowed, the nature and strength of the evidence adduced by the prosecution in support of the charge notwithstanding.

In the appeal before me, the record of the trial Magistrate has absolutely no record or indication as to what language the proceedings were conducted and the appellant spoke. On the day of the plea, it is shown that there was an interpretation in English and Kikuyu languages. However there is no indication that this is the language that the appellant had elected to use during the trial. In any event the appellant is Meru. Thereafter it is not shown anywhere in the record what languages the witnesses gave their evidence in and if the appellant understood such languages or whether it was being interpreted to him. It is not even shown what language the appellant himself addressed the Magistrate in. It is a matter of serious regret and concern to me that such a senior Magistrate adopted such a casual approach when trying the appellant despite the several court of appeal decisions on the question of interpretation which I am certain the learned Magistrate is aware of.

The trial commenced on 10th May, 2004 and was concluded on 17th February, 2006 when the appellant was convicted and sentenced. The learned Magistrate cannot claim to have been oblivious of the now notorious court of appeal decision on the subject in the case of **Swahibu Simbauni Simiyu & Another V Republic, Criminal Appeal No.KSM.243 of 2005** (*unreported*). In that case the court of appeal held that since *section 77 (2)* of the constitution requires that;

“.....Every person who is charged with criminal offence shall be informed as soon as reasonably practicable in a language that he understands in details of the nature of offence with which he is charged and since the record of the magistrate did not show the language used by the two appellants, there was violation of the appellants’ constitutional rights under the forgoing section.....”

The appeal too was allowed on that basis, once again the nature and strength of the evidence availed by the prosecution in support of the charge notwithstanding.

The failure of the learned Magistrate to keep a record of at least the name of the interpreter and the nature of the interpretation was a serious defect in the trial and must render the conviction of the appellant unsafe and unsustainable. I must therefore allow the appeal and set aside both the conviction and sentence.

I now wish to consider the question of retrial. The learned State Counsel had already conceded this appeal on the grounds that the identification of the appellant by his alleged victim was not watertight. I agree with the learned state counsel. When called to an identification parade, the complainant ended up picking another member of the parade and not the appellant. This goes to show that the complainant did not positively identify the person who allegedly sexually assaulted her much as the offence was committed during the day. The appellant may be a victim of mistaken identity and indeed it is possible that he was picked upon merely because he was a stranger in the area as he claimed in his defence.

I am satisfied therefore that if a retrial is ordered and this self-same evidence was tendered a conviction is unlikely to result. **See Mwangi V Republic (1983) KLR 522.**

Taking all the foregoing into account, I hold the view that this is not a proper and fit case for an order for retrial. Accordingly I decline to make such an order. Instead I order that the appellant be set at liberty forthwith unless otherwise held for some other lawful cause.

Dated and delivered at Nyeri this 29th day of September, 2008.

M.S.A. MAKHANDIA

JUDGE