

SOLOMON NJOROGE GICHANGI.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(Being an appeal from the judgment of M.R. Gitonga,

Principal Magistrate in Chief Magistrate's

Criminal Case No. 100 of 2004 at Nyeri)

JUDGMENT

The appellant was charged with *attempted defilement of a girl contrary to section 145(2) of the Penal Code* on the first count and *indecent assault on a female contrary to section 144(1) of the penal code*. The lower court after conducting the trial convicted the appellant on the second count. The present appeal is against conviction and sentence. When the appeal came for hearing the learned state counsel conceded to the appeal on the basis that the trial court had failed to indicate the language used during the trial. The learned state counsel further stated that the appellant was detained in custody for more than 24 hours contrary to the provisions of section 72 (3)(b). Indeed as correctly stated the learned magistrate failed to indicate the language used by the witness to give evidence. The Court of Appeal found that an accused person has a right to interpretation of the proceedings in the language he understands. In the case of *Swahibu Simbauni Simiyu & another Vs Republic Criminal Appeal No. 243 of 2005* the said court had this to say;-

“It is shown what language each appellant used to that from the record of the magistrate it is really not possible to say each spoke in English or in Swahili and whether each of them understood whatever language was being used. We find it incredible that this could have happened in the court of a Senior Principal Magistrate. Clearly there was not the slightest attempt to comply with the provisions of the Kenya Constitution or the

Criminal Procedure Code. On that basis alone, the appeals must be allowed.”

In the case of ***Kiyato V/S Republic (1982 – 88) KAR 418***, the Court of Appeal held:-

“(1) It is fundamental right, under the Constitution of Kenya section 77 (2) that an accused person is entitled without payment, to the services of an interpreter who can translate the evidence to him and through which he can put questions to the witnesses, make his statutory statement, or give his evidence. Moreover, the Criminal Procedure Code (Cap 75) section 198 (1) also requires that evidence should be interpreted to an accused person in a language that he understands.

(2) It is the standard practice in the courts to record the nature of the interpretation used and the name of the interpreter. The trial magistrate in this case made no note of the language in which the evidence of the witnesses was being interpreted.

(4) There had been no compliance with the Constitution of Kenya section 77 (2) and the Criminal Procedure Code (Cap 75) section 198 (1) in this case.....”

On the basis that the trial court did not indicate the language used by the trial court this appeal would succeed. But as correctly stated by the learned state counsel and echoed by the appellant’s counsel the police detained the appellant in custody after his arrest for more than 24 hours provided under section 72(3) (b) of the Constitution. There is now a wealth of court of appeal’s decision on the consequences of the violation of the Constitutional Rights and more particularly relating to prolonged detention in custody beyond the period allowed under the Constitution. See the case of *Albanus Mwasia Mutua Vs. Republic, Criminal Appeal No. 120 of 2004 (unreported) and Gerald Macharia Vs. Republic (2007) e KLR*. It is clear from those decisions that it is the duty of the court to uphold Constitutional provisions. The Court of Appeal in finding that those provisions have been violated in respect of any party has proceeded to acquit such a party. On my part without any further a do I do hereby allow the appellant’s appeal against conviction and sentence. I do hereby quash the lower court’s conviction and set aside its sentence. I order the appellant to be set free unless otherwise lawfully held.

Dated and delivered at Nyeri this 7th day of October 2008.

MARY KASANGO

JUDGE