REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL 184 OF 2004

PHILIP KIAGO MUCHUCHE …………………….....……. APPELLANT

VERSUS

REPUBLIC ………………………….…….…...………. RESPODNDENT

(Appeal from original Conviction and Sentence in the Chief Magistrate's Court at Nyeri in Criminal Case No. 162 of 2004 dated 29th April 2004 by Mrs. M. R. Gitonga – P.M.)

J U D G M E N T

This is a first appeal. The appellant Philip Kiago Muchuche, was charged in the Chief Magistrate's Court at Nyeri with the offence of defilement of a girl under the age of 16 years contrary to section 145 of the Penal Code. In the alternative the appellant was charged with indecent assault on a female contrary to section 144(1) of the Penal Code. He pleaded not guilty to the charges but after a full hearing, he was found guilty as charged on the main count, convicted and sentenced to 25 years imprisonment with hard labour. The appellant was not satisfied with the subordinate court's decision and hence proceeded to appeal to this court.

In his petition of appeal filed in person, the appellant has advanced 4 grounds upon wich the learned magistrate's decision can be faulted. However in the light of the events that unfolded at the hearing of the appeal, it is not necessary to revert to those grounds of appeal.

When the appeal came up for hearing, **Mr. Orinda**, learned principal State Counsel conceded to the appeal on the technical ground that the language of the court and in which the witnesses testified was not indicated in th record of the trial magistrate. This by itself rendered the proceedings a nullity. As to whether I should order a retrial, counsel took the view that the evidence tendered was tenous and accordingly declined to ask for a retrial. It was also his view that the particulars of the charge were defective. The appellant had nothing to say in response.

I have carefully scrutinized the record of the subordinate court and I am afraid I am in agreement with the learned state counsel's observations. It is readily clear to me that the language of the court and in which the appellant and the witnesses who were summoned to testify communicated is not indicated and or reflected in the record. This omission was a gross violation of the provisions of section 77(1) (b) and (f) of the constitution of Kenya

ll as section 198(1) of the Criminal Procedure Code. First, the record and its contents.

The appellant was first taken to court on 16th January 2004 when the charge was read over to him and he pleaded not guilty to the charge. The record on tht day is silent as to the language in which the charge

was read and explained to the appellant. Hearing was then fixed to commence on 5th February 2004 in Court 2. On 30th January 2004 the case came up for mention. On 5th February 2004 the case came up for hearing but the prosecution applied to substitute charge. The substituted charge was read to the appellant and he pleaded not guilty and the hearing commenced in earnest. On that occasion 4 prosecution witnesses testified. However there is no record as to which language the court, the witnesses and the appellant communicated. On 25th February 2004, the case again came up for hearing when 1 witness only testified and it was adjourned to 22nd March, 2004. On that date 1 witness testified and the prosecution closed its case. The matter was again adjourned to 15th April 2004 for a ruling on no case to answer. On that day in a rather short and terse ruling, the learned magistrate found that the appellant had a case to answer and put him on his defence whereupon the appellant elected to give unsworn statement.

It should be noted that on all these occasions again there was no record at all as to the language the court, the witnesses and the appellant communicated. Section 77 of the Constitution deals with provisions to secure the protection of law. The pertinent provision is section 77(2) (b) and it is worded in the following terms:-

"**(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"

And section 198(1) of the Criminal Procedure Code states:

"**198(1) Whenever any evidence is given in 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."**

Thus, in law, at the trial of an accused person, the court must ensure not only that the charge is explained to the accused in a language he understands but that the court is further enjoined to ensure that the evidence given during the trial is interpreted to the accused in a language that the accused understands. These are legal requirements. They are constitutional rights of an accused person and cannot, in my view be waived or abrogated in the belief that the accused must have understood the language of the court as he participated in the proceedings by cross-examining witnesses summoned and testified in his defence. In the case of **Jackson Leskei v/s Republic – Criminal Appeal No. 313 of 2005** the court of appeal laid down the law in the following terms:

"**It is the Court's duty to ensure tht the accused's right to interpretation is safeguarded and to demonstratively show its protection."**

Mr. Orinda, the learned Principal State Counsel conceded the appeal on that ground. To my mind, he took the correct approach in conceding the appeal and from what I have stated above, I do agree with him. I therefore allow the appeal, quash the conviction and set aside the sentence of 25 years plus hard labour imposed upon the appellant.

The next matter I need to consider is whether to order a retrial the position taken by the learned

Principal State Counsel on the issue notwithstanding. The appellant I note, did not oppose or support an order for retrial. I have anxiously considered the law and circumstances of this particular case. The court of appeal has in the past considered similar cases and in the case of **Richard Omolo Ajoga v/s Republic – Criminal Appeal No. 223 of 2003**, it considered and analysed several cases decided on the issue regarding under what circumstances a retrial should be ordered. Such other cases were **Pascal Ouma Ogola v/s Republic – Criminal Appeal No. 114 of 2006**. **Henry Odhiambo Otieno v/s Republic – Criminal Appeal No. 83 of 2005, Ahmed Sumar v/s Republic (1964) E.A. 481 at page 483** and ended up with the case of **Benard Lolimo Ekimat v/s Republic – Criminal Appeal No. 151 of 2004** (unreported) where it stated:

"**There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."**

The principal acceptable is that each case will depend on its own circumstances. In this case, the charge is serious as it involved the violation of the sanctity of a woman. It

was executed in a very brazen and vicious manner. Contrary to the opinion expressed by the learned Principal State Counsel, I find upon perusal of the evidence tendered during the trial not to be tenous but cogent enough such that if the self same evidence was tendered at the retrial a conviction may result (See **Mwangi v/s Republic (1983) KLR 522**. The appellant has only served 3 years out of the 25 years imprisonment imposed. I do not think therefore that if he was to be retried on the self same offence he will be prejudiced or will suffer injustice. It is my view that it would be in the interest of justice for a retrial to be ordered in this case.

The upshot of the foregoing is that the appellant shall be presented before the Senior Principal Magistrate's Court at Nyeri on 1st November 2007 for his retrial to commence on the self same charges before any other magistrate of competent jurisdiction other than **M. R. Gitonga** who presided over the earlier trial. Until then the appellant shall remain in prison custody.

Dated and delivered at Nyeri this 29th day of October 2007.

M. S. A. MAKHANDIA

JUDGE