REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Criminal Appeal 399 of 2002

PETER MBOGO THOITHI ……...……...…… APPELLANT

VERSUS

REPUBLIC ……..…..…….. RESPONDENT

(Appeal from original Conviction and Sentence of Chief Magistrate's Court at Nyeri in

Criminal Case No. 1514 of 2002 dated 1st August 2002 by M. R. Gitonga – SRM)

J U D G M E N T

Peter Mbogo Thoithi, the appellant, was charged and tried with the offence of Rape contrary to section 14 of the Penal Code. He also faced an alternative count of indecent assault on a female contrary to section 144(1) of the penal code. He was thereafter convicted of the main count and sentenced to 14 years imprisonment plus 4 strokes of the cane. He was aggrieved and hence the appeal before me now.

During the hearing of this appeal however, **Ms Ngalyuka**, learned state counsel, conceded to the same on the technical ground that the language of the court was not indicated in the record. Accordingly the trial of the appellant could have been a nullity. On retrial, the learned state counsel was of the view that it was not necessary as the appellant had served a substantial portion of the sentence imposed.

The appellant for obvious reasons welcomed the gesture by the state. He had nothing to add.

I have carefully perused and considered the record of the proceedings in the subordinate court and I have no doubt at all that the learned state counsel was right in conceding to the appeal on the ground that the language of the court was not indicated in the record. This was in contravention of section 198(1) of the criminal procedure code and section 77(2) of the constitution of Kenya

The appellant was first taken to court on 7th June 2002 when the charge was read over to him and he pleaded not guilty to the charge. The record on that 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 19th June 2002 in Court No. 2. On the aforesaid date when the case came up for hearing, three witnesses testified.

The matter was then adjourned to 5th July 2002 when the last prosecution witness was heard.. The prosecution closed its case and the appellant was called upon to defend himself. He gave unsworn statement and the matter was adjourned to 10th July 2002 for further defence hearing which came to pass. On all those dates, there is no record as to which language the court, the witness and the appellant communicated.

The trial court did not consider that the appellant was not represented at the time of he hearing of his

case which meant that he needed to be thoroughly conversant with the court language. Section 77 of the Constitution deals with provisions to secure protection of law. The pertinent provision is section 77(2) (b) and it states 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 at the trial of the charge.

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

"**198(1) 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."**

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 that the accused understands but the court is further enjoined to ensure that the evidence given during the trial is interpreted to the accused in a language the accused understands. These are legal requirements. They are constitutional rights of an accused person and cannot, in my view, be waived on belief that the accused understands the language of the court by the mere fact that he posed questions to the witnesses in cross-examination and was even able to make a statement in his defence. In the case of **Jackson Leskei v/s Republic – Criminal Appeal No. 313 of 2005** the court of appeal stated:

"**It is the court's duty to ensure that the accused's right to interpretation is safeguarded and to demonstratively show its protections."**

Ms Ngalyuka, the learned Senior State Counsel, conceded the appeal on that ground but did not seek for a retrial. In my mind she took the correct approach in conceding the appeal and from what I have stated above, I do agree with her. I would therefore allow the appeal and set aside both the conviction and the sentence of 14 years and 4 strokes of the cane imposed upon the appellant.

The next matter I need to look into is whether to order a retrial the position of the learned state counsel notwithstanding. I have anxiously considered the circumstances of this particular case. The court of appeal has in the past considered similar cases and in the case of **Richard Omolo Ajuoga v/s Republic – Criminal Appeal N. 223 of 2003**, it considered and analysed several cases decided on the issue of under what circumstances a retrial should be ordered. Some of those cases were **Pascal Ouma Ogolo 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 principle acceptable is that each case will depend on its own circumstances. In this case, although the charge is serious, there is doubt as to whether the offence was ever committed. The appellant is alleged to have raped his sister in law. There is evidence of misunderstanding between the appellant and his sisters in law as well as his mother in law. They do not seem to approve of the marriage. The appellant has not been able to pay dowry. His wife seems to back the appellant's claim that her relatives have a grudge against the appellant and it would appear they ganged up to fabricate the appellant with the case

The appellant has also been in custody since he was arrested on 3rd June 2002. He has been behind bars for 5 or so years. He has thereby served a substantial portion of the sentence. The mistake ending in this appeal being allowed was not a prosecution's mistake but a court's mistake. I feel that considering all the circumstances of this case, it would not be in the interest of justice to order a retrial.

The upshot of the foregoing is that the appellant is set free forthwith unless he is otherwise lawfully held. These are the orders of this court in this appeal.

Dated and delivered at Nyeri this 26th day of October 2007

M. S. A. MAKHANDIA

JUDGE