



REPUBLIC OF KENYA
(From original conviction and sentence in Criminal Case No. 61 of 2000 of the Chief Magistrate’s Court at Kiambu – J. G. King’ori SRM)

JOSEPH KAMAU GITAU APPELLANT
VERSUS
REPUBLIC RESPONDENT

JUDGMENT

Due to a litany of errors of omission and commission committed by the Learned Magistrate during the hearing of this case in the subordinate Court, this Appeal must succeed. First and foremost, there was failure to provide the Appellant with an interpreter and secondly, the Learned Magistrate failed to comply with the mandatory provisions of Section 214 of the Criminal Procedure Code when he allowed the substitution of the charge sheet. Although these issues were not raised by either of the parties in their submissions, they only dawned on us during the preparation of the Judgement since the issues are fundamental and go to the jurisdiction of the Court, we decided to grapple with them nonetheless.

The Appellant with other six co-accused were jointly charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The Appellant was further charged with rape contrary to Section 140 of the Penal Code. Following a full trial, all the Appellant’s co-accused were acquitted of the charge. The Appellant was however convicted on both counts and sentenced to death on the first count and to 18 years imprisonment in respect of the 2nd count.

The Appellant was aggrieved by the conviction and sentence and hence lodged the instant Appeal. In his petition of Appeal, the Appellant faulted his conviction on seven grounds. However we need not go into them as the outcome of this Appeal is predicated upon the acts of omission committed by the Learned Magistrate during the trial already alluded to at the commencement of this Judgment. The record does not show that the Appellant was provided with an interpreter nor is the language used in the trial indicated. In the case of ***KIYATO VS REPUBLIC (1982 – 88) KAR 418***, the Court of Appeal held that since Kiyato had not been provided with an interpreter contrary to Section 77 (2) (f) of the Constitution, his Appeal would be allowed. The nature and strength of the evidence adduced by the Prosecution in support of their charge did not really count in such a situation.

As regards failure to indicate in the record the language used in the trial Court, this Court is aware of the recent Court of Appeal decision in ***SWAHIBU SIMBAUNI SIMIYU AND ANOTHER VS REPUBLIC, CRIMINAL APPEAL NO. 243 OF 2005 (UNREPORTED)*** in which the Court held that since Section 77 (2) of the C onstitution requires that:-

“...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 details, of the nature of the 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 a violation of the Appellant’s Constitutional rights under the foregoing Section and the Appeal was allowed.....”

Once again the nature and strength of the evidence brought by the Prosecution in support of its charge did not really count. On the need for Courts to be vigilant and enforce Constitutional provisions the Court of Appeal in the recent case of **ALBANUS MWASIA MUTUA VS REPUBLIC, CRIMINAL APPEAL NO 120 OF 2004 (unreported)** observed:-

“....At the end of the day it is the duty of the Courts to enforce the provisions of the Constitution, otherwise there would be no reason for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the Judgment appears to be that an unexplained violation of a Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge...”

In the Appeal before us, there was undoubtedly a gross violation of the Appellant’s Constitutional rights guaranteed to him by Section 77 of the Constitution. These violations are sufficient to dispose off this Appeal in line with the authorities we have endeavoured to cite above.

However there is one issue that cannot escape out attention. Just after the last witness had testified, the Prosecutor applied to substitute the 2nd count. Initially in the 2nd count the appellant had been charged with defilement contrary to Section 145 (1) of the Penal Code. The Prosecutor sought and obtained leave of Court to substitute the said charge with one of rape contrary to Section 140 of the Penal Code. Under Section 214 (1) of the Criminal Procedure Code, the trial Magistrate is under a duty in such situation to read over the amended charge to the Appellant and to ask the Appellant whether he (Appellant) wanted to have the witnesses who had previously testified to be recalled to testify afresh or for further cross-examination. The proviso to Section 214 (1) of the Criminal Procedure Code is in these terms:-

“.....Provided that

(i). Where a charge is so altered, the Court shall thereupon call upon the accused to plead to the altered charge.

(ii). Where a charge is altered under this subsection the accused may demand that witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last mentioned event, the Prosecution shall have the right to re-examining the witnesses on matters arising out of further cross-examination.

These two provisions are obviously for the protection of persons facing Criminal trials. In the instant Appeal although the substituted charge was read over and explained to the Appellant, there is nothing on record to indicate that paragraph (ii) of the proviso was complied with. The Magistrate was required to inform the Appellant of his right to have the previous witnesses recalled either to give evidence afresh or to be further cross-examined. Dealing with a similar case, the Court of Appeal had this to say in the case of **HARRISON MIRUNGU NJUGUNA VS REPUBLIC, CA 90 OF 2004 (UNREPORTED)**

“.....The right to hear the witnesses give evidence afresh on the amended charge and to cross-examine the witnesses further is a basic right going to the root of a fair trial and clearly it was the duty of the trial Court to show in his record that he had informed the Appellant of that right and to record further what the Appellant said in answer to the information.... Failure to inform an accused person of his rights given to him by law is not a procedural irregularity which can be cured under the provisions of Section 382 of the Code.....”

Ordinarily when an Appeal is allowed on the ground that the trial was either defective or a nullity the usual order to make is one for retrial of the Appellant on the self same charges. Is that an appropriate order to make in the circumstances of this case? We do not think so. Going by what the Court of Appeal held in the cases of **KIYATO, SWAHIBU SIMBAUNI** and **ALBANUS MWASIA MUHIA (SUPRA)** that an unexplained violation of a Constitutional right of an accused will normally lead to an acquittal, we are of the view that an order for retrial is not appropriate in the circumstances.

For all the foregoing reasons we allow the Appeal, quash all the convictions recorded against the

Appellant, set aside the sentences imposed on him and order that he shall be released from prison forthwith unless he is held for some other lawful cause.

Dated at Nairobi this 2nd day of November, 2006.

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LESIIT

JUDGE

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MAKHANDIA

JUDGE

Judgment read, signed and delivered in the presence of:-

Appellant

Erick/Tabitha: Court clerks

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LESIIT

JUDGE

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MAKHANDIA

JUDGE