



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. E163 OF 2021**

**PAK ABDOLGHAFAR.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. The application dated 1<sup>st</sup> October, 2021 was filed pursuant to section 362 and 364 of the Criminal Procedure Code as well as Article 50 (2) (m) of the Constitution of Kenya, 2010 seeking that this court calls for and examines the record of the criminal proceedings in Criminal Case No. 1255 of 2014-Republic v. Youssef Yaqoob and 11 Others, for the purpose of satisfying itself as to the correctness, legality and regularity of the proceedings and orders passed by the subordinate court in its ruling of 6<sup>th</sup> June, 2021.

2. The application was supported by the affidavit of the Mr. Omondi Ogutu-advocate sworn on 1<sup>st</sup> October, 2021 and the grounds on the face of the Notice of Motion.

3. This application was not opposed and the Applicant's advocates filed written submissions. It was submitted that the right to a fair trial is enshrined in the Constitution of Kenya, 2010 at Article 50 (2) (m) and according to the holding in **Wilson Kipchichir Koskei v. Republic (2019) eKLR**, Mativo J. stated that:-

**“right of fair trial means that there has to be a fair trial and no miscarriage of justice and under no circumstances should prejudice be caused to the accused person.”**

4. It was therefore argued that it is self-evident that the right of the 7<sup>th</sup> accused had been blatantly ostracised and he had been bundled up with all the foreign accused persons without any regard to the fact that he had a distinct origin, speaks a different language and is subject to a different culture other than that of his co-accused.

5. The Applicant further submitted although he speaks Farsi and Persian, the court brushed aside his request to have a Farsi or Persian interpreter and this has infringed on his right to fundamental rights and freedoms. It was pointed out that the Applicant had numerous omissions that left him at a glaring disadvantage.

6. When this matter came up for plea on 9<sup>th</sup> July, 2014, the Applicant indicated he understood Iran or Pakistan. On 24<sup>th</sup> July, 2014, Mr. Ombeta- advocate for the accused persons indicated that A1, A2, A3, A4, A5, A6 and A8 spoke Urdu- a Persian language. On the other hand, he said that the 7<sup>th</sup> (Applicant) and 9<sup>th</sup> persons speak Hindi language.

7. Plea was differed so that a translator for Urdu and Hindi languages were sourced for. It was not until; 31 July, 2014 that one Mr. Amin Ahmed Juneya was availed to interpret or to translate the charges to the Applicant and his co-accused in Urdu language and henceforth proceedings were conducted in the English language and interpreted into the Urdu language for the Applicant and his co-accused.

8. On 26<sup>th</sup> August, 2014, the charge against the Applicant and his co-accused was consolidated with another where 3 other suspects were jointly charged with them. The Applicant and his co-accused were represented by Mr. Magolo, Mr. Ouma, Mr. Oluga and Mr. Ombeta-advocates through-out the trial when 34 prosecution witnesses testified and the Applicant and 11 of his co-accused were placed on their defence and defence hearing set for 28<sup>th</sup> February, 2018 and 1<sup>st</sup> March, 2018. Hearing did not proceed on 28<sup>th</sup> February, 2018 as well as 1<sup>st</sup> March, 2018.

9. It is on 1<sup>st</sup> March, 2018 that Ms. Wahenya-Advocate, indicated that she needed another interpreter as the present interpreter is not proper and the accused would be prejudiced in the matter. The trial magistrate in his ruling stated that there has been an interpreter in court

throughout the hearing and if the defence thinks he is not a proper one, then the matter may be raised in final submissions or appeal.

10. Defence hearing was adjourned to 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 29<sup>th</sup> and 30<sup>th</sup> March, 2018. On 18<sup>th</sup> May, 2020, Muthee-Advocate, indicated he was able to communicate with the Applicant and during the covid-19 pandemic, the Applicant was not being accessed. Hearing was therefore deferred. On 21<sup>st</sup> April, 2021, Mr. Ogutu-Advocate for the Applicant, indicated that the Iranian embassy had availed an interpreter as the prosecution had no objection. The trial magistrate however declined to allow the Persian interpreter on record at the defence stage since during hearing of prosecution's case, there was no objection raised that the interpreter Mr. Amin, would not interpret the Persian language. It was directed that the Persian interpreter would assist the defence in communicating with the prosecution.

11. On 3<sup>rd</sup> June, 2021, the issue of an interpreter who speaks Farsi language was re-visited and the prosecuting counsel-Mr. Muteti objected, saying that it is not true that the 7<sup>th</sup> accused/Applicant herein understands only Persian as he had been communicating with his advocates in English and that the demand for a Farsi interpreter was being used as a delaying tactic. Mr. Amin who had been interpreting since the beginning of the proceedings was put on oath and he said that when the statement of the Applicant was being taken at the KPA Police Station, he went there and he did interpretation from English to Urdu. That the Applicant spoke in Urdu very fluently.

12. By a ruling delivered on 8<sup>th</sup> June, 2021, the trial magistrate dismissed the application to have a Parsi interpreter as he was fluent in Urdu language which an interpreter-Mr. Amin Junega, had been procured to provide.

13. The proceedings in Mombasa Chief Magistrate's Court Case No. 1255 of 2014 started when the Applicant and his co-accused were arraigned in court on 9<sup>th</sup> July, 2014 and they took plea on 31<sup>st</sup> July, 2014 when the court managed to secure the services of Mr. Amin Ahmed Junega to provide interpretation services to the Applicant and his co-accused at the police station and at the hospital and in court during trial.

14. The right to have an interpreter under Article 50 (2) (m) is one of the many elements that constitute fair hearing and it is a right that has to be established during the preliminary stages of a trial in a pre-trial conference. It does not come at the tail end of the criminal trial. It would have been expedient for the Applicant's counsel to raise the issue before the first prosecution witness testified. Having gone through trial with an interpreter in the Urdu language, this court finds that the application for a Parsi interpreter has not been done in good faith.

15. Mr. Amin Junega did not only provide interpretation services for the Applicant in court but even between the Applicant and the police at the police station and between the Applicant and the doctors at the hospital. No complaint was raised that he did not understand or that Mr. Amin wrongly interpreted what he said to the police and the doctor. It cannot be true that almost 7 years down the line, the Applicant now claims that he does not understand the Urdu language.

16. I would agree with the trial magistrate in her finding that the right under Article 50 (2) (m) does not include a right to have trial conducted in a language of the Applicant's choice but rather, a language that he understands.

17. The Application for revision of the orders of the trial magistrate made on 8<sup>th</sup> June, 2021 has not shown that there is any error, illegality or irregularity to warrant the same being revised. The application is therefore dismissed.

18. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS. TEAMS ON THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2021**

**HON. LADY JUSTICE ANNE ONG'INJO**

**JUDGE**

**In the presence of:**

Ogwel- Court Assistant

Applicant's Advocate

Ms. Ogega for Respondent

Mr. Magolo Paul Advocate hold brief for Mr. Ogutu Advocate for Applicant

**Hon. Lady Justice Anne Ong'injo**

**Judge**

**MS. OGEGA**

We filed grounds of opposition.

**COURT**

Orders: The court didn't locate them.

**Hon. Lady Justice Anne Ong'injo**

**Judge**