REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 34 OF 2019

(CORAM: R. E. ABURILI - J.)

MUSLIM ODEMBA HAMSA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence from judgment ***delivered in the Principal Magistrate's Court, Bondo dated 25.5.2019 in Criminal Case (SO) No. 6 of 2018 before Hon. E.N. Wasike, Senior Resident Magistrate)***

JUDGMENT

1. The Appellant **Muslim Odemba Hamsa** was convicted and sentenced to serve 20 years imprisonment for the offence of defilement of a child aged 11 years. This was on 24/5/2019.

2. He appealed against the conviction and sentence, which appeal was heard by way of his written submissions and oral highlights on 22/1/2020, with the prosecution opposing the appeal and urging the court to uphold the conviction and sentence.

3. As I was deliberating on the appeal as required of the first Appellant Court, reviewing and reevaluating the evidence adduced before the trial court, I discovered the following irregularity which compels me to determine this appeal at a preliminary stage:

> ***(1) That the trial court did not indicate the specific language which was used by the accused person/appellant or which language the witnesses spoke in their testimonies before the trial court. This omission violates the provisions of Section 198 of the Criminal Procedure Code and Article 50(2)(m) of the Constitution.***

4. I note that the charge facing the appellant was serious as it carries a heavy punishment upon conviction, considering the age of the complainant.

5. It was important that the court does not just record in the quorum the three languages used for interpretation but also proceeds to indicate which of the three languages: English/Kiswahili/Dholuo that the accused/appellant understood or elected to be used for interpretation and therefore when the witnesses were sworn to testify, it should have been indicated in which languages they testified.

6. In addition, the language in which the appellant testified in his defence is not shown. Albeit there are conflicting decisions from the Court of Appeal on the effect of failure to indicate the language in which the witnesses testified, my humble view is that it is safer to allow proceedings to be conducted regularly and in accordance with the law and the constitutional dictates than to leave matters for the appellate courts to interpret.

7. The Court of Appeal in **Gabriel Owang Otila & another v Republic [2009]** eKLR citing several other decisions by the same court observed and held inter alia:

> **"The issue of interpretation in criminal trials is also provided for in section 198 of the Criminal Procedure Code which states as follows:-**

"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."

This Court has in the past had several occasions to deal with similar matters and has been consistent in its judgments that the need to comply with the requirements of section 77 (2) (b) and (f) of the Constitution as well as with the provisions of section 198 of the Criminal Procedure Code, is a matter that the Court has no option but to accept and ensure. In the case of Patrick Kubale Wesonga Criminal Appeal No. 204 of 2005 heard at Kisumu this Court stated:-

> ***"As the Court did not state the language used at the trial apart from English, one cannot state for certain that the appellant understood the language that was used to conduct the entire trial. Section 77 (2) (b) of the Constitution, which we have cited above, emphasizes that the offence is explained to an accused person in a language that he understands. Section 77 (2) (f) goes further and states that an accused person is entitled to have an interpreter if he cannot understand the language used in trial. Thus, the need for the trial court to indicate the language in which the trial proceeded cannot be waived even if an accused person has an advocate. As we have stated, there is nothing in the proceedings except one day when the case was not for hearing, to show the language in which the proceedings were conducted. That omission would also vitiate the trial before the subordinate court."***

The same view was also held by this Court in the case of Degon Dagane Nunow v. R. Criminal Appeal No. 223 of 2005 and several other decisions before and after it."

8. Yet in **George Mbugua Thiongo v Republic [2013] eKLR** the same Court of Appeal even without referring to its earlier decisions held as follows regarding the same issue of failure of the trial court to indicate the language in which the witnesses testified:

"20. With regard to the issue of language, the appellant has complained that the language used by PW 1 and 3 contravened Section 77(2)(f) of the retired Constitution and Section 198(1) of the Criminal Procedure Code. Section 77 (2) (b) of the former Constitution provided specifically that every person who is charged with a criminal offence shall be informed as soon as practicable in a language that he understands and in detail of the nature of the offence with which he is charged; and (f) that "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." Based on the record of proceedings, when the appellant first appeared in court for plea, there were English/Swahili interpretation and the charge was stated in a language that the appellant understood. The record does not, however, show that prior to the evidence being taken the learned trial magistrate enquired from the appellant the preferred language and no record is made in that regard.

21. The language in which the witnesses testified is not indicated either throughout the trial, however, there was a court clerk. In the case of Said Hassan Nuno V. Republic Criminal Appeal No. 322 of 2006 this Court stated:-

> ***"Apart from the above, at each stage of the proceeding, a court clerk was in attendance and we take judicial notice that one of the core duties of a court clerk is to offer interpretation services to accused, his counsel, the court or to the witness...It is our view that there was a language in which the proceedings were conducted and with the appellant's admission that he understood the charge, we are in no doubt he followed the proceedings adequately."***

22. For the court to nullify proceedings on account of lack of language used during the trial, it should be clear from the record that the accused did not at all understand what went on during his trial.

That is not the case here. The appellant cross-examined all three witnesses with no difficulty. He had no difficulty in conducting his defence. It is clear that the appellant clearly understood the proceedings. We do not therefore consider that the omission by the learned trial magistrate to record the language occasioned a miscarriage of justice."

9. In my humble view, the 2010 Constitution is more progressive and it is a rights based Constitution which guarantees fundamental rights of accused persons in Article 50 and which right to a fair trial and fair hearing cannot be limited. To hold otherwise in my humble view, would flies in the face of constitutionally guaranteed rights under **Article 50(2)(m) of the Constitution**.

10. A similar situation arose in **JOSEPH NGANGA NJENGA & 6 OTHERS v REPUBLIC [2008] eKLR.** The learned Judges on appeal in the High Court held, and I agree wholly:

"On examination of the Lower Court's proceedings we also have confirmed that the Learned Magistrate failed to indicate the language used by each witness. Section 77(2) (b) and (f) of the Constitution makes provisions that every person charged with a criminal offence ought to be informed in a language he understands the nature of the offence he faces. That section provides:-

"77 (2) every person who is charged with a criminal offence –

(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.

(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 …"

Similarly section 198 of the Criminal Procedure Code requires that there be interpretation for the accused in a language he understands. That section also provides:-

> ***"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.***
>
> ***(2) If he appears by an advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English."***

It is clear from the provisions set out in the Constitution and the Criminal Procedure Code that in a criminal trial the language of the trial must be understood by the accused. To that extent the trial court ought to state the language used when the evidence is adduced to demonstrate compliance with those provisions. <u>This indeed was the holding in the case of KIYATO VS REPUBLIC (1982 – 88) KLR 418. In that case it was held;</u>

> ***"(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 whom 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.***
>
> ***It is the standard practice in the courts to record the nature of the interpretation used or the name of the interpreter. The trial magistrate in this case made no note of the language into which the evidence of the witnesses was being interpreted.***
>
> ***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."***

The Learned State Counsel submitted that this case was not suitable for retrial because there was no evidence that there was attempted robbery with violence. The Learned Counsel did not address us on the issue of availability of witnesses if a retrial was ordered. In the case of <u>Ahmed Sumar V Republic [1964] E.A. 481</u> it was stated in respect of retrial that:-

> ***"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecutor is to blame, the court will not order a retrial. <u>But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view follow that a retrial should be ordered."</u>***

11. Article 50(2)(m) of the current Constitution is a replica of Section 77(2) (b) and (f) of the former Constitution.

12. Applying the above principles to this appeal, I find the proceedings leading to the conviction of the appellant to be irregular. I quash the same and set aside the sentence imposed on the appellant. In its place, I order that the appellant Muslim Odemba Hamsa shall be retried before Bondo PM's Court for the same offence. He shall be presented before the said court for fresh plea, as soon as possible.

Orders accordingly.

Dated, signed and Delivered at Siaya, this 5th Day of May 2020 via Skype due to Covid 19 situation.

R.E. ABURILI

JUDGE