REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 124 OF 2013

GILBERT KIPRUTO KORIR……..APPELLANT

VERSUS

REPUBLIC…….……RESPONDENT

JUDGMENT

The appellant herein Gilbert Kipruto Korir has filed this appeal (Eldoret Criminal Appeal No. 124 of 2013), seeking to overturn the judgment of the Hon. B. Limo (Resident Magistrate) made in Kapsabet Law Courts, Criminal Case Number 3820 of 2011. In his amended grounds of appeal filed on 9th February, 2017, he had listed 3 grounds of appeal, namely;

> **(i) That the learned trial magistrate erred in both law and fact by convicting him on contradictory evidence of PW1 and PW2.**
>
> **(ii) That the trial magistrate erred in both law and fact in convicting him while relying on exhibit one produced in court, but which had not been listed as exhibit.**
>
> **(iii) That the trial magistrate erred by convicting him without observing that the charge and all the essential ingredients of the offence was not explained to the accused person in his own language or in a language that he understands and same is not indicated in the court records.**

When the appeal came up for hearing on 6th April, 2017, the appellant only stated that he relied on the submissions he had filed in court. The state, through the learned state counsel, has vehemently opposed this appeal. I have considered the said submissions filed and also the oral submissions made in court the learned counsel for the state.

In his submissions the appellant lumped grounds 1 and 2 together and basically submitted that there was contradiction in the evidence of PW1 and PW2. That whereas PW1 stated that he had noted a deep cut wound on the nasal bridge, and a cut and fracture of the metacarpal of the left arm, PW2 stated that he was cut on the left middle finger and was hit on the nose before he got injured and lost consciousness.

He challenged the fact that the P3 form was produced as exhibit and yet it had not been listed as such, and that the said P3 form produced (Exhibit – 1) is missing from the court records.

And lastly, the appellant submitted that the language used to record the plea is not indicated. He claimed not to know or understand either English or Kiswahili.

In opposing the appeal, Ms. Kegehi for the state, submitted that the 4 witnesses called by the prosecution

side were credible, reliable, consistent and they gave well corroborated evidence. That the evidence of PW1, the Clinical Officer, that complainant had a deep cut on the nasal bridge and fracture on left arm was corroborated by the evidence of the complainant (PW2) that he was hit by a hoe and he sustained injuries on his left finger and nose. And there was corroboration by PW4 who stated he saw appellant hit PW2 on the face near the nose.

On the issue of language, counsel submitted that the appellant brings up this ground as an afterthought since he was able to enter a plea from the date of plea and he even cross-examined PW3 (Page 16). He later also gave his defence in Kiswahili. Counsel urged that this appeal be dismissed and the conviction and sentence upheld.

I have considered the submissions of both the appellant's and the prosecution sides. To me, the 3rd ground raised by the appellant of the proceedings having been carried out in a language he did not understand, deserve to be considered first. This is because language goes to the very roots of the trial. Obviously, if the trial went on in a language(s) that the appellant did not understand and same were not accordingly interpreted to him, the process would not be tantamount to a fair trial.

Under Article 50(2) (m) of the constitution, every accused person has the right to a fair trial, which includes;

> **"to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial".**

Similarly, Section 198 of the Criminal Procedure Code also requires that the evidence be interpreted to a language he understands.

I have perused the proceedings of the lower court. There is no indication of which language was used by the court when taking the plea on 28th December, 2011. Neither is it on record the language appellant used to enter the Plea of Not Guilty. And in the subsequent proceedings, PW1 is noted to have given evidence in Kiswahili. There is no record to show if the appellant knew this language or if the same was interpreted to him in a language he understands. The same was also the case during the evidence of PW2. And in both cases, the appellant had no questions to ask the witnesses when called upon to cross-examine. Same as PW4 and 5. For PW3, the record shows he gave evidence in English. There is no indication of whether the appellant understands English or had the benefit of interpretation to a language he knows. Even the language the accused used in his own defence is not indicated.

The question to answer is if the proceedings were conducted in a language the appellant understands or if same were interpreted to him. It is impossible to answer this question, leaving the possibility that they were not conducted in a language he understands or accordingly interpreted. His failure to cross-examine the witnesses is a probable pointer to this. This issue was dealt with by the court of appeal in Simiyu & Another –vs- Republic (2006) IKLR 100, ananimous holding that in a criminal trial, the language of the trial must be understood by the accused person.

Under Section 354 (3)(II); this court has powers;

> **"reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction…"**

The circumstances of this case are such that the trial may have proceeded in languages that the appellant did not know. With this possibility, it would be unfair to let the outcome of the process stand. And with a possibility of having not followed the proceedings, I do not find any possibility of prejudice that appellant stands to suffer should this trial start a fresh.

As to the other grounds raised by the appellant (grounds 1 and 2), the same go into the merits of the case. I refrain from making any opinion on the same. On the other hand, in the interests of justice, I order that the appellant be retried again (fresh trial) before a court of competent jurisdiction at Kapsabet Law

Courts.

DATED, SIGNED and **DELIVERED** at **ELDORET,** this 20th day of July, 2017.

D. O. OGEMBO

JUDGE

Judgment read out in open court in English interpreted to Kiswahili language in presence of: -

1. The Appellant &

2. Ms. Asiyo for the State.

D. O. OGEMBO

JUDGE