REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 48 OF 2014

(From original conviction and sentence in Narok Criminal Case No. 190 of 2014)

SANGEI NKURUNA..... 1ST APPELLANT

NKULAI NKURUNA.....2ND APPELLANT

KITULI NKURUNA..... 3RD APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

1. The Appellants were charged with and were on their own plea of guilty convicted of the offence of grievous harm contrary to Section 234 of the Penal Code *(Cap. 63, Laws of Kenya)*, and were each sentenced to five years imprisonment. They have come to this court on appeal on similar grounds, that is, though they pleaded guilty, their pleas were not unequivocal in that they did not understand the language in which the charges were read to them and that the trial magistrate failed to explain to the Appellants the substance and effect of the charges in a language each of the Appellants understood.

2. Because the appeals arose from the same trial, in which the three appellants were convicted and sentenced as aforesaid, I declined to grant them bail pending appeal and directed counsel to address me on the substantive appeals. I also determined that the appeals should be consolidated and heard as one.

3. The appellants case was urged by Mr. Githui while the State's case was urged by Mr. Nombi *(Prosecution counsel)* from the Office of the DPP. Whereas Mr. Githui urged the court to allow the appeals, Mr. Nombi opposed the appeals and insisted that the charges were proper, the charges were explained to them in the language they understood and they pleaded guilty, were convicted on their own plea, and were given a lenient sentence of five years instead of life imprisonment as provided under Section 234, the charging provision.The State thus urged the court to uphold the conviction and sentence, and dismiss the appeals.

4. Mr. Githui however argued to the contrary, that though the Appellants pleaded guilty, the record does not show compliance with either Article 50(b) and (m), nor Section 198(1) of the Criminal Procedure Code *(Cap. 75, Laws of Kenya).*

5. Counsel submitted that if an accused cannot understand the charge or language being used, the court must ask them. There is no presumption that an accused who answers to the Kiswahili greeting *"jambo, jambo"* understands or speaks Kiswahili language.

6. The sub-ordinate court, like this court is a court of record and for anyone to understand what transpired in the course of a trial, the court record is the final authority both in this court, and the sub-ordinate court. Plea taking counsel submitted is a three pronged process -

1. ***there has to be a record of the language which the accused understands, and***
2. ***the formal reading of the charge, and***
3. ***explanation in detail of the effect of the charge, and punishment if one pleads guilty, or is convicted on evidence.***

Counsel relied on the case of **Abrahim Wafula vs Republic [2013] eKLR** and **Tiampati Ololchurie vs Republic** ***(Nakuru Criminal Appeal No. 1 of 2013).***

7. The lower court record shows the **coram** – the *charge read, - English/Kiswahili/Maasai.* The language in which the charge is read is unclear. If it were in English or Kiswahili, there is no record that the Appellants understood. There is no indication that there was a translator. Without a translator the proceedings would be a nullity. Counsel submitted that in criminal trials it is the accused who has a heritage of rights, and it is the prosecution which must prove its case beyond reasonable doubt. No presumption can be made that the three appellants from a remote village in deep Narok County understood the language of the court. Counsel urged the court to declare the trial of the appellants a nullity and set them free.

8. As already stated above, the State opposed the appeals. Prosecution Counsel relied on the case of **ADAN VS. REPUBLIC [1973] E.A. 445,** that the requirements of a plea of guilty were adhered to strictly. The Appellants pleaded guilty when the charges were read to them, and a plea of guilty was entered. When the facts were read to them the appellants again confirmed that the facts are true, and the plea of guilty was confirmed, and when they were asked to mitigate they asked for leniency. All this showed that the accused understood the charges facing them, and there could not have been a question of misunderstanding.

9. Again, I have carefully considered these rival arguments. In my view, the standard of criminal trial cannot depend upon the remoteness of the trial court, or the origin of the accused.The standard is one laid down by the Constitution, Article 50(b) and (m) and Section 198 of the Criminal Procedure Code aforesaid. Article 50(2)(b) and (m) of the Constitution of Kenya 2010, provides as follows -

> ***"50 (1)***
>
> ***(2) Every person has the right to a fair trial which includes the right -***
>
> ***(a)***
>
> ***(b) to be informed of the charge, with sufficient detail to answer it,***
>
> ***(c) (c) – (l),***
>
> ***(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial."***

and Section 198 of the Criminal Procedure Code says -

"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."

10. I have examined the record of proceedings and in particular the plea taking process. It cannot be overemphasised that plea taking is the first and perhaps most important part of the trial. Whether an accused pleads guilty or not guilty the process is the same. **Firstly** the accused will be asked which language he best understands, and the same question is put to witnesses if a matter goes to trial.

Secondly, the charge is read in the official language of the court *(English or Kiswahili Section 198(2) of the Criminal Procedure Code)*, and **thirdly** the charge is explained in detail in a language which the accused understands well or best. These three steps or stage of plea taking must be clearly indicated in the record. It is the first record for purposes of appeal. These steps are therefore critical to a proper trial. They constitute the first elements of a fair trial, the accused must know and understand the charge facing him, and the effects of his pleading either guilty or not guilty, and consequences of such plea.

11. If these elements are missing from the record, they cannot be inferred or presumed. In this case for instance, the record reads – charge read in English/Kiswahili/Maasai. The Coram is Hon. Z. Abdul R. M., Court Prosecutor, P. C. Ihaji, Court Clerk, Winnie. Even if Winnie the court clerk was the translator, it is not indicated in the record in what language she was translator/interpreter. The omission is not within the spirit of fair trial as envisaged by Article 50 of the Constitution.

12. Section 348 of the Criminal Procedure does not allow appeals where the accused have pleaded guilty except to the extent or legality of sentence. The sentence of five years is extremely lenient from the point of the prescribed punishment of life imprisonment under Section 234 of the Penal Code, under which the Appellants were charged. However in light of the failure to adhere to the cardinal provisions of fair trial, it is unsafe to sustain the convictions of the appellants. I therefore quash the appellants convictions, set aside the sentence of five years, and direct that the appellants be set free.

13. However, I bind the appellants under probation for a period of three years not marry off their under age daughters, and not to commit similar crimes, and if they do, they shall be charged and tried afresh. They will also report to the Area Chief every two weeks to confirm their good behaviour.

It is so ordered.

Dated, signed and delivered at Nakuru this 16th day of May, 2014

M. J. ANYARA EMUKULE

JUDGE