



CRIMINAL

- A person facing trial is entitled to have the proceedings interpreted in a language he understands.
- What the court should consider in ordering retrial.

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**CRIMINAL APPEAL CASE NO. 55 OF 2001**

**JULIUS MUKUBIO ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

(An appeal against the judgment of Hon. S. Ombaye SRM in Traffic Case No.3412 of 1999 at delivered on 11th October 2001)

**JUDGMENT**

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The appellant was charged before the Senior Principal Court at Embu with the traffic offence in Criminal Case No. 3412 of 1999. He was charged with ten separate counts of causing death by dangerous driving contrary to section 46 of the Traffic Act and with one count of carrying excess passengers contrary to section 100 (2) of the Traffic Act. He was acquitted of the offence of carrying excess passengers but was convicted of the ten counts of the offence of causing death by dangerous driving. He was sentenced to pay a fine of Kshs. 200,000/= and in default to serve 10 years in prison. He was aggrieved by his conviction and sentence by the lower court and has filed this appeal. At the hearing of the appeal, the learned state counsel Mr. Kimathi conceded to the appeal quite rightly on the basis that the conviction of the lower court was vitiated by the lower court's failure to indicate the language used during trial. Prosecution called 13 witnesses. When those witnesses testified, the lower court failed to indicate the language they used. Section 198 of the Criminal Procedure Code and section 77 (2) of the old Constitution of Kenya required the proceedings to be conducted in a language understood by the accused persons. This was stated in the case Antony Njeru Kathiari & Ano. Vs. Republic CRA No. 21 & 23 of 2004 where the Court of Appeal had this to say:-

“Mr. Orinda, learned Principal State Counsel, did not seek to support the convictions recorded against the appellants and in view of this court's previous decisions, Mr. Orinda is certainly right in conceding the appeals. Way back 1985 this court, in the case of Diba Wako Kiyato Vs Republic [1982 – 1988] 1 KAR 1974 held that:-

“It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands.”

The Court in that case was relying on the provisions of section 77 (2) (f) of the Constitution of Kenya and section 198 (1) of the Criminal Procedure Code. The court said:-

“The practice of recordings (sic), if not the name of the interpreter, at least the nature of the interpretation, has been standard practice in these courts for many years. For example, that which is described as the “plea form,” Form Criminal 133, contains under all the other details of the case and of the accused, a space against the word ‘Interpretation.’ There was no compliance with either of these two statutory provisions or with the standard practice in the instance case. The magistrate made no note of the language into which the evidence of the witnesses, many of whom spoke in English or Swahili was being translated.....”

The requirement to show the language of the court is also to be found in the constitution of Kenya 2010 Article 50 (M) which provides:-

“Every accused person has the right to a fair trial, which includes the right-

- a) .....
- b) .....
- c) .....
- d) .....
- e) .....
- f) .....
- g) .....
- h) .....
- i) .....
- j) .....
- k) .....
- l) .....

m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

The question that arises in respect of the appellant’s trial before the lower court is what language was used and whether that language was understood by the appellant. In the case *Degow Dagane Nunow Vs. Republic NYR*, Criminal Appeal No. 223 of 2005 (Unreported) the Court of appeal stated in respect of the right of an accused to have an interpreter:-

“.....It is the responsibility of trial courts to ensure compliance with these provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume that the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place.....”

It is clear from that decision that there is an obligation for the trial court to show compliance to section 198 of the Criminal Procedure Code and the then section 77 of the former Constitution. There was no indication that the trial court complied with those provision and the state counsel was right to concede to the appeal. The state after conceding to the appeal sought that this court would order the appellant to be retried. The state counsel sought retrial on the basis that the accident caused the death of ten people and that there was overwhelming evidence against the appellant which could lead to a conviction on retrial. The state counsel informed the court that the prosecution witnesses could be traced. Learned counsel for the appellant Miss Mwangi opposed the retrial. She submitted that the offence occurred in 1999. Miss Mwangi submitted that it is now 11 years after the date of the offence and that a retrial will not serve any public interest. She termed such a retrial as oppressive to the appellant. The appellant relied on two cases relating to retrial- *Mwangi Vs. Republic* [1983] KLR and *Fatehali Manji Vs. The Republic* [1966] E.A. The decisions reached in those two cases were well considered in the recent case of the Court of Appeal, that is, *Richard Omollo Ajuoga Vs. Republic* Criminal Appeal No. 223 of 2003. In that case the Court of Appeal in considering the principles that should guide a court when considering retrial had this to say:-

“We have anxiously considered all the cases to which we were referred and the law on this point. In the case of Ahmed Sumar Vs. Republic [1964] EA 481, at page 483, the predecessor to this court stated as follows:-

“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. 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.”

The court continued at the same page at paragraph II and stated further:-

“We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”

“Taking the queue from that decision, this court in the case of Bernard Lolimo Ekimat Vs. R. Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-

There are many decision on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it.”

The prosecution called 13 witnesses. The witnesses who gave the most damning evidence against the appellant and I believe the basis upon which he was convicted was the evidence of form one students. It is now 11 years later. It is certain that they are no longer students at the same school where they were when the accident occurred. I have grave doubt whether they can be traced 11 years later. By simple calculation, they completed their school in the year 2004. Further, although it is true that if the same evidence adduced before the lower court was repeated in a retrial, it would lead to a conviction, I am however persuaded that such retrial would lead to prejudice against the appellant. The trial before the lower court was vitiated not because of the fault of the prosecution but due to the failure of the court. However, that being so, to order the appellant to be retried would be prejudicial to him because of passage of time and because it is possible witnesses will not be traced. I hold that the lower court’s trial was a nullity due to the trial court’s failure to indicate the language used by the witnesses before it. I therefore quash the conviction of the appellant by the lower court and I set aside the appellant’s sentence. I decline to order that he be retried and I therefore order that he be set free unless he is otherwise lawfully held.

**Dated, signed and delivered at Meru this 3rd day of March 2011.**

**MARY KASANGO  
JUDGE**