



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**CORAM: KWACH, OMOLO & SHAH, J.J.A.**

**CRIMINAL APPEAL NO. 45 OF 1999**

**BETWEEN**

**CHAKA TSUMA CHAKA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

(Appeal from a judgment of the High Court of Kenya at Mombasa (Ang'awa J) dated 21st August, 1998

in

H.C.CR.A. NO. 1 OF 1997)

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**JUDGMENT OF THE COURT**

*CHAKA TSUMA CHAKA* (the appellant) was charged with and convicted of murder contrary to section 203 as read with section 204 of the Penal Code, the particulars of the charge being that on the 8th day of January, 1996, at Mbande village, Matumbi sub-location, in Kwale District within the Coast Province, he murdered *Bendoro Kaziya Chondo*. He has now appealed against his conviction and sentence.

The appellant has set down in a supplementary memorandum of appeal 5 grounds and the complaint in ground 5 is that the trial was a nullity because it was conducted in a language he did not understand. The appellant made several appearances in the superior court before his plea was taken. On 5.5.97 he was finally taken before Waki J for plea. The record shows that there was a clerk called Tinga, a State Counsel called Mrs. Mwangi and Mr. Obara, an advocate, who appeared for the appellant. The record shows that the appellant denied the charge and a plea of not guilty was entered. In the record of the proceedings of that day there is no indication that the appellant understood English language or that any steps were taken to interpret the proceedings into a language which the appellant understood or preferred.

The trial proper got underway on 18.2.98 before Ang'awa J. Apart from the Judge there were Mr. Gacivih for the Republic, Mr. Obara, for the appellant, and a clerk called Sibiya. Assessors were examined and selected. Mr. Gacivih made his opening address and called 4 witnesses before the trial was adjourned to 4.3.98. Again, there is no indication in the record that the proceedings were conducted in a language understood by the appellant or that they were interpreted to him.

*Section 77 (2)(f) of the Constitution of Kenya provides that: "77 (2)Every person who is charged with a criminal offence:*

*(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."*

This is a fundamental constitutional right of an accused person intended to secure for a person charged with a criminal offence a fair trial. We cannot tell from the record whether the trial was conducted in Swahili or English, but whatever the language was, the appellant says he did not understand what was going on. At the end of it all he was convicted of murder and sentenced to death. His conviction was based largely on a lengthy statement under inquiry and a charge and caution statement in which he appeared to have admitted his involvement in the murder. It is quite possible that if he had followed the proceedings he would certainly have instructed his advocate to object to the admission of those incriminating statements. Mr. Gacivih, for the Republic, insisted that in spite of the silence of the record, interpretation of the proceedings into a language intelligible to the appellant must have been provided. That is not a serious submission and we reject it.

It must follow from what we have said so far that the trial was a nullity. Mr. Magolo, for the appellant, suggested that the appellant be acquitted rather than be sent to the superior court for retrial. We cannot accede to this suggestion. The charge against the appellant is a serious one and the victim lost his life. We accordingly allow this appeal, set aside the conviction and sentence and remit the case back to the superior court for trial de novo .

**Dated and delivered at Mombasa this 27th day of July,1999.**

**R. O. KWACH**

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**JUDGE OF APPEAL**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**