



IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Kneller, Hancox & Nyarangi JJA)

CRIMINAL APPEAL NO. 100 OF 1985

BETWEEN

KIYATO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the High Court at Nairobi, Mbaya J)

JUDGMENT

On the night of August 7, 1983, a gang of three persons raided the dwelling house of Mr Pedro Nihages de Mello in Nanyuki, attacked his wife and daughter who were sleeping there and robbed them of a number of items, including watches, a radio, clothing and a pair of shoes, and, most importantly, cash to the value of Kshs 200,600. The appellant was arrested in Isiolo on November 8, 1983, three months after the robbery (not the very next day as the High Court erroneously stated on the first appeal). The evidence at his trial held before the senior resident magistrate at Meru in March, 1984, consisted mainly of visual identification evidence, and possession of four items identified as having been stolen during the course of robbery.

The appellant was convicted of the capital offence of robbery contrary to section 296(2) of the Penal Code and duly sentenced to death as that subsection requires. His first appeal to the High Court was dismissed and, legally represented for the first time, he has preferred a second appeal to this court. Both before the High Court and in the original and supplementary petition of appeal to this court the appellant has consistently maintained that he had asked for a Boran interpreter at his trial, but that the interpreter used was a Somali. We understand that there is a considerable difference in these two languages, though they occasionally overlap. In the High Court and in this court he was afforded the services of a Boran court interpreter.

In the event this was the only ground seriously argued by Mr Adala, who now represents the appellant and settled the supplementary memorandum of appeal filed on April 29, 1986, the day before the hearing, grounds 2 and 3 states:

“2. The learned trial judge erred both in law and fact in failing to appreciate that the proceedings in the lower (magistrate’s) court were conducted in a language which the appellant was not familiar or proficient in or at all, the appellant being a Boran and proficient in the Boran language and the proceedings being conducted in the Somali language.

3. As a result of this the appellant did not follow the proceedings of the lower court at all and this occasioned a serious miscarriage of justice.”

It is a fundamental right in Kenya, whatever maybe the position in other countries, that a person accused before the courts of an offence is entitled to, without payment, to the services of an interpreter who can translate the evidence to him, and through whom he can put such questions to the witnesses as he wishes, and make his statutory statement, or give his evidence, as the case may be. This is ideal from section 77(2) of the Constitution which states:-

“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.”

Section 198(1) of the Criminal Procedure Code is even more precise and 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.”

The words “in a language which he understands ...” are of crucial importance.

The practice of recordings, 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 instant case. The magistrate made no note of the language into which the evidence of the witnesses, many of whom spoke in English and Swahili, was being translated. The fact that the appellant did make a request for Boran interpreter is borne out of the passage in the evidence of I/P Kimanzi, who recorded the appellant’s inquiry statement, Exhibit 8, and who said:

“I am surprised to hear him ask for a Boran interpreter today. He was speaking in Kiswahili that day.”

Indeed both that statement and the appellant’s charge and caution statement, made on November 21, 1983, are recorded in Swahili.

There is a reference to the forgoing in the magistrate’s judgment when he said that it is a legal requirement that an accused person should be accommodated in the language he prefers. Nevertheless, it seems that the magistrate did not observe this legal requirement, and Mr Adala referred us to several passages in the record, into which we do not propose to go into detail at this stage, which, he submitted, demonstrated that the appellant did not fully understand the proceedings. In particular he pointed to the brevity of the appellant’s unsworn statement as indicating that while he may have understood the gist, or drift, of that which was going on, he was not able to make his defence to the charge in as full a manner as he would have wished.

Mr Gathaara, on behalf of the republic submitted that the pattern of the appellant’s question to Miss de Mello, PW 2, which was quite long, showed that he knew very well what was going on and that it was an intelligent and searching cross-examination. He did, however, concede that, particularly as this is a capital case, he was not entirely happy that the translation was carried out in a language which the appellant understood. If it was in Somali, there was, as said, a chance that, in view of the differences between the two languages, the appellant did not fully understand the proceedings sufficiently to make his defence thereto.

For these reasons, exercising our powers under section 361(2) of the Criminal Procedure Code, we allow ground 2 of the supplementary memorandum of appeal and make an order remitting the case to a

magistrate's court of competent jurisdiction to rehear and determine the case according to law, with particular reference to the legal requirements as regards interpretation.

Orders accordingly.

Dated and Delivered in Nairobi this 7th day of May 1986.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

I certify that this is a true
copy of the original

DEPUTY REGISTRAR