IN THE COURT OF APPEAL

AT NYERI

(SITTING IN MERU)

CRIMINAL APPEAL NO. 46 OF 2014

(CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

BETWEEN

HAWO IBRAHIM.....……...….....APPELLANT

AND

REPUBLIC.....…..…….....……...….. RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Meru (Lesiit, J.) dated on 15th day of August, 2013

in

H. C. Cr. C. No. 24 of 2011

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JUDGMENT OF THE COURT

1. Although this appeal was fully argued by learned counsel for the appellant, **Miss Kiome,** we shall not, for reasons that shall become apparent shortly, consider the facts or the merits of the appeal. The appellant, **Hawo Ibrahim** comes from Marsabit and speaks the Borana language. On the 27th April 2011, she was taken before the High Court in Meru **(Lesiit J.)** for a plea on a charge of murder. It had been alleged in the information filed before the court that on the 6th day of April 2011 at Manyata Lami Sublocation within Marsabit County, she murdered **Bukei Asman Abdi** (deceased). The deceased was her mother-in-law and it was alleged that the appellant was found in the macabre act of cutting her up into pieces with a *panga* and knife and stuffing the pieces in a metal box.
2. The Information was read out in Kiswahili language but the appellant was not required to plead. She was remanded in custody and the registry was directed to allocate an advocate for her and to avail a Borana interpreter when she was next produced in court. But there was no advocate when she was produced in court on 9th May 2011. The court interpreter provided was also not Borana but Garre. An advocate was subsequently appointed but the interpreter remained Garre as she took her plea again on 25th May 2011. She reportedly responded that she did not kill anyone and a plea of *'not guilty'* was entered. It would appear, however, that there was a problem with interpretation and the court made the following order:

"In future Borana interpreter from within be called for interpretation".

3. Eventually the hearing commenced before Lesiit J. on 6th March 2013 and continued on 7th May 2013 when five witnesses were heard. The language used in court was recorded as **"English/Kiswahili/Kiborana".** The last witness was the Investigating Officer, but when he testified, there was no *Kiborana* interpreter and no reason was recorded for the absence of one. The appellant's advocate appears to have indicated that the appellant understood Kiswahili and the court so recorded and proceeded with the case without further interpretation. When the court found the appellant had a case to answer, the advocate is recorded to have said the appellant *"opts to remain silent"*, and made no submissions in the case. The silence by the appellant appears to have been taken against her when the trial court, in its judgment stated as follows:

> ***"The accused person gave no explanation in this case, in fact she opted to keep quiet in her defence. In absence of any explanation from the accused the court has a statutory power under Section 119 of the Evidence Act to presume that it was the accused person who attacked the deceased, cut off her throat, cut off her major blood vessels of the neck area of the deceased causing severe hemorrhage that caused the death of the deceased. The accused also amputated the lower limbs of the deceased and threw her inside the box. I find that the prosecution has adduced sufficient direct and circumstantial evidence to establish beyond any reasonable doubt that it was the accused and not no one else who murdered the deceased."***

4. The main complaint raised by the appellant through Miss Kiome is that her fair trial rights under **Article 50(2)(m)** of the **Constitution** were breached thus rendering the trial a nullity. In her submission, the language understood by the appellant was Kiborana and it was used partly in the trial. There was no reason given for the sudden change to a language the appellant did not understand and it matters not that her advocate was responsible for it. The rights to a fair trial belong to an accused person and the trial court has a duty to protect them. Counsel further opined that it was possible the appellant chose to remain silent because she did not understand what was going on anymore.
5. Opposing those submissions, learned Prosecution Counsel, **Mr. Musyoka,** contended that there was interpretation in Garre and Borana languages when most of the witnesses testified. Only one witness testified in Kiswahili after assurances from the appellant's advocate that she understood Kiswahili. There was therefore no reason to complain at this stage when no complaint was raised before the trial court. It was an afterthought. In counsel's view, **Article 50 (2) (i)** of the **Constitution** provided for *'silence'* as an element of fair trial and the appellant was within her rights to remain silent. Mr. Musyoka, nevertheless, finally conceded that the court did not comply with **Section 306 (2)** of the **Criminal Procedure Code (CPC)** and called for a retrial before another Court in Marsabit because all the witnesses were readily available.
6. With respect, Mr. Musyoka was right to concede this appeal and to call for a retrial. The appellant who was obviously illiterate does not appear to have been served well by her *pro bono* advocate who seems to have compromised her fair trial rights. **Article 50 (2) (m)** states as follows:

2. ***"Every accused person has the right to a fair trial, which includes the right—***

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

As this Court stated in the case of ***Abdalla Hassan Hiyesa v Republic [2015] eKLR:-***

> **"Article 50(2) (m)** ***guarantees every accused person the assistance of an interpreter without payment if he does not understand the language used at the trial. In Kyalo Kalani v. Republic, Cr. App. No. 586 of 2010, this Court emphasized the importance of that guarantee as follows:***
>
> ***"The importance of the right to an interpreter in a criminal trial cannot be gain said. It is***

an integral part of a fair trial and is intended to ensure that an accused person, who risks life and liberty, fully understands the case against him and is able to defend himself adequately. It was a right guaranteed under Section 77(2) (f) of the former Constitution and is currently guaranteed under Article 50 (2) (m) of the Constitution of Kenya, 2010. So important is the right to fair trial that it is one of the few rights and fundamental freedoms that cannot be limited under Article 25."

7. Section ***198*** of the ***CPC*** is also relevant and provides:

"(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.

(2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.

(4) The language of the High Court shall be English, and the language of the a subordinate court shall be English or Swahili."

8. This Court has emphasized many times before that the burden is on the trial court itself to show that an accused person has himself selected the language which he wishes to speak and in which proceedings are to be interpreted to him. These are not procedural technicalities and the trial court ought to demonstrate compliance by showing on the face of the record the language the accused has chosen to speak. See ***Rwaru Mwangi v. Republic Cr. App. No. 18/2006 (UR)*** and ***Degow Dagane Nunow Cr. App. No. 223 /2005 (UR).***

We are persuaded in this case that the provisions of the law relating to language were not adhered to and the trial was therefore a mistrial. We so declare.

9. Furthermore, the trial court found at the close of the prosecution case that the appellant had a case to answer. Without compliance with **Section 306** of the CPC, the trial court simply placed her on defence leading to the intervention by the appellant's advocate opting for silence. The Section, as relevant, states as follows:-

306 (2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact. (Emphasis added).

It is evident from the record, and is readily admitted by the learned Prosecution Counsel, that the court did not comply with those provisions of the law. The rights under the Section belonged to the appellant as rightly put by Miss Kiome and the duty bearer was the trial court to explain them to her. Failure to do so vitiates the trial and we so hold.

10. What remains is the order for retrial. Mr. Musyoka asked for a retrial and Miss Kiome was not averse to it. We think for ourselves that it is an appropriate order in the circumstances of this case. The principles applicable, which we have considered, have been restated many times and we take it from ***Bernard Lolimo Ekimat –vs- R. Eldoret Criminal Appeal No.151 of 2004*** **where the Court stated:**

"…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".

11. We allow the appeal and set aside the conviction and sentence imposed on the appellant. She will be retried afresh on the self-same charge before the High Court sitting in Marsabit. While awaiting the trial which ought to be conducted expeditiously, we direct that the appellant shall be detained by the police and be produced before that court for plea within 14 days of this order.

Those are the orders of the Court in the appeal.

Dated and delivered at Meru this 18th day of July, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify this is a true copy of the original.

DEPUTY REGISTRAR