REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO. 372 OF 2006

SAMUEL NGURE KARIUKI ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From the original conviction and sentence in Criminal Case No. 2499 of 2003 of the Chief Magistrate's Court at Nairobi by T.N.Ngugi (Mrs) – Senior Resident Magistrate)

JUDGMENT

The learned state counsel, Mr. Mureithi, informed the court that the appeal herein was being conceded. The reason for the concession was that there were a number of legal technicalities, which rendered the trial proceedings a nullity.

As the first appellate court, we would ordinarily be obliged to re-evaluate all the evidence on record, and to draw our own conclusions therefrom. We would then also re-evaluate the judgment of the trial court, with a view to ascertaining if it was in compliance with both the evidence adduced, and the applicable law.

But following the respondent's decision to concede the appeal; and because the basis for the concession is legal technicalities, we shall first give due consideration to the alleged technicalities.

Of course, we are not at all suggesting that the concession by the respondent should sway our decision. Indeed, there may well arise instances in which the appellate court may uphold a judgment and sentence, even though the respondent may have already conceded the same.

In this case, the first issue raised relates to the language in which the witnesses testified. If the language is not expressly recorded by the trial court, would that be a basis for upsetting the judgment arrived at, at the end of the proceedings?

Secondly, is the fact that an Identification parade is made up of fewer persons than stipulated in the rules governing such parades, a sufficient ground to quash a conviction which is founded, *inter alia*, on the result of such an Identification Parade?

Thirdly, does the failure by the learned trial magistrate, to date the judgment, render the said judgment a nullity?

Other than those three issues, the appellant's advocate, Mr. Ondieki, had also asserted that when a muslim

is indicated, on the court records, as having sworn on the Bible, the court must deem the "oath" as a nullity.

Of course, any person who professes a faith would ordinarily be sworn using the religious book that is central to his faith. Therefore, a Muslim would be expected to swear an oath whilst hoisting a Koran in his right hand. A Christian would hold the Bible in his right hand whilst swearing on oath. A devotee of the Sikh faith would normally use a Geeta.

In this case **PW 1, ABDI MOHAMID ALI HAJJ ABASS**, was described by the trial court as a Christian. However, there is nothing to indicate that he took an oath using a Bible or Koran.

If one considered **PW 1's** names as being indicative of his muslim faith, as suggested by the appellant, he should have sworn using the Koran.

Mr. Ondieki presumes that, by virtue of his names, **PW 1** was a muslim. That is probably true, but it is a matter of fact whether or not he actually is a muslim.

Secondly, it is not clear on the record whether the said witness swore on the Bible or on the Koran.

Therefore, it would not be open to this court to make any assumptions which are not derived expressly from the record.

In any event, section 21 of the Oaths and Statutory Declarations Act states as follows;

> **"where on oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking the oath, no religious belief shall not for any purpose affect the validity of the oath."**

As regards language, the learned trial magistrate did not indicate, on the record, the language in which the witnesses testified.

In **FRANCIS KOIKAI KATIKENYA Vs REPUBLIC, CRIMINAL APPEAL NO. 280/2006**, the Court of Appeal held as follows;

> **"A careful reading of Sections 197 and 198 Criminal Procedure Code, clearly shows that failure to show, demonstrably, the language used in Criminal proceedings, will, in an appropriate case, this being one, vitiate the trial. True, as Mr. Kaigai submitted, the appellant was given an opportunity to, and he cross-examined various witnesses. However, he faced capital charges and he stands convicted of the same. It may not be possible to fathom the extent of any prejudice that might have occasioned to him."**

On that basis alone, the Court of Appeal allowed the appeal.

In this case, too, the appellant utilized the opportunity he had to extensively cross-examine the prosecution witnesses. However, that would not reverse the legal requirement imposed on the trial court, to indicate on the record the language spoken by the witnesses as they testified.

In **DEGOW DAGANE NUNOW Vs REPUBLIC, CRIMINAL APPEAL NO. 233 of 2005** (Unreported), the Court of Appeal said;

> **"Of course there was, right from the beginning of the trial an interpreter be present in court; that is clearly shown in the record of the Magistrate. What is not shown throughout the record is the language in which the appellant or the witnesses addressed the Magistrate**."

The Court then went further to state as follows in the judgment:

> **"The provisions show that the question of interpretation of evidence to a language which an accused understands is not a matter for the discretion of the trial Magistrate. It must be done, and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak."**

Having made it clear that section 198 of the Criminal Procedure Code and section 77 (2) of the Constitution give to an accused person the right to be tried in a language he understands, the Court of Appeal concluded as follows;

> **"It is the responsibility of the trial courts to ensure compliance with those provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are 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."**

There is nothing useful that we can add to that statement of law.

Meanwhile, by dint of section 169 (1) of the Criminal Procedure Code;

> **"Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."**

The judgment of the learned trial magistrate herein is signed but is not dated. Does that omission render the judgment a nullity? Alternatively, can the said defect be curable, pursuant to section 382 of the Criminal Procedure Code?

In **RICHARD KAMISOI & ANOTHER V. REPUBLIC, CRIMINAL APPEAL NO. 254 of 2006,** (Unreported), the Court of Appeal answered those two questions in the manner following;

> **"The requirement that a judgment be dated and signed at the time of pronouncing it is mandatory and is a statutory requirement. In our view, a judgment that is not dated is not a judgment at all and so the defect in it cannot be cured under section 382 of the Criminal Procedure Code, because for the defect in a judgment to be so cured, the judgment must itself exist. In a case where it is not dated, it is not a valid judgment and therefore a nullity, and therefore incapable of being cured."**

For the reasons stated hereinabove, the judgment cannot be sustained. It is therefore quashed, and the sentence is set aside.

Finally, we note that the state has not sought an order for a retrial. We hold the considered view that the decision to forego a retrial is wise in the circumstances prevailing. We say so because the appellant has already been in custody for over seven years. And, apart from the technical deficiencies already highlighted above, we noted that the Identification Parade at which the appellant was identified, had only seven members.

As the minimum number of persons required in an Identification Parade is eight, the results of that exercise were not of any evidential value to the prosecution case.

If the results of the flawed Identification Parade were to be excluded, we hold the view that the rest of the prosecution evidence may be insufficient to sustain a conviction. In the event, a retrial would be unlikely to serve the interests of justice.

In conclusion, we now order that the appellant be set at liberty forthwith unless he was otherwise lawfully held.

Dated, Signed and Delivered at Nairobi this 22nd day of March, 2010

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FRED A. OCHIENG **JOYCE KHAMINWA**

JUDGE **JUDGE**