IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 57 OF 2008

BISHAR ABDI ……………..……………………………………..APPELLANT

AND

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

(An appeal against the judgment of the High Court of Kenya at Nairobi (Ojwang' & Omondi, JJ.) dated 6th May, 2008

in

H.C.CR.A. NO. 48 OF 2006)

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JUDGMENT OF THE COURT

This is a second appeal. The appellant ***Bishar Abdi*** faced a charge of robbery with violence contrary to ***section 296(2)*** of the Penal Code, the particulars of which were that:-

"On the 27th day of February, 205 at Kagishu in Riruta within Nairobi Area Province jointly with another not before court while armed with offensive weapons namely knives, robbed one David Wahia Kariuki off (sic) a wallet containing cash Kshs.1,500/=, National ID. Card and job card all valued at Kshs.1,650/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said David Wahia Kariuki."

At the time plea was taken on 2nd March, 2005, the record shows that interpretation was in English/Kiswahili and the Court Clerk was one Kimuyu. The plea entered was "*not guilty.*" On 6th April, 2005, the hearing of his case commenced before Muketi, Principal Magistrate. The Court Clerk was one Odhiambo. The complainant David Kariuki was the first witness. He gave his evidence in Kiswahili language but after his evidence in chief, when the appellant started cross-examining him, the cross-examination did not proceed to the end as apparently after four answers in cross-examination, the appellant stated:

"Accused: I am not conversant with Kiswahili, I understand Borana."

The trial court then adjourned the hearing. As the hearing was being marked as adjourned, the Court Prosecutor, probably prompted by the court stated:

"Prosecution, we have a Borana Clerk from the High Court."

The court then made an order for arrangements to be made for a Borana interpreter to be availed and further hearing was fixed to be on 30th May, 2005. On 30th May, 2005, the record shows that the scheduled hearing did not take off and the matter was fixed for further hearing on 19th July, 2005. No reason was given for that adjournment. Again on 19th July, 2005 the matter was not heard and was again fixed for hearing on 14th October, 2005. On that date the matter came up before Wasilwa, Principal Magistrate and the hearing proceeded *de novo* albeit without any orders to that effect. The record shows that the language was Kiswahili and Court clerk was Maina/Carol. There is no record as to what happened about the order that had been made on 6th April, 2005 directing arrangements to be made for a Borana interpreter to be availed as the appellant had said he was not conversant with Kiswahili language and required a Borana interpreter who was said to be available. Nothing shows what arrangements, if any, were made pursuant to that order and the reasons why the court felt it fit to proceed and have the case conducted in English/Kiswahili. Thereafter, the entire case proceeded to the end without a Borana interpreter. Five witnesses were called by the prosecution and the appellant gave unsworn statement in his defence in which he denied the charge and being at the scene of the alleged offence. In a judgment delivered on 8th February, 2006, the learned Principal Magistrate found the appellant guilty as charged, convicted him and sentenced him to death by hanging.

The appellant was not satisfied with that conviction and sentence. He lodged an appeal against it in the superior court and in doing so he filed grounds of appeal which were later amended. The third ground of his amended grounds of appeal in that court stated:-

"(iii) that the conduct of the trial had not been fair."

On our perusal of the judgment of the superior court, it is clear to us that in support of that ground, the appellant who made written submission in that court, contended that he had been denied a fair trial and his constitutional rights were violated, in that both at the time of taking plea and at the trial, he had asked for Borana interpreter who could translate whatever was going on into Borana Language but that was not accorded him by the trial court. The superior court, in its judgment, considered that complaint and addressed itself thus:

"Although we think the appellant's intimation regarding his preference for Borana language interpretation should have been addressed more squarely, and a record in that regard kept, we find as a fact that the hearing did take place with Kiswahili interpretations; that the appellant made no further complaint; and that the appellant fully exercised his rights of cross-examination of prosecution witnesses. So long as those elements were achieved, no appearance of infringement of the appellant's trial is left (sic). The importance of the requirements for suitable language interpretation is that they enable an accused person to hear and be heard, as part of the trial process. This court must set its sights practically on that practical angle to communication in court, as it is this that empowers or disempowers an accused during a criminal trial, from the facts before this court, we would conclude that the appellant had not suffered any disadvantage during trial, on account by difficulties of language. Accordingly, we disallow this belatedly adopted ground of appeal."

That finding, together with others resulted into the dismissal of the appellant's appeal in the superior court and is what has prompted this appeal before us.

The appellant challenged the dismissal of his appeal by the superior court. In his own original memorandum of appeal, he raised that issue and in his supplementary memorandum of appeal he specifically raised it as the first ground which read:-

"That the learned appellate Judges erred in law and fact by holding that I was not prejudiced in the case without observing that my constitutional rights under section 77(2) were violated."

When the appeal came up for hearing before us, Mrs. Chesang', the learned counsel for the appellant abandoned both the original grounds of appeal and the supplementary grounds of appeal filed by the appellant in person and proceeded to argue the appeal relying on supplementary grounds of appeal filed

by her firm of advocates on 10th September, 2009. However, on realizing that this issue which was raised in the abandoned grounds of appeal could not be wished away in this appeal, she sought the Court's leave to argue it and she was allowed to address us on it. Mrs. Ouya, the learned Assistant Deputy Public Prosecutor conceded the appeal on this ground but sought a retrial though she was not certain whether such a retrial, if ordered would be successfully mounted.

Although other grounds of appeal were raised in the supplementary memorandum of appeal filed on 10th September, 2009 and relied upon by Mrs. Chesang', we feel this issue of language, being a complaint on violation of constitutional rights should be disposed of first and depending on our decision, other matters can be considered.

It is not in doubt and the record before us is clear, that the appellant made it clear at the hearing of his case that he was not conversant with Kiswahili. He said that he understood Borana language. The trial court appreciated that and adjourned the hearing midstream making an order for arrangements to be made to avail Borana Interpreter, one of whom was said to be at the High Court. It is instructive that the appellant sought Borana interpreter, after he had started cross-examination of the complainant but before he could go far. Perhaps, he was unable to make any headway in cross-examining that witness in Kiswahili and that is what made the court appreciate his predicament. Whatever was the reason, the court had made an order and by 14th October, 2005 when the trial resumed before another court, that order had not been rescinded. The superior court observed that the appellant made no further complaint when the hearing resumed in Kiswahili. The appellant had obtained a court order for a Borana interpreter and if that order was not being obeyed, he might very well have resigned his fate in the hands of the court and hence said no more.

The law is clear on the issue. ***Section 77(2)(b)*** and ***(f)*** of the Constitution of Kenya states:

"77(2) Every person who is charged with a criminal offence

(a) ……………..

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged.

(c) ………………

(d) ………………

(e) ……………….

(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."

And ***section 198(1)*** of the Criminal Procedure Code states:-

"I98 (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 language which he understands."

These provisions, do in our minds direct that an accused person in a criminal case is by fundamental law of the land entitled to have his case, if he is present in court, conducted in a language that he understands. The superior court was of the view that as it appeared from the record that the appellant cross-examined witnesses who gave evidence in Kiswahili, he could not complain as by so cross-examining the witnesses, he exercised his right as, for that court, the importance of the requirements for suitable language interpretation was that they enabled an accused person to hear and be heard as part of the trial process. With respect, that was a misdirection. In our view, it amounted to glossing over the omission by the trial court to ensure compliance with an important constitutional requirement. As this Court stated in the recent case of ***John Irungu vs Republic*** ***Criminal Appeal No. 303 of 2005 (UR)***

where a similar situation obtained:

"Thus, in law, at the trial of an accused person, the court must ensure not only that the charge is explained to the accused in a language the accused understands but the court is further enjoined to ensure that the evidence given during the trial is interpreted to the accused in a language the accused understands. These are legal requirements. They are constitutional rights of an accused person and cannot, in our view, be waived on belief that the accused understands the language of the court particularly when the accused has stated, like the appellant did state in the case before us. , that he was not good in English or Kiswahili. Further, as we have stated, in this case, a competent court had ordered that interpreter be availed at the trial of the appellant. Court orders must be obeyed and more so by the same court that makes them. We have no reason on record as to why the trial court reneged on its order to have a Gikuyu interpreter for the accused at his trial."

That appeal was allowed by this Court on those grounds which as we have stated, are similar to those before us. We too have no reasons on record as to why the trial court reneged on its order to have arrangements made for a Borana interpreter. Whereas we agree that the ability to conduct defence case is one of the tests to be applied by courts in gauging whether the accused understands the language, in our view, it is not all that is required as the superior court felt. It is not only a matter of accused hearing and being heard in court. It is a matter of whether the accused understands what he is hearing and whether he is also being understood as a result of the means of communication available to him namely language.

The above being our view, we have no doubt that the trial before the Principal Magistrate was vitiated by failure on the part of the court to ensure that the appellant's right to a language that he understood pursuant to ***section 77(2)(b)*** of the Constitution and by extension to services of an interpreter under ***section 77(2)(f)*** of the Constitution as read with ***section 198(1)*** of the Criminal Procedure Code. We allow the appeal, quash the conviction and set aside the sentence of death imposed upon the appellant.

What next? Mrs. Ouya seeks a retrial, but is not certain that the prosecution would be able to get the witnesses so as to mount a successful retrial. Mrs. Chesang' seeks release of the appellant but she does so, on other grounds of appeal we have not found it fit to consider. We have considered decisions of this Court on the principles that guide the Court when faced with similar situation. These are decisions in cases such as ***Ahmed Sumar v Republic (1964) EA 481*** and ***Pascal Ouma Ogolo v Republic, Criminal Appeal No. 114 of 2006***. We think the decision in the case of ***Bernard Lolimo Ekimat v R., Criminal Appeal No. 151 of 2004 (UR)*** which is a summary of these decisions would be a proper guide. In that case this Court stated:-

"There are many decisions 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."

In this case the appellant was arrested on 27th February, 2005. He has been in incarceration in one form or the other for five years. The prosecution is not certain whether if a retrial is ordered a successful prosecution would ensue. The value of what was allegedly stolen was Kshs.1,650/=. The charge is at variance with the evidence that was adduced in court in that whereas the charge stated that actual violence was only threatened, the evidence of the complainant was that he was injured on the arm and eye whereas the Doctor's evidence does not mention anything about an eye injury. Considering all these, we think the interests of justice tilts against an order of retrial.

The appellant is released and is at liberty unless otherwise lawfully held.

Dated and delivered at Nairobi this 12th day of March, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……………………….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR