REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Criminal Appeal 449 of 2007

GABRIEL OWANG OTILA

STEPHEN ODERA OWADHO ……APPELLANTS

AND

REPUBLIC ……RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Kisumu (Mwera & Mugo, JJ) dated 11th December, 2007

in

H.C.CR.A. NO. 110 OF 2004)

****

JUDGMENT OF THE COURT

This is a second appeal. The appellants ***(Gabriel Owang Otila and Stephen Odera Odhiambo)*** filed first appeals in the superior court which were consolidated and conducted by the appellants in person. Those appeals were dismissed in a judgment dated and delivered on 11th December 2007. They were charged before the Principal Magistrate at Siaya with the offence of robbery with violence contrary to ***section 296 (2)*** of the Penal Code, the particulars of which stated that:-

"***On the third day of January 2003 at Sidindi village in Siaya District of the Nyanza Province, robbed Flora Omolo of eight hens valued at Ksh. 2,400 and at or immediately before or immediately after the time of such robbery wounded the said Flora Omolo by cutting her."***

They pleaded not guilty to that charge but after hearing the case, the learned Senior Resident Magistrate (F. M. Omenta) found them guilty as charged, convicted both of them and sentenced them to death. That is what prompted their appeal to the superior court which, as we have stated, was dismissed and hence this appeal brought on eight grounds of appeal filed on 29th July 2009 through Mr. L. G. Menezes, their learned counsel. The original memorandum of appeal filed by each appellant and the supplementary memorandum filed by their former advocates on 29th March 2008 were abandoned.

When the hearing of the appeal commenced before us, Miss Oundo, the learned Senior State Counsel addressed us first and submitted mainly on the first and third grounds of appeal. These two grounds were:-

"***1. The first appellate court misdirected itself in not assessing or evaluating at all the fact that the appellants' rights under section 77 of the Constitution may have been heavily infringed by the original court's behaviour towards them."***

2. …….

3. The first appellate court rushed through its assessment of evidence as manifested in the fact that there is extreme doubt as to whether parts of the trial was (sic) conducted by a properly constituted prosecutor."

Miss Oundo conceded the appeal on those two grounds submitting that whereas on 20th November 2003 when the plea was taken, the record shows that one Yongo was the Court Clerk and interpretation was on that day in English, Kiswahili and Luo and that Inspector Okoth was the prosecutor, thereafter the record is silent as to who was the interpreter and the language in which the entire proceedings was conducted and further, thereafter the record does not show who was the prosecutor. The phrase "*coram as before"* is used thereafter and according to Miss Oundo, one cannot be certain as to who was the prosecutor and whether subsequent prosecution of the case before the subordinate court was conducted by an unqualified prosecutor or not. Having conceded the appeal on those grounds, Miss Oundo however asked us to order retrial on account that the offence was serious as life was lost, but she immediately sought to withdraw that comment on the loss of life as she conceded the record did not bear her out on that aspect. She nonetheless sought a retrial contending that the evidence on record shows that a conviction on retrial could be secured; that witnesses could be availed and in any case, she maintained that such a retrial would be proper as there was no lacuna on the prosecutions side resulting in the subject proceedings being vitiated.

Mr. Menezes, the learned counsel for the appellants reiterated the same points raised by Miss Oundo with approval but on retrial, he was of the view that as the appellants have been in incarceration for over six and a half years on account of the matter whereas the properties allegedly stolen in the course of the alleged robbery were only eight chicken valued at Ksh.2,400/= and as the alleged injury to the complainant was minor, the period spent in custody was sufficient punishment in the circumstances of this case. He felt the appellants have paid their debt to society and a retrial would mean more waiting time in custody and would amount to unfair punishment.

Those two points were the issues raised in this appeal. The other grounds were not canvassed before us and we do not find it necessary to consider them.

The record shows that the two appellants were taken to court for the first time on 13th January 2003. On that day IP Chabari was the prosecutor and Habil was the Court Clerk. It is stated that the charge was read over and explained to the accused and that plea was entered and a hearing date together with a mention date were set. Thereafter, for one reason or the other including non production of appellants into the court, the hearing did not take off. On 20th November 2003, the case came up for hearing. On that day, Inspector Okoth was the prosecutor and Court Clerk was one Yongo. It was clearly indicated that Yongo was an interpreter in English, Kiswahili and Luo languages. The charge was read over to the appellants and explained to them. They each pleaded not guilty and a plea of *Not guilty* was entered for each appellant. That was proper. However, the hearing did not proceed on that day. It was adjourned to 4th December 2003, but even on that day, the hearing did not take off again and from there on it was adjourned from date to date till 24th February 2004 when the hearing started. On that date the record does not show who was the prosecutor neither does it indicate who was the interpreter. All that is stated is "*coram as before."* It is stated that the charge was read and explained to the accused but it does not state in which language it was read over to them and whether they understood the language. Be that as it may, when the only two witnesses who gave evidence on that day testified, there is no indication in what

language they gave their evidence. All that was entered was the name of the witness followed by initials "*A/S/S"* which we understand to mean "*Adult/Sworn/States."* Thereafter, the hearing was adjourned to 24th March 2004 for further hearing. Again on that day all that was stated was "*coram as before"* and "*accused present."* There was no mention of the language in which the third and fourth witnesses gave evidence. Like in the first scenario, all that was stated was the name of the witness followed by the initials A/S/S which as we have stated, meant "*Adult/Sworn/States."* Thereafter further hearing proceeded on 4th May 2004 when the last prosecution witness's evidence was taken. There was no entry in the record even on that day as to the language in which that witness gave evidence. After the close of the prosecution's case, the appellants were put on their defence and they each gave unsworn statements on 17th May 2004. It was not stated in which language they gave their unsworn statements.

It is thus not entirely incorrect when the two counsel state that it was not clear as to whether the provisions of ***section 77*** of the Constitution had been complied with. Whereas we accept that the phrase "***coram as before"*** may mean that the attendances before the Court including the name of the trial magistrate were as stated earlier in the record, in this case however, that approach could result into confusion as earlier on 13th January 2003, the prosecutor was IP Chabari and Court Clerk was Habil while later on 20th November 2003, the prosecutor was IP Okoth and Court Clerk was Yongo. In that scenario, whereas "*coram as before"* after 20th November 2003, could have meant that Yongo the Court Clerk and IP Okoth, the prosecutor were present on all the subsequent hearings, it may not necessarily be so. In any event even if we are to accept that as there was no reason to suggest that an unqualified prosecutor did conduct the case in the trial court, "*coram as before"* meant that Inspector Okoth was the prosecutor throughout the trial and he was a qualified prosecutor still one hurdle remains in that there is no evidence whatsoever to show in what language each witness gave evidence at all times the trial proceeded and to show that such language was understood by the appellants. Thus the point raised by Miss Oundo and supported by Mr. Menezes particularly as regards the alleged violation of ***section 77 (2) (b***) and ***(f)*** of the Constitution of Kenya, cannot be wished away.

It is a constitutional issue which questions the validity of the entire trial that was conducted by the learned Senior Resident Magistrate. It was raised for the first time probably because in the superior court the appellant conducted their own appeals in person. ***Section 77 (2) (b)*** and ***(f)*** of the Constitution aforesaid provides that:-

"***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 in the trial of the charge."

The issue of interpretation in criminal trials is also provided for in ***section 198*** of the Criminal Procedure Code which states as follows:-

"***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."***

This Court has in the past had several occasions to deal with similar matters and has been consistent in its judgments that the need to comply with the requirements of ***section 77 (2) (b)*** and ***(f)*** of the Constitution as well as with the provisions of ***section 198*** of the Criminal Procedure Code, is a matter that the Court has no option but to accept and ensure. In the case of ***Patrick Kubale Wesonga*** Criminal Appeal No. 204 of 2005 heard at Kisumu this Court stated:-

"***As the Court did not state the language used at the trial apart from English, one cannot state for certain that the appellant understood the language that was used to conduct the entire trial. Section 77 (2) (b) of the Constitution, which we have cited above, emphasizes that the offence is explained to an accused person in a language that he understands. Section 77 (2) (f) goes further and states that an accused person is entitled to have an interpreter if he cannot understand the language used in trial. Thus, the need for the trial court to indicate the language in which the trial proceeded cannot be waived even if an accused person has an advocate. As we have stated, there is nothing in the proceedings except one day when the case was not for hearing, to show the language in which the proceedings were conducted. That omission would also vitiate the trial before the subordinate court."***

The same view was also held by this Court in the case of ***Degon Dagane Nunow v. R.*** Criminal Appeal No. 223 of 2005 and several other decisions before and after it. In the case before us, as we have stated in details above, the language of communication was only indicated on 20th November 2003, a date when the hearing never proceeded. In fact that was also the last date a name of a Court Clerk or interpreter was mentioned. Thereafter no mention of the language and of the name of the Court Interpreter was made throughout the record. As we have stated, we are prepared to accept that probably IP Okoth conducted prosecution of the case throughout the trial as we have no evidence of any other person after IP Okoth was recorded as the prosecutor and thereafter coram was marked either "*as before"* or "*as earlier."* In our view, before a court can act and declare the proceedings vitiated on account of an unqualified prosecutor having conducted the case, such evidence must exist and must be related to actual trial of the case and not mere presence on mention days. Here, we cannot pin point even by name as to who that unqualified prosecutor was for he could only come into mind on account of the name and rank of the prosecutor at the actual hearing having been mentioned. We deprecate the use of short phrases like "*coram as before"* which though used to shorten the work of a trial court, may end up creating more problems than the benefit of time saved like is clear in this case. In any case, we do not think the time saved by such short cuts, which is in reality very short time, can be a fair explanation for the injustice such practices can create.

We think we have stated enough to demonstrate that the proceedings before the Senior Resident Magistrate must be and are hereby vitiated. The proceedings and judgment, were, on account of the learned magistrate's failure to indicate the language in which the witnesses gave their evidence and the language in which defences were conducted, rendered a nullity.

What next? Miss Oundo asks for a retrial whereas Mr. Menezes seeks release of the appellants. Should we order retrial or should we not do so? That is the question we must now tackle. A brief preview of facts as presented to the trial court may help here.

The complainant, Flora Omolo Oduor (PW1) was staying at her house in Nyabeda, North Gem location of the Siaya District. She was living with her grandson Vitalis Omondi (PW3). On the night of 3rd/4th January 2003 at 12.30 a.m, she was sleeping in her house. Her grandson also slept in that house. It started raining and she woke up, lit a lamp, woke up her grandson and opened the door to go and harvest rain water from the roof. She met one of the appellants who without a word cut her on the back of her head with a panga and pushed her inside the house. The same person hit her with a club. The thugs were many but she did not know how many they were. They asked her if there was a hen in the house which was laying eggs and her grandson replied in the affirmative that there was a hen which had laid six eggs. They then ordered her grandson to slaughter the hen. The hen was slaughtered, ugali cooked and the thugs plus Flora's grandson ate the chicken. All this time Flora was made to lie on her belly on her bed as one of the thugs sat on her all along. After they ate the chicken, they took away all the remaining eight chicken and fertilizer which Flora had kept in the cupboard and left. Flora was later examined by Vincent O. Ratemo, a Clinical Officer at Nyawara Health Centre who assessed the degree of the injuries

sustained as harm.

The Court has considered in details, the principles that guide an appellate court when considering whether or not to order a retrial. In the case of ***Pascal Ouma Ogolo vs Republic*** – Criminal Appeal No. 114 of 2006, this Court stated as follows on pertinent aspect:-

"***We have considered whether or not we should order a retrial. The alleged offences were committed on 9th February, 2000 and the appellant had already been in custody for 5 years. The main critical issues amongst others at the hearing of the first appeal to the superior court were as to identification and recognition in the circumstances in which both state counsel and the Court found out to be favourable for identification in respect of the other appellants who were set at liberty. It may well prove impossible to trace the witnesses and those that are traced may not have accurate memory of the details of events. We agree with Mr. Musau that this is not a suitable case in which to order a retrial."***

That was a case where the learned Senior Principal State Counsel did not support an order of retrial on grounds that the evidence on record would not sustain a conviction even if retrial was ordered. In the case of ***Ahmed Sumar vs. Republic*** (1964) EA 481 the predecessor to this Court stated at page 483 as follows:-

"***It is true that where a conviction is vitiated by gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view follow that a retrial should be ordered."***

The Court continued at the same page at paragraph 11 and stated:-

"***We are also referred to the judgment in Pascal Clement Braganza v. R. (1957) EA 152. In this judgment the court accepted the principle that 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 the 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."***

That decision was accepted by this Court in the case of ***Lolimo Ekimat vs. R*** – Criminal Appeal No. 151 of 2004 (unreported) where this Court stated as follows:-

"***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 before us, although Miss Oundo says a successful prosecution can still be mounted and that considering the evidence on record and potential case as a whole, a conviction can be secured, we are nonetheless of the view that as the injuries to complainant was classified as harm and as the stolen property were 8 chicken valued at Ksh.2,400/=, and against all that the appellants have been in incarceration since 4th January 2003, now for over six and a half years, interest of justice demands that we accept that the punishment already meted out is enough in the circumstances of this case. We thus agree with Mr. Menezes that in this case an order of retrial would not be just and fair.

The upshot is that on the grounds stated above, the proceedings and judgment in the subordinate court is declared a nullity. That in effect means the judgment of the superior court is set aside. The appellants are released forthwith unless they or either of them are or is otherwise lawfully held.

Dated and delivered at Kisumu this 9th day of October, 2009.

P. K. TUNOI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

…….

JUDGE OF APPEAL

D. K. S. AGANYANYA

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR