



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**  
**Criminal Appeal 221 of 2006**

**CISSE DJIBRILLA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from a judgment of the High Court of Kenya at Nairobi (Mbaluto, J) dated 1/7/2003***

**in**

**H.C.C.R.A. NO. 217 OF 2002)**

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**JUDGMENT OF THE COURT**

*CISSE DJIBRILA*, the appellant, was convicted by the Senior Principal Magistrate, Kibera, of trafficking in narcotic drugs contrary to *section 4(a)* of the Narcotic Drugs and Psychotropic Substances (Control) Act (No. 4 of 1994), the Act, and sentenced to life imprisonment and; in addition thereto, a fine of Shs.1,000,000/= was imposed on him.

The appellant was aggrieved by both the conviction and sentence, and consequently lodged an appeal in the High Court of Kenya at Nairobi. On 1<sup>st</sup> July, 2003 *Mbaluto J* dismissed his appeal. He now comes before us by way of a second and final appeal.

The facts as accepted by both the trial court and the first appellate court were briefly as follows. The appellant is a citizen of Guinea. On 10<sup>th</sup> September, 2001 at about 6 am he arrived at JKIA, Nairobi, from Dubai in flight No. KQ 311. While all the passengers had disembarked, police officers *Cpl. Maritim (PW1)* and *Cpl. Otieno (PW2)* noticed one suspicious looking passenger. They beckoned him aside and after checking his passport and ticket they escorted him to their office where they searched his luggage. They found nothing on him or in his luggage. That passenger was the appellant. However, the police officers suspected that the appellant could have concealed some drugs in his body and they placed him under observation for sometime. At about 2.30 p.m. on the same day the appellant asked to be taken to the toilet wherein he emitted fifteen (15) pellets of a whitish substance from his rectum. Later, he emitted a further twenty nine (29) pellets making in all a total of forty four (44) pellets. On examination by the Government Analyst, the whitish powder was found to contain diacetylmorphine (or heroin), a narcotic drug listed under the Act.

*Mr. Wandugi* for the appellant in his submissions before us has faulted the first appellate court in failing to consider the failure by the trial court to ensure that the proceedings were conducted in a language that the appellant could understand. *Mr. Kaigai*, the learned Senior State Counsel did not seek to support the conviction and the sentence but has asked for a retrial.

We think that *Mr. Kaigai* is certainly right in conceding the appeal.

In the case of *DIBA WAKO KIYATO V REPUBLIC (1982-88) I KAR 1974* this Court held that:-

*“It is a fundamental right in Kenya, whatever the position is elsewhere, that an accused person is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands”*

The Court in that case was, of course, relying on the provisions of *section 77(2)(f)* of the Constitution of Kenya and *section 198(1)* of the Criminal Procedure Code.

The record of the trial magistrate shows that the proceedings were conducted in English and translated into Kiswahili. However, it is not shown that the appellant understood either English or Kiswahili. Further, it is not even shown in what language the appellant himself understood or could speak or in what language he used to cross-examine the witnesses or defended himself. It is apparent that his failure to understand the language which was used in the trial court to conduct the proceedings resulted in him remaining silent or mute during the proceedings. Also, it is worthy of note that the appellant kept quiet when called upon to defend himself. We note further that though the appellant complained to the learned Judge during his first appeal that:-

*“My English is not good but I do understand some.”*

the first appellate court did not at all consider that complaint.

We deprecate the manner in which the trial magistrate adopted when trying the appellant on a very serious charge which resulted in his being sentenced to life imprisonment. The failure by the trial magistrate to keep a record of the nature of the interpretation was a serious defect in the trial. Again, it was a serious lapse on the part of the first appellate judge not to observe the directions given by the predecessor of this Court in *OKENO V R [1972] EA 32*. Due to these fundamental breaches there has been a miscarriage of justice and the conviction of the appellant is unsustainable and must be quashed.

Should we order a retrial? It is well established that:-

*“In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.”* See *FATHHALI MANJI V REPUBLIC.*

The charge against the appellant was alleged to have arisen on 17<sup>th</sup> September, 2001, some six years ago and he has been in custody and prison since then. Furthermore, *Mr. Wandugi* doubted and *Mr. Kaigai* did not confirm that the drugs which were vital exhibits in the case are still available.

In our view, the appellant having been in custody for such a long period and the drugs whose value was Shs.715,000/= having been destroyed, the interests of justice do not lead to consider a retrial.

We accordingly allow the appeal, quash the conviction recorded against the appellant and order that he shall be released forthwith from prison unless held for some other lawful cause. Those shall be our orders in this appeal.

*DATED and DELIVERED at NAIROBI this 7th day of March, 2008.*

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR