



IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 386 OF 2006

BERNARD WACHIRA KAMONYE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Lesiit & Makhandia, JJ) dated 27th May, 2006

In

H.C. Cr. A. No. 924 of 2003)

JUDGMENT OF THE COURT

On 8th October, 2003, **Bernard Wachira Kamonye**, the appellant herein, was sentenced to death by the then Senior Principal Magistrate at Makadara, C.O. Kanyangi, Esq., on a charge of robbery with violence contrary to **section 296 (2)** of the Penal Code. The particulars of that charge were that on the 6th January, 2003 at Majengo/Pumwani Estate in Nairobi, the appellant, jointly with others not before the court, while armed with knives, robbed Samuel Cheruiyot Keter of his wrist watch

Seiko 5 valued at Kshs.6000/-, one mobile phone make Nokia 8210 valued at K.shs.27,000/-, two video cassettes valued at K.shs.300/-, cash Kshs.10,000/- and other documents, all to the total value of K.shs.43,300/- and that at, or immediately before or immediately after the rime of the robbery, they used actual violence to the said Samuel Cheruiyot Keter.

The plea of the appellant was taken before the trial Magistrate on 24th March, 2003. Right from that date upto the 8th October, 2003 when the Magistrate convicted and sentenced the appellant to death, it is impossible to say what language was being used in the court of the Magistrate. The language in which the appellant pleaded to the charge and in which he gave his unsworn evidence is not shown. The language in which all the witnesses gave their evidence in court is not known but since the proceedings are recorded in English, one can only assume that the appellant and all the witnesses must have addressed the Magistrate in the English language in which the proceedings are recorded. There is no indication anywhere in the record that any interpretation took place from one language to the other. It is shown in the record that there was a court clerk called Kakai, but the record is silent as to whether that clerk was interpreting the proceedings from one language to the other and at this stage, it must be assumed in favour of the appellant that the proceedings were being conducted in English language. In the case of **DIBA**

WAKO KIYATO V. REPUBLIC (1982 - 88) 1 KAR 974, this Court, constituted by KNELLER, HANCOX and NYARANGI, JJ.A had this to say on a similar situation:-

“It is a fundamental right in Kenya, whatever may be the position in other countries, that a person accused before the courts of an offence is entitled, without payment, to the services of an interpreter who can translate the evidence to him, and through whom he can put such questions to the witnesses as he wishes and make his statutory statement, or give his evidence, as he may be (sic) -----”.

The learned Judges in this case then cited the provisions of **section 77 (2) (f)** of the Constitution and **section 198 (1)** of the Criminal Procedure Code and then continued as follows:-

“The words ‘in a language which he understands’ are of crucial importance. The practice of recordings (sic), if not the name of the interpreter at least the nature of the interpretation, has been standard practice in these courts for many years. For example that which is described as the ‘plea form’, Form Criminal 133, contains under all other details of the case and of the accused, a space against the word ‘Interpretation’. -----”

This case, which was decided way back in 1986, lays down the principle that either the name of the person interpreting the proceedings to an accused person be recorded or at least the nature of the interpretation be record. The “*nature of interpretation*” can only be by showing the language of interpretation and as the learned Judges there pointed out:-

“--- The practice of recording, if not the name of the interpreter, at least the nature of the interpretation, has been standard practice in these courts for many years. ----.”

Just like in the present appeal we are dealing with, **Diba Wako Kiyato** had been tried and convicted on a charge of robbery with violence contrary to **section 296 (2)** of the Penal Code and had been sentenced to death . The gravity of the offence did not itself deter the court from quashing the conviction and ordering a retrial.

In **ABDALLA VS. REPUBLIC [1989] KLR 456**, this Court comprising MASIME, GICHERU & KWACH, JJ.A dealing with a similar issue held as follows:-

“Because of the complaint alleging failure to interpret the proceedings, we called for but not have received, the original trial court’s file in District Magistrate’s Limuru Criminal Case No. 854 of 1988. This Court has recently held that it is a fundamental right of an accused charged with a criminal offence to have the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands. See Diba Wako Kiyato v. Republic, Criminal Appeal No. 100 of 1985, section 77 (2) (f) of the Constitution and section 198 (1) of the Criminal Procedure Code. The record of the trial court alludes to interpretation in Kiswahili but does not state that there was any clerk or interpreter in court; only the presence of the Magistrate, the prosecutor and the accused are recorded. This record lends credence to the Appellant’s complaint that there was no interpretation of the proceedings to him in a language that he understands though the record has indications that he may have followed the gist of the proceedings. In the circumstances there was a breach of the appellant’s constitutional and fundamental right which is fatal to the proceedings. -----”

ABDALLA’s conviction on his own plea of guilty to the charge of theft was quashed and he was set at liberty . There, as is apparent from the above quotation, there was some indication in the trial court’s record that interpretation was being done from one language to the Swahili language, but the record did not show who it was that was doing the interpretation. As the learned Judges said in their judgment, that was fatal to the conviction. In the appeal before us, there was a clerk called Kakai; but it is not shown what language he was interpreting the proceedings into.

These decisions were followed by the Court in **SWAHIBU SIMBAUNI SIMIYU & ANOTHER V. REPUBLIC**, Criminal Appeal No. 243 of 2005 (unreported), **DEGOW DAGANE NUNOW V.**

REPUBLIC, Criminal Appeal No. 223 of 2005 (unreported) and **RWARU MWANGI V. REPUBLIC**, Criminal Appeal No. 18 of 2006 (unreported). The decisions range from 1986 to 2006 and are all consistent on one point, i.e. that the language or nature of interpretation be shown. In the appeal before us right from page one of the trial court's record upto the very last page, it is impossible to tell the nature of the interpretation of the proceedings to the appellant. This appeal, on this point alone, must go the same way indicated by the previous authorities cited herein.

The appellant was tried from 24th March, 2003 upto 8th October, 2003 when he was convicted and sentenced to death. His first appeal to the High Court was dismissed on 27th April, 2006. It is some five years since he was first arrested and under those circumstances, no meaningful retrial would be possible if we were to order one. In the circumstances, we allow the appeal, quash the conviction for the offence of robbery with violence under **section 296 (2)** of the Penal Code, set aside the sentence of death imposed upon the appellant and order that the appellant be released from prison forthwith unless he is held for some other lawful cause.

Dated and delivered at Nairobi this 4th day of July, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.