IN THE COURT OF APPEAL OF KENYA PEAL AT NYERI

Criminal Appeal 223 of 2005

DEGOW DAGANE NUNOW ……. APPELLANT

AND

REPUBLIC ……RESPONDENT

***(Appeal from a judgment of the High Court of Kenya at Meru (Onyancha & Sitati, JJ) dated 28th June, 2005* In H.C. Cr. A. No. 62 of 2003)**

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JUDGMENT OF THE COURT

On 19th April, 2001, R. N. Nyakundi Esq., a Senior Principal Magistrate, sitting at the Magistrate's Court, Garissa convicted Degow Dagane Nunow, the appellant herein, on one count of robbery with violence contrary to ***section 296(2)*** of the Penal Code and two other counts of possession of a firearm in (count two) and possession of ammunition (count 3) contrary to ***sections 89 (1)*** and ***89 (2)*** of the Penal Code. On the first count of robbery with violence the appellant was duly sentenced to death, while on the second and third counts the appellant was sentenced to two concurrent terms of ten years imprisonment. On his first appeal to the superior court, that court (Onyancha and Sitati, JJ) while confirming the three convictions, suspended the operation of the sentences on counts two and three. The appellant now comes to this Court by way of a second appeal.

Mr. Kimani, learned counsel for the appellant, argued only grounds (4) and (8) of the grounds contained in what the appellant had designated as "PETITION OF APPEAL" which really ought to have been a memorandum of appeal. Those grounds are as follows:-

"***(4) That the appellate judges erred in law while not observing that the provisions of section 85(2) as read with section 88 (1) of the c.p.c. (sic) {Criminal Procedure Code?} were violated during the plea and several mentions in that the matter was handled by unqualified court prosecutor one P.C. Onyancha.***

"***8. That since I cannot recall all that transpired during the trial of this appeal, I hereby request that this honourable court to serve me and my counsel with the certified copy of the trial proceedings to enhance (sic) us substantiate (sic) more firm grounds and I further request to be present during the trial of this appeal in person."***

Mr. Kimani told us that what the appellant meant in ground (8) is that the proceedings in the trial court were conducted in a language which the appellant did not understand. That issue was raised by the appellant in his submissions before the superior court. Onyancha, J recorded the appellant as saying:-

"***- The lower court did not give me a good chance to defend myself, since I did not understand***

Swahili. Only during judgment was there an interpreter. I now say during the trial there was an interpreter."

The notes of Sitati, J are as follows:-

"*….. The proceedings in the lower court were held in Kiswahili, a language I did not understand. Interpretation was only on the day of judgment. Now, I say there was an interpreter during the hearing of the case ……..*"

The notes of the trial court on the day judgment was delivered, i.e. 19th April, 2001 show as follows:-

"***Court: Judgment delivered in open court in presence of the accused, IP. Mukono for state, court clerk Mohamed Somali/Swahili."***

Of course, there was, right from the beginning of the trial an interpreter 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. On the day of the plea, for example, the record simply shows:-

"***20.12.2000.***

Before me Nyakundi R. N., SPM

Prosecutor - P.C. Onyancha

Court clerk: Ismail/Osman.

Accused present.

Charge read over and explained to accused who pleads as follows:-

Count 1

Accused: It is not true

Not guilty

Count 2:

Accused: It is not true

Not guilty

Count 3:

Accused: It is not true

Not guilty."

As is abundantly clear from this extract, the language being used by the appellant was never mentioned and this went on even when the witnesses testified. The record of the Magistrate shows:-

"***P.W1 – MOHAMED ALI BILAL SWORN AND STATES AS FOLLOWS."***

That was the case with P.W.2, P.W.3, P.W.4, P.W.5, P.W.6 and P.W.7. The record is the same in respect of the appellant and the two witnesses called by him. The only place where it is shown that interpretation

of the proceedings was being done from Swahili language to the Somali language is the date when judgment was delivered . As to the other parts of the record, one can only presume that because the appellant cross-examined the witnesses called by the prosecution and because he also gave evidence on oath, he must have understood the language of the court. There is really no reason for making such a presumption. On this aspect of the matter, the burden is on the trial court itself to show that an accused person has himself selected the language which he wishes to speak and in which proceedings are to be interpreted to him. As we have repeatedly pointed out, these are not mere procedural technicalities. There is, first ***section 198*** of the Criminal Procedure Code and that section provides:-

"***198(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 a language which he understands.***

(2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate it shall be interpreted to the advocate in English."

The provisions show that the question of interpretation of evidence to a language which an accused person understands is not a matter for the discretion of a 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. ***Section 77*** of the Constitution is in relevant parts, in these terms:-

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

It is the responsibility of trial courts to ensure compliance with these provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are also 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.

The record of the Magistrate before us shows that interpretation from Kiswahili to Somali language only took place during the delivery of the judgment. The appellant complained about that position to the superior court and he still complains to us about the same. As we have said, there is no reason for us to presume as the superior court appears to have done, that the proceedings must have been interpreted to the appellant from Swahili to Somali language. On this ground alone, we must allow the appeal and we need not, therefore, deal with ground four.

What should we do with the appellant? The charges brought against him though they date back to 2000 were of a grave nature and the evidence in support of the charges was of a substantial nature. The superior court dismissed his appeal on 28th June, 2005 and Mr. Orinda, learned Principal State Counsel on behalf of the Republic told us that witnesses can still be made available . In those circumstances, we allow the appeal, set aside all the convictions and sentences imposed and order that the appellant shall be tried ***de novo*** on the self - same charges. The appellant shall be detained in prison pending the new trial.

Those shall be the orders of the Court on the appeal.

Dated & delivered at Nyeri this 11th day of May, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

…….

JUDGE OF APPEAL

W.S. DEVERELL

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.