



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Masime Ja, Gicheru & Kwach JJ A)

CRIMINAL APPEAL NO 46 OF 1989

BETWEEN

ABDALLA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from a Judgment of the High Court at Nairobi, Porter J, dated 14th April 1989,

in

High Court Criminal Appeal No 1144 of 1988)

August 15, 1989, the following Judgment of the Court was delivered.

This is an appeal from the High Court's decision in its appellate jurisdiction (Porter, J) whereby the appellant's appeal was dismissed. The appellant was convicted by the District Magistrate II at Limuru on a plea of guilty entered on 26th August, 1988. He was among nine accused who were arrested at a roadside at Ngenia and who were similarly convicted.

In this appeal the decision of the High Court is attacked on four grounds: that the High Court erred:

1. In holding that the appellant's plea was unequivocal;
2. In not holding that there was a failure to interpret the proceedings to the appellant which was fatal to the conviction.
3. In not holding that the absence of a formal conviction rendered the proceedings a nullity;
4. In not holding that the address by the prosecution on prevalence and seriousness of the offence was prejudicial to the appellant.

All these complaints were urged before the High Court which recognized the errors but held that they were cured or did not prejudice the appellant or lead to a miscarriage of justice. In the submissions before us a further ground of appeal was disclosed; the facts stated to the court by the Prosecutor did not identify this appellant as one of those allegedly found on the roadside committing the offence charged.

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 into 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.

As we have said the High Court recognized the other errors complained of in this appeal but held that those errors were either cured or did not occasion a failure of justice to the appellant. The High Court, however, did not deal with the appellant's third ground of appeal to that Court which complained that the facts put forward by the prosecutor did not disclose an offence. The complainant was alleged to have seen:

"about 10 men unloading maize from the lorry. He rushed to Tigoni Police Station and reported the matter. He came back with three policemen to the scene. The ten men who were unloading the lorry started running away. The police managed to arrest the 9 accused but one of them managed to escape..."

The appellant was on these facts clearly entitled to raise the issue of his identification as one of the men that were unloading maize from the lorry; and, the superior Court ought to have dealt with that issue.

In view of what we stated earlier, however, this appeal succeeds and we quash the conviction of the appellant, set aside the sentence and order that the appellant shall be set at liberty forthwith.

Dated and Delivered at Nairobi this 15th August , 1989

J.R.O MASIME

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

R.O KWACH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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