

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: NSEKELA, J.A., MSOFFE, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO.292 OF 2008

**QAITI HAWAI
KILIMANJARO HERIA** }**APPELLANTS**
VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court
of Tanzania at Arusha)**

(Sambo, J.)

**Dated 31st day of July, 2008
in
Criminal Appeal No. 129 of 2006**

JUDGMENT OF THE COURT

6TH & 10TH October, 2011

MSOFFE, J.A.:

Before the Resident Magistrate's Court of Arusha the appellants QAITI HAWAI and KILIMANJARO HERIA together with one PHILEMON STELI appeared to answer a charge of Gang Rape contrary to Section 131A and 2 of the Penal Code, as amended. After a full trial the appellants were convicted as charged whereas the said Philemon Steli was acquitted. Consequently they were sentenced to life imprisonment. The appellants preferred a first appeal to the High Court at Arusha where they were unsuccessful, hence this second appeal.

The first appellant filed a six point memorandum of appeal while the second appellant had a memorandum of appeal with one ground of complaint. At the hearing of the appeal the appellants came up with "joint additional grounds of appeal".

In view of the position we have taken on the appeal we will not discuss the evidence leading to the conviction in question. In similar vein, we will not address the first appellant's grounds of appeal and the appellants' joint additional grounds of appeal. Rather, we will address the sole ground raised by the second appellant in his memorandum of appeal.

In brief, the second appellant's complaint is that he was not afforded a fair trial because the proceedings were conducted in a language he is not proficient with. The proceedings were conducted in Swahili and he was not afforded the services of an interpreter conversant with both Swahili and his native Iraqw language. In his view, the fact that this happened explains the fact that he could not even cross - examine the witnesses.

Admittedly, the above point was not raised before the High Court in the first appeal. However, since the point is fundamental and touches the

trial as a whole we have deemed it fit and proper to address it in this second appeal.

Before us the appellants appeared in person(s), unrepresented. The respondent Republic had the services of Mr. Ponsiano Lukosi, learned Senior State Attorney.

At first Mr. Lukosi was of the view that the second appellant knew some Swahili and that was why he defended himself as the record of proceedings dated 14/2/2006 shows. On reflection however, he was of the view that in the interests of justice a retrial could be ordered.

A look at the record of proceedings will show that throughout the prosecution case the second appellant did not intimate to the trial court that he was not conversant with Swahili. It was at the defence stage when he revealed this fact. On 31/1/2006 when he was asked to defend himself he said:-

I am not ready. I am not conversant with Swahili.

Thereafter, the prosecutor responded as follows:-

It is better to adjourn in order to give a chance for 2nd accused to find interpreter.

The above exchange of words was followed by an Order from the court thus:-

ORDER: Defence hearing on 14/2/2006. The matter is adjourned in order to give a chance for 2nd accused to find interpreter. Accused further remanded in custody.

When the proceedings were resumed on 14/2/2006 the issue of an interpreter was never taken up again either by the prosecutor or the second appellant. Instead, the second appellant was allowed by the court to defend himself presumably in the manner described above by Mr. Lukosi.

In our view, it is probably true, as earlier intimated by Mr. Lukosi, that the second appellant is conversant with a bit of Swahili and that was why he defended himself on the above date. However, that will be far from saying that he was fully conversant with the language as to be able to understand and appreciate everything that was going on at the trial. Indeed, his lack of proficiency in the language is probably also explained by the fact that throughout the trial he did not cross-examine any witness. In fact, we may as well say here that even when he appeared before us he had to address us through an interpreter. In the premise, we think it is

safe to give the second appellant the benefit of doubt and hold that he is not versed with the Swahili language.

In the light of the foregoing, we are of the view that it will not be easy to say with utmost certainty that the second appellant was given a fair trial. In this sense, we go along with Mr. Lukosi that the best way out will be to order a retrial. In saying so, we are aware that the first appellant is not covered by the complaint raised by the second appellant. However, the effect of our decision touches the first appellant as well because by its nature the charge of gang rape involves more than one person. In this regard, the first appellant too has to go through the process of a retrial.

For the above reason, we hereby allow the appeal and accordingly declare a nullity the proceedings before the trial court and the High Court in respect of the appellants. There will be a retrial before the trial court encompassing the two appellants. We make no order relating to the said PHILEMONI STELI because following his acquittal there was no appeal by the Director of Public Prosecutions to the High Court. As it is therefore, there is nothing before us relating to the said Philemon Steli. We will only add here one point for the benefit of the trial court that at the resumed hearing or retrial it will be upon the court to look for an interpreter.

Ordinarily it is the duty of the court to look for an interpreter; it is not for an accused person to do so as the trial court appears to have thought vide its Order dated 31/1/2006 (*supra*).

DATED at ARUSHA this 7th day of October, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL