

UGANDA / JUDGMENT

Wang li Bao v Uganda (Criminal Appeal 85 of 2023) [2023]

UGHCCRD 154 (25 October 2023)

[2023] UGHCCRD 154

COURT

HC: Criminal Division (Uganda)

BEFORE

Gadenya, J

CASE / FILE NUMBER

Criminal Appeal 85 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (CRIMINAL DIVISION)

10 CRIMINAL APPEAL NO. 085 OF 2023

(Arising from Criminal Case No. 690/2023 of the Chief Magistrate's Court of Buganda Road)

WANG LI BAO :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

JUDGMENT

BY JUSTICE GADENYA PAUL WOLIMBWA

1.0 Introduction

25 This is an appeal against a sentence imposed on the Appellant by His Worship Ronald Kayizzi, Chief Magistrate at Buganda Road Court, on 28th July, 2023.

Wang Li Boa, herein called the Appellant, was charged with the offense of theft contrary to sections 254(1) and 256 of the Penal Code Act. The prosecution alleged that the Appellant on 22nd June 2023 in the Central Division of Kampala stole two hundred million shillings and one

30 hundred and twenty-five thousand dollars, belonging to China North Machine Company Limited.

The prosecution alleged that the Appellant who was the General Manager of China North Machine Company Limited was assigned to recover the said sum of money from the creditors of the company. The Appellant, indeed, collected the money, but instead of handing it over to the 35 Company he gambled the money in Grand Lis Bao Casino. The Appellant was arrested and charged with theft c/s 254(1) and 261 of the Penal Code Act. He pleaded guilty and was convicted and sentenced to three years' imprisonment. He was also ordered to pay compensation to the company.

The Appellant, being aggrieved by the decision of the Chief Magistrate, Buganda Road, appealed 40 against the conviction and sentence.

2.0 Grounds of the Appeal

The grounds of Appeal are as follows:

- 1) That the Learned Trial Magistrate erred both in law and fact in not properly recording the plea of guilt thereby occasioning grave miscarriage of justice to the Appellant.
- 45 2) That the Learned Chief Magistrate erred in law and fact when he convicted and sentenced the Appellant without establishing the competence of the interpreter as to the Chinese language dialect comprehensible and spoken by the Appellant, thereby occasioning a gross miscarriage of justice.
- 3) That the Learned Trial Magistrate erred in law and in fact when he passed a harsh 50 sentence against the Appellant.

3.0 Representation

The Appellant was represented by M/s Mwesigwa Associated Advocates, while the Respondent was represented by Ms. Apolot, a Senior State Attorney from the Office of the Director of Public Prosecutions.

55 4.0 Submissions of the Parties

The parties filed written submissions as directed by the court.

5.0 Consideration of the Appeal

This appeal has three grounds of appeal. I will deal with ground II of the Appeal before considering the other grounds of appeal because if successful, this ground has the effect of 60 disposing of the entire appeal.

5.1 Ground II of the Appeal

The learned Chief magistrate erred in law and fact when he convicted and sentenced the Appellant without establishing the interpreter's competence as to the Chinese language dialect compressible and spoken by the Appellant, thereby occasioning a gross miscarriage of justice.

65 1. The Appellant's Submissions

The gist of the appellant's submissions is that the Appellant was not able to understand and respond to the court proceedings because Ssentimba Jackson, a Chinese interpreter of Ugandan origin engaged by the court, was not competent and fluent in the Chinese dialect spoken by the Appellant.

- 70 Counsel submitted that while the interpreter stated that he knew Chinese, there was no language called Chinese. He said that there are several languages spoken in China. He referred me to Wikipedia, which lists Mandarin and Cantonese as the major languages spoken in China. He said that these languages are not mutually intelligible as they have major differences in written, spoken, and intonation.
- 75 He submitted that the Chinese interpreter did not bother to find out which Chinese language or dialect the Appellant spoke and understood and that as a result, there were discrepancies on the record as to whether the Appellant had acted with others or alone in the alleged commission of the offense. He gave me two examples:

In the first example, the Appellant said:

80 *We are ready to pay the compensation if ordered by the Court.*

Yet the same Appellant on page 13 of the record stated that:

He is ready to pay compensation to the company.

Counsel submitted because of the inadequacies in interpretation, the Appellant was prejudiced and suffered a miscarriage of justice as he did not understand the court proceedings.

85 2. The Respondent's Submissions

The Learned Senior State Attorney submitted that the court provided Ssentimba, a Chinese interpreter to help the Appellant, follow the court proceedings in accordance with Article 28(3)(f) of the Constitution. As the record bears, the interpreter read the charges to the Appellant in Chinese, which he responded to without raising any complaints regarding the interpretation. She

90 submitted that the Appellant understood and followed proceedings before in the court and cannot, therefore turn around to say that he never understood what was going on in court. She submitted that in the absence of any complaints from the Appellant regarding the competence and quality of interpretation, this ground of appeal is baseless.

She referred me to the case of **Yang Zheng Jun vs. Uganda Misc. Application No. 99 of 2013** 95 which involved a Chinese national who was staying in Uganda. He was not conversant in English, the language used in court. So, the court engaged several interpreters, but he kept objecting to the quality of their interpretation because the interpreters were not conversant with his dialect. This matter went on appeal, and the court held that:

It is for the trial court to ultimately ensure that a proper interpreter is secured, and once court is satisfied 100 *that no prejudice is being made to the applicant in this regard, the trial of the applicant should continue.*

The learned Senior State Attorney submitted that this case was distinguishable from the present appeal because the Appellant in this appeal never objected to the interpreter or the quality of the interpretation, unlike in the **Yang Zheng Jun** case. In conclusion, she asked me to disallow this ground of appeal.

105 3. The Appellant's Rejoinder

The Appellant reiterated his earlier submissions regarding the interpreter's inadequacy and the translation's quality. He submitted that the **Yang Zheng Jun** case did not take away the duty of the learned Chief Magistrate to ascertain the competence of Ssentimba Jackson in the Chinese language, he is not Chinese but a Ugandan who had learned the language.

110 6.0 Resolution of the Ground of Appeal

Article 28(3)(f) of the Constitution, which is relevant to this ground of appeal, provides that:

Every person who is charged with a criminal offence shall-

Be afforded, without payment of that person, the assistance of an interpreter if that person cannot understand the language used at the trial.

- 115 Article 28(2)(f) of the Constitution makes it mandatory for the Court to avail services of an interpreter to an accused person who does not understand the language being used in court. The right to be availed of an interpreter falls among the cluster of fair trial rights. An accused person cannot ably exercise his right to a fair trial, which includes the right to be present, to challenge and confront the witnesses, and to have adequate time and facilities to prepare his defense unless
- 120 he fully understands and is able to follow proceedings against him. Thus, it is the responsibility of the judicial officer before the beginning of the trial to find out if the accused person understands the language used in court and if they do not to find an interpreter paid for by the state to help them follow the proceedings. The Interpreters Oath (criminal) under the **Oath Act**, which is instructive in this matter provides as follows:

- 125 *I..., swear by Almighty God that I will well and faithfully interpret and true explanation make between the court, the assessors/jury, the witnesses and prisoner at the bar according to the best of my skill and understanding*

According to the Oath, the interpreter chosen must be sufficiently qualified and proficient in the language spoken by the accused and the language of the court, which in this case is English. The 130 interpreter bears a professional duty to help the court and the accused person understand the proceedings, which are being relayed to the court through direct and verbal communication so that both are able to fully understand and participate in the trial. I will lay out cases from the Commonwealth where the issues of interpretation were at the heart of the trial to explain the importance of the right to an interpreter in the criminal justice system.

- 135 In **Kunnah v. the State**, [1993] 1 WLR 1315, this is a decision of the Judicial Committee of the Privy Council arising from Mauritius, where both the constitutional and common law sources concerning the right to interpretation were advanced as grounds for overturning the appellant's conviction. Although an interpreter was present during the trial, he interpreted only the indictment and a subsequent amendment to it for the accused and also interpreted the accused's 140 sworn statement for the court. In his statement, the accused stated that he did not understand the evidence of the witnesses who testified against him. The Privy Council, applying the principles in the case of **Lawrence v R** [1933] AC 669 and **R v. Lee Kun** [1916] 1 KB 337, held that the defendant's conviction should be quashed because the trial was conducted without his
- presence for all practical purposes. The Court said that presence must not just be a corporeal 145 presence but necessarily include the defendant's understanding of the charges against him, which

would enable him to make an informed decision regarding his case. The court concluded that since the defendant had little or no understanding of the proceedings against him, his lack of presence denied him the opportunity of a fair trial in breach of natural justice principles.

In **Meghji Naya v. R** (1952) 19 EACA 247, this case involved inferior interpretation. The 150 Resident Magistrate indicated on the record that at a certain point in the proceedings, presumably during the accused's defense, the interpretation was bad, and consequently, he could not put any weight on that particular aspect of the evidence of the accused. The Court of Appeal stated that the magistrate should have stopped the case when he realized that the interpretation was deficient. The court observed as follows:

- 155 *We consider whether his (the magistrate's) omission to do could be held to be a curable irregularity, but we decided that it could not. We appreciate that the learned Magistrate, in his note, was recording that because of an interpretation, he was not going to hold it against the accused that he had given different explanations to the police about the production of the invoice. This showed great fairness on the part of the learned Magistrate, but can we be sure, on the hypothesis that the appellant's evidence was badly interpreted to the*

- 160 *Court, that the Magistrate had put before him the true essence of his testimony? Clearly not. The point is vital because the prosecution had established a prima facie case of receiving against the appellant so that everything depended on his evidence*. *For this reason, we were unable to apply the provisions of section 381 of the Criminal Procedure Code Act (that the verdict ought to stand since there had not been substantial miscarriage of justice)*
- 165 With regard to the failure by the Appellant to object to the quality of the, the court observed as follows:

We do not think that because Mr. Stacey, for the accused, did not object to the interpretation, the trial Magistrate was thereby relieved of the responsibility of ensuring that the interpretation of the accused's evidence was at least adequate.

170 In the English case of **R v Iqbal Begum (1991) 93 Cr. App. 96**, the interpreter had no competence in Punjabi, the accused's native language. The report indicates that the interpreter and accused had some knowledge of Urdu, suggesting limitations regarding their competence in the language. The Court believed it was extremely important to have an interpreter with sound knowledge of Punjabi and Urdu. This being the case, the court concluded that:

175 *it would be impossible to feel sure that when she pleaded guilty to murder, she understood all the implications of what she was doing. A proper plea had thus not been entered, and consequently, a proper or fair trial had not taken place*.

The court further added that:

It must be appreciated that the court is very much in the hands of solicitors and counsel when a plea is being 180 *tendered to an indictment. The court is entitled to feel confident that before that plea has been tendered solicitors and counsel have satisfied themselves that the person arraigned fully understands what is going on, and that that person has before that time given full and intelligible instructions so that counsel has in the end been able to satisfy himself that the person is able to make a proper plea... The failure here both by solicitor and counsel was to realise that the reason for the apparent lack of communication lay in the*

- 185 *inadequacy of interpretation. Yet not once does it appear to have occurred to either of them to question the interpreter so as to understand whether or not he was understanding what the appellant was saying to him and whether he, the interpreter, had the impression that she was not comprehending the language he was talking to her."*
- 190 About the adequacy of interpretation, the European Court of Justice, in the case of **Kaminski v. Austria 19 December 1989, ECHR, No.978/82,13EHRR36**, emphasized that given the need for the right (to interpretation) to be practical and effective (emphasis is mine), a state's responsibility under the article did not end with the appointment of an interpreter but may also extend to a degree of subsequent control over the adequacy of the interpretation provided. The 195 gist of this decision is that the right to an interpreter encompasses having an interpreter who is competent and proficient in the language being

interpreted.

From the above decisions and an interpretation of Article 28(3)(f) of the Constitution, the following imperatives must be observed in all cases where interpretation is required:

- a) The court bears the legal burden of establishing whether the accused person understands the language used in court before the commencement of the trial. This duty remains on the court until the case is closed and includes translating documents used at the trial for the accused person.
- b) The court bears the legal burden of providing an interpreter where the accused does not understand the language used in court.
- 205 c) The interpreter chosen must demonstrate that he or she is conversant with the language spoken by the accused person and the language used in court. The interpreter, who is akin to an expert, must present academic qualifications and certificates for foreign languages to show they have the requisite competencies to offer interpretation services in the chosen languages/s.
- 210 d) The quality of the interpretation must enable the accused person to be present and fully participate in their trial.
- e) The quality of the interpretation must be sufficient for the accused person and the court to understand the proceedings in the court.
- f) Whereas it is good practice for the accused person to object to the quality of translation, 215 this does not absolve the court of its responsibility to provide adequate interpretation services.
- g) Failure to provide adequate interpretation services will not automatically lead to the setting aside of the proceedings except if the failure results in a substantial miscarriage of justice.
- 220 I will now address the merits of the interpretation in the instant case. According to the record of proceedings, before the court commenced hearing the case against the appellant, the Prosecutor told the Court that he had a Chinese Interpreter in the name of Ssentimba Jackson. The Chief Magistrate then directed Ssentimba to take the interpreter's oath, which he did. Although the record does not show whether the court asked the appellant the language he wanted
- 225 to use in court, the Appellant reportedly responded that he understood Chinese. The charges were then read to the Appellant. He pleaded guilty. The facts constituting the offense were read out, and the appellant confirmed that he had stolen the money. He was convicted, imprisoned for three years, and ordered to compensate the complainants. The record of proceedings does not indicate anywhere where the Appellant objected to the translation or interpretation service being

- 230 rendered. Other factors remain constant; the record shows seamless proceedings with logical responses from the Appellant to the questions he was asked in court.

However, there are challenges with how the Learned Chief Magistrate dealt with the issue of the interpreter. First, the Chief Magistrate assumed that all Chinese people spoke one language called Chinese. According to Ray, whose works appear on Google Scholar, there is no single
235 language called Chinese.

Ray says:

Mandarin is the most-spoken language in the world, with **over 1.5 billion speakers***. ¹</sup>When most people think of "Chinese", it is Mandarin that they are picturing. But Mandarin Chinese is far from the only variant of the Chinese language – or the only language spoken in China...*

In fact, there are a great number of Chinese languages. These include **eight primary spoken dialects** *within mainland China, which are – in the main – mutually unintelligible. Remember – this is a country which is both very large and very, very old. Different regions within the vast expanse of terrain that is China can be separated not only by great distances but also by broadly impassable topographical* 245 *features such as mountain ranges.*

Understanding the situation is complicated by the fact that, while many Chinese people in different geographical areas of the country may not understand each other when they speak their regional dialect, they **may share the same written language***. Even if their pronunciation of different characters within* 250 *that language may vary.*

This is even true across locations as distinct as Taiwan and Hong Kong, for example. Both share, with some important differences, Traditional Chinese characters as their written script. But in Taiwan, Mandarin is spoken. In Hong Kong, most people speak Cantonese.

Ray goes on to say that:

There are eight main variants of spoken Chinese and hundreds of less common ones. However, there is an ongoing debate in linguistic circles as to whether these variants should properly be called dialects or

260 *languages.*

Many of the dialects of Chinese which we'll list below have some degree of intelligibility between them. Some, however, are mutually unintelligible. All have huge variations even within them! These can be as subtle as speakers in different regions having unique accents. They could mean that there are some dialect

¹</sup> Ray S; how many languages are spoken in China

<https://asianabsolute.co.uk/blog/2018/04/24/languages-spoken-in-china/>

265 *words only known in certain areas They could be similar to the differences between US and UK English. Or they may be much, much greater:*

Therefore, considering that there are multiple dialects in the languages spoken by Chinese people, it was important for the court to establish whether the interpreter was proficient and 270 fluent in the dialect the Appellant spoke and understood before swearing him in. In the absence of this vital fact, it is difficult to determine whether the interpretation services rendered by Ssentimba, met the needs of the accused person.

Secondly, the Chief Magistrate did not establish the proficiency and competence of the interpreter. He thought that Ssentimba knew Chinese and was, therefore, capable of interpreting 275 for the court. An interpreter of a foreign language is like an expert witness who must satisfy the court that they have acquired the necessary technical skills and proficiency in the relevant to the level that is sufficient to help the accused and court understand and participate in the proceedings. In this particular case, the court should have ascertained what language the Appellant understood and then ascertained the academic and experience profile of Ssentimba before swearing him as an 280 interpreter.

Thirdly, the court did not give sufficient consideration that the Appellant was unrepresented and, therefore required a little exercise of diligence in determining whether he was following the proceedings with sufficient intelligence to understand and defend himself against the charges. This is particularly, important for foreign citizens, who appear in our courts. It is safe to assume 285 that they know so little about our legal regime and that in the absence of consular assistance or of legal counsel, they are assisted to fully participate in the trial. This however, should not be interpreted to mean that foreigners have better rights than locals but rather should be seen as a way of helping them to operate at the same level playing field as the locals.

In light of the above three shortcomings in the provision of interpretation services, it is not 290 possible to determine with exactitude whether the interpretation services provided were adequate and sufficient for the Appellant to understand the proceedings in court. However, before I conclude this matter, I shall address the question raised by the Learned Senior State Attorney of why the Appellant is complaining of poor interpretation services when he never raised them during the trial.

- 295 As submitted by the Learned Senior State Attorney, I should have expected the Appellant, the General Manager of China North Machine Company Limited and obviously an educated man, to object to the interpretation if he was not following or understanding the proceedings in the court. Instead, the Appellant participated in the proceedings as if everything was normal. Prima facie, if the record of proceedings is taken the way it is, there are no reasons for me to believe that the 300 Appellant never understood the proceedings against him. Be that as it may, failure by the Appellant to object to the quality of interpretation is not fatal, as the legal burden of providing competent and adequate interpretation services lies on the court rather than the accused person once the accused has asked for the service. The accused cannot therefore be faulted for inadequate

interpretation services if the court fails in its duty.

- 305 As I observed above, the learned Chief Magistrate failed to exercise due diligence in determining whether Ssentimba, the selected interpreter, was proficient and conversant with the dialect of Chinese language spoken by the Appellant. He also did not exercise diligence in establishing Ssentimba's academic competencies and skills in the Chinese dialect spoken by the Appellant. The exercise of due diligence by the court was even more heightened in this case as the Appellant
- 310 was facing a felony, which attracts a sentence of ten years' imprisonment. Additionally, the Appellant had also pleaded guilty. The Appellant's liberty could only be taken away after the court was satisfied that he fully knew and understood the case he was pleading guilty to.

The Appellant was physically in court. He listened to the proceedings. He participated in the proceedings. However, the lack of effective interpretation services legally excluded him from the 315 trial and prevented him from confronting his accusers in court by raising an informed plea to the charge. It is irrelevant that the proceedings made good reading because, without the appellant being able to defend himself, their validity can only be as good as the quality of the interpretation services. I am persuaded by the reasoning in the **Iqbal case** supra, where the conviction was set aside because of inadequacies in interpretation services to hold that the Appellant, in this case,

- 320 did not enjoy a fair trial. The gaps in the interpretation services in the instant case were fundamental and went to the roots of a fair trial that they should not be left to stand. Therefore, I am giving the Appellant the benefit of the doubt by quashing the conviction and sentence imposed by the learned Chief Magistrate.
- 11

The Appellant shall be subjected to a new trial in accordance with the law after a suitable 325 interpreter is identified by the court. In the meantime, the Appellant shall remain in custody as he waits for his trial unless he is granted bail by the Chief Magistrate, Buganda Road Court.

7.0 Decision

Ground II of the Appeal has succeeded and therefore disposed of the entire appeal. I therefore make the following orders:

- 330 a) The conviction and sentence of the Appellant is set aside.
- b) The Chief Magistrate, Buganda Road Court, is directed to re-try the Appellant.
- c) In the meantime, the Appellant shall remain in custody as he waits for re-trial unless the Chief Magistrate grants him bail.

It is so ordered.

Gadenya Paul Wolimbwa **JUDGE** 340 25th October 2023.

I request the Deputy Registrar to read this decision on 26th October 2023.

Gadenya Paul Wolimbwa **JUDGE** 25th October 2023.

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