



**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA  
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**Case No: SS169/2006**

In the matter between:

**THE STATE**

and

**NIZIYIMANI SAIDI**

Accused

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Coram: YEKISO J

Heard: 8 February, 20 & 22 March 2007

Delivered: 22 March 2007

Summary:

Use of translation services of *ad hoc* interpreter – difference between official interpreter and casual interpreter explained – requirements for and manner of swearing casual interpreter explained.

Witness statement – evidence of witness differing materially from contents of earlier written statement made to the police – bringing veracity of evidence at trial into question.

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**REASONS FOR THE ORDER GIVEN ON 22 MARCH 2007**

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**YEKISO, J**

[1] Once again, this is one of those matters that constantly get referred to this Court in terms of section 52(1) of the Criminal Law Amendment Act, 105 of 1997 (hereinafter simply referred to as the Criminal Law Amendment Act), for consideration and imposition of an appropriate sentence after a conviction in the regional court of an offence referred to in Part 1 of Schedule 2 to the Criminal Law Amendment Act.

[2] The matter initially came before me on 8 February 2007 when I had same postponed till Tuesday, 20 March 2007 to afford the magistrate who presided at trial an opportunity to respond and let me have her comment to queries I raised with her per my letter dated 8 February 2007. As at 22 March 2007 I had not as yet received a response from the magistrate. Because of lack of response from the magistrate, I was unable to determine if the proceedings in the regional court were held in accordance with justice, as I am required to do in terms of section 52(3)(b) of the Criminal Law Amendment Act. In view thereof, I set the conviction of the accused on a charge of rape aside and ordered that the accused be released from custody. I did not then give full reasons for the order I made. I merely indicated to the

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parties that the reasons for the order I made would be furnished in due course. In the paragraphs which follow are the reasons for the order I made.

[3] As pointed out in the preceding paragraph, the accused in this matter was charged with rape, the allegation against him according to the charge sheet being that between October and November 2004 and at or near Mandalay in the regional division of the Western Cape, the accused, being a male person, unlawfully and intentionally had sexual intercourse with the complainant, one Sinazo Mnqeta, a female person, without her consent. The charge sheet, and as well as evidence led at trial, indicates that the complainant was eight years of age at the time of the alleged commission of the offence.

[4] The accused, who was legally represented throughout his trial, pleaded not guilty to the charge preferred against him. As a basis of his defence it was contended on his behalf by his legal representative that the accused did not know the complainant, denied having had sexual intercourse with the complainant and thus placing virtually each one of the elements of the offence with which he was charged in dispute.

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[5] After hearing evidence and argument on behalf of the parties, the magistrate concluded that the State succeeded to prove its case beyond reasonable doubt and thereupon convicted the accused of rape as charged. As the magistrate was of the view that the offence of which the accused was convicted is an offence referred to in Part 1 of Schedule 2 to the Criminal Law Amendment Act, thus warranting a sentence in excess of the jurisdiction of the regional court, the accused was committed to this court in terms of section 52(1) of the Criminal Law Amendment Act for consideration and the imposition of an appropriate sentence.

[6] Once furnished with the record of the proceedings at trial, the initial task in matters of this nature is to ascertain and satisfy oneself that the proceedings at trial were held in accordance with justice. It is only when satisfied that the proceedings in the regional court were held in accordance with justice, that one can confirm the conviction, accept the record of those proceedings as part of the proceedings in the High Court and thereafter proceed with sentencing proceedings.

[7] Once I had considered the record of the proceedings at trial I noted that the accused was a Burundian national and that the services of a casual interpreter were utilised to translate his evidence into the record. There is no

indication on the record of the proceedings if the casual interpreter was sworn in before the commencement of the proceedings, nor whether any enquiry was held to establish the linguistic competence of the casual interpreter to interpret from the language of the accused into the English language and vice versa. I further noted on basis of the trial record that at some point during the course of trial a reference was made to a previous inconsistent statement made by the complainant to the police the contents whereof differed materially from her evidence at trial; that the magistrate omitted to accept such inconsistent statement into the record of the proceedings and that there was absolutely no reference to this statement in the evaluation of evidence.

[8] When the matter came before me on Thursday, 8 February 2007 I raised the issues referred to in the preceding paragraph with the parties' legal representatives. I pointed out to the parties that in view of the issues raised, I had doubt if the proceedings in the regional court were held in accordance with justice. I then had the matter postponed till 20 March 2007. As required in terms of section 52A(3)(b) of the Criminal Law Amendment Act I addressed a letter to the magistrate who presided at trial seeking her comment on the issues raised and directed her to let me have her response and comment well in advance of 20 March 2007 so that when the matter resumes before me on the latter date, I would have had the benefit of her

comment in determining whether the proceedings in her court were held in accordance with justice

[9] The queries I raised with the magistrate are contained in paragraph 4 of my letter of 8 February 2007. The content thereof reads as follows:

“4.1 In as much as the casual interpreter was used in the proceedings in the Regional Court, I shall be grateful if the magistrate who presided in the matter will advise me with regards to the following:

4.1.1 I note, on basis of the record annexed to the charge sheet, that a Mr Isaac Mungai Kinyanjui was used as the casual interpreter and, ostensibly, sworn in for this purpose. With regards to this issue I shall be grateful if the magistrate who presided in the matter could advise if she did enquire and establish the following:

4.1.1.1 The home language of the casual interpreter used as the interpreter in the proceedings.

4.1.1.2 The accused's home language.

4.1.1.3 What language the interpreter used to interpret / translate the evidence from English to the language of the accused.

4.1.1.4 Whether the home language of the interpreter is the same as that of the accused.

4.1.1.5 Whether any formal enquiry was made to establish the interpreter's expertise and the linguistic competence to interpret the evidence from the English language to the home language of the accused.

4.1.2 I note that on 12 October 2005 another casual interpreter was used in the person of B Ochora. The same queries raised with regards to Isaac Mungai Kinyanjui apply *mutatis mutandis* to B Ochora..

4.2 It appears on basis of the evidence on record that the complainant made a previous inconsistent statement, the contents of which have been confirmed by the Investigating Officer in the person of Inspector Le Roux. As regards this latter issue, I shall be grateful if the magistrate who presided at trial could advise and comment on the following:

4.2.1 Why, when it became evident that the complainant made, ostensibly, a previous inconsistent statement, which appears to have differed materially from her evidence at trial, did the Court not recall the complainant in order to clarify this inconsistency and discrepancy.

4.2.2 Why did the magistrate omit to accept what ostensibly is an inconsistent statement into the record of the proceedings, particularly when the author of the statement in the person of the Investigating Officer confirmed the contents thereof..

4.2.3 Why no reference is made to the ostensible inconsistent statement in the evaluation of evidence.”

[10] As at 19 March 2007 no response had as yet been received from the magistrate. I thereupon directed my registrar to address a further letter to the magistrate concerned pointing out to her that her response had not, as at 19 March 2007, been received and further directed that she should let me have

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her response to my queries no later than 12h00 on Tuesday, 20 March 2007. On Tuesday, 20 March 2007 I had the matter further postponed to Thursday, 22 March 2007 with the hope that the magistrate would in the interim furnish me with a response to my queries. As no response had as yet been received as at Thursday, 22 March 2007, I proceeded to set aside the conviction of the accused as I could not, in the absence of a response to my queries, conclude that the proceedings in the regional court were held in accordance with justice.

[11] It is evident on basis of paragraph 4 of my letter of 8 February 2007 that my query to the magistrate, in effect, related to whether the casual interpreter, whose translation service was used, was properly sworn in and also a comment why no reference was made, in the evaluation of evidence, to the statement the complainant made to the police the contents of which appeared to differ materially from her evidence at trial. It is on the basis of these two issues that I concluded that the proceedings in the regional court were not held in accordance with justice. In the paragraphs which follow I shall proceed to deal with these two issues.

### **USE OF CASUAL INTERPRETERS**



[12] Section 6(2) of the Magistrate's Court Act, 32 of 1944, places a duty on the magistrate to call a competent interpreter if he or she is of the opinion that the accused is not sufficiently conversant in the language in which the evidence is given to translate such evidence into a language with which an accused person professes to be sufficiently conversant. This position was later entrenched in section 35(3)(c) the Constitution of the Republic of South Africa, 1996 which confers upon every accused person the right to be tried in a language that he or she understands or, if that is not practicable, to have the proceedings interpreted in that language.

[13] The Magistrate's Court rules, promulgated in terms of the since repealed section 25 of the Magistrate's Court Act, provide for an oath or affirmation to be taken by an interpreter upon entrance into office. The rule draws a distinction between an interpreter and a casual interpreter. Rule 68(3) provides for an oath or affirmation to be taken by a casual interpreter. It provides that whenever a casual interpreter is appointed to interpret in a particular case he or she shall be required to take an oath or to truly affirm, before a judicial officer, that he or she shall truly and correctly, to the best of his or her ability, interpret from the language he or she is called upon to interpret in the proceedings into either of the official languages and vice versa. To the extent that the rule still refers to a translation into either of the

official languages, it would appear that the rule is outdated or obsolete in view of the eleven official languages proclaimed in section 6 of the Constitution. But what is abundantly clear is that such an oath or affirmation shall be taken before a judicial officer and should be administered in the manner prescribed for the taking of an oath or affirmation.

[14] The duty of the presiding judicial officer in an instance where the translation service of an *ad hoc* interpreter has to be made is succinctly described by Binns-Ward AJ in the matter of *Emmanuel Mponda v The State*, a judgment handed down in this Court on 27 August 2004 and subsequently reported in the All South African Law Reports under the citation *Mponda v S* [2004] 4 All SA 229 (C). At p237 para [34] Binns-Ward AJ observes that when the services of an *ad hoc* interpreter are used in trial proceedings, it is essential that the presiding officer formally satisfy him or herself as to the relevant expertise of the interpreter. He further observes that this would ordinarily be done by swearing in the interpreter in open court during the proceedings and by appropriately questioning the interpreter to establish his or her linguistic competence before the interpreter commences with the functioning of interpreting any evidence. I would add that such an enquiry and the subsequent swearing in should be formally recorded in the record of the proceedings.

[15] In the instance of this matter, the record shows that on 17 August 2005 use of an *ad hoc* interpreter in the person of one Isaac Mungai Kinyanjui was made and apparently sworn in for this purpose. The record shows that the swearing in process took the following form “Mr Isaac Mungai Kinyanjui declare (sic) under oath. I swear that I will interpret truthfully and correctly and to the best of my ability – So help me God [sworn in]”. The trial did not commence on the aforementioned date and the matter was postponed to 25 August 2005 to afford the accused an opportunity to consult with his legal representative for purposes of trial and also for the defence to be furnished with further particulars for purposes of trial. The magistrate responded to my queries per a letter dated 26 March 2007. In her response the magistrate points out that Mr Kinyanjui, a casual Swahili interpreter, only assisted in interpreting two postponements and that she held a short enquiry into his language competence but that she had failed to note down the enquiry on the charge sheet.

[16] On 25 August 2005 the matter was further postponed till 16 September 2005 ostensibly for trial. The following is recorded on the occasion of this postponement “PP – Three languages used – 16/9/05. Ms Fick confirm (sic) date. Rem 16/09/05 p + t” (the latter ostensibly meaning for plea and trial). There is

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no indication on the record of the proceedings as regards into which language the interpreter had undertaken to interpret truthfully, correctly and to the best of his ability and vice versa. There is further no indication in the record of the proceedings if the magistrate made an enquiry to establish the linguistic competence and proficiency of the interpreter to interpret into the language in which the evidence was to be recorded.

[17] The trial commenced on 16 September 2005 before Ms G De Wee, regional magistrate. A Ms Mtetwa is on record as having been the interpreter. There is no indication on record if a Swahili interpreter was used and if so, who he was. To make matters worse there is no record if whoever was used as an *ad hoc* interpreter was sworn in before the commencement of the proceedings. In her response dated 26 March 2007 the magistrate indicates that on the occasion of the commencement of trial on 16 October 2004 a Mr B Ochora (his first name is not given in full, only the initial "B") was the casual interpreter used for the duration of the trial. The response further indicates that the magistrate did conduct an enquiry into his linguistic competence before the commencement of trial. However, there is absolutely no indication in the entire record of the proceedings as regards at what stage of the proceedings such an enquiry was held and, if indeed such an enquiry and subsequent swearing in was held, whether same was held in an open court.

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I had virtually combed the entire record of the proceedings and, regrettably, I could not find anywhere in the record if Mr B Ochora was ever sworn in as an interpreter nor any enquiry into his language proficiency. The magistrate's court is a court of record. Whatever is done which is directly related to the proceedings has to be recorded in the record of the proceedings. It cannot just be accepted that a procedure, which is not recorded, was followed purely on the magistrate's *ipse dixit*.

[18] Omission or failure to properly swear in a casual interpreter has a potential for grave consequences. As I have already pointed out a distinction is drawn between an officially appointed interpreter and an *ad hoc* or casual interpreter. An official interpreter, who invariably would be an officer in the public service, does not have to be sworn in on each occasion he performs a translation service whilst an *ad hoc* or casual interpreter, on the other hand, has to be sworn in in respect of each case he has to perform a translation service in court proceedings.

[19] In *S v Naidoo* 1962(2) SA 625(A) the then Appellate Division held that the account by an unsworn interpreter of the testimony of a witness who gives his evidence through an unsworn interpreter must be regarded as unsworn testimony and that such testimony is inadmissible. The Appellate Division

further held that in the absence of any other evidence to justify a conviction, the conviction based on the evidence procured through the translation service of an unsworn interpreter ought to be set aside. In the instance of this matter the unsworn testimony is limited to the evidence emanating from the accused, for it is only the accused testimony which was translated into the record through the translation service of the unsworn interpreter. There is other evidence on record which is not contaminated by the unsworn translation but which nonetheless tends to implicate the accused. But before dealing with such evidence, I need to raise a caution arising from what appears to be an increasing demand for use of casual interpreters to render translation services for accused persons who are immigrants from other countries in the continent and whose home languages are neither of the eleven official languages nor proficient in any of the eleven official languages.

[20] Since the advent of democracy in April 1994 there was an emergence of influx into South Africa of a considerable number of legal and illegal immigrants from many parts of the world and the continent. Such persons, invariably in the course of their stay in South Africa, do have an encounter in criminal courts either as accused persons or witnesses. In such instances, as in the instance of this matter, the courts often find themselves having to use two interpreters, one for the language commonly used in South Africa and

the other to interpret in a foreign language. When such persons do have an encounter with the law and end up being accused persons, they become entitled to all those fair trial rights listed in section 35(3) of the Constitution and, in particular, a right to have the proceedings interpreted in the language they understand. An effective communication with such accused persons is an essential principle of a fair trial which cannot be achieved without the use of properly sworn in interpreters. Presiding judicial officers will obviously realise the importance and the significance of proper presentation of evidence through the use of properly sworn in interpreters to ensure such accused person's right to fair trial and the right to adduce and challenge evidence is not compromised.

[21] As was held in *S v Naidoo*, supra, the consequence of tendering the accused's evidence through the medium of an unsworn interpreter is that the evidence emanating therefrom is unsworn evidence which, in the nature of things, is inadmissible. Section 35(3)(i) of the Constitution confers on every accused person a right to adduce and challenge evidence. The consequence of placing unsworn testimony through translation service of an unsworn interpreter not only violates the accused's right to adduce and challenge evidence but negates the very right to fair trial. To the extent that the accused's rights in this matter have been violated in the manner

described, I cannot, in the absence of any other evidence implicating the accused, conclude that the proceedings in the regional court were held in accordance with justice. This brings me to the question as to whether, despite the irregularity of the proceedings occasioned by the use of an unsworn interpreter, there is nonetheless any other admissible evidence implicating the accused to justify a conviction.

### **THE COMPLAINANT'S EVIDENCE**

[22] There is an aspect of the evidence on record which casts some doubt on the veracity of the complainant's evidence. This evidence relates to a previous statement made by the complainant to the investigating officer the contents whereof appear to differ materially to the complainant's evidence tendered at trial. In the paragraph which follows I shall briefly summarise the evidence tendered by the complainant and thereafter proceeded to determine if the omission by the magistrate to accept the complainant's previous inconsistent statement into the record of the proceedings and the magistrate's omission to refer to this aspect of the proceedings and the evaluation of evidence compromised the integrity of trial.

[23] The evidence of the complainant, in broad terms, boils down thereto that on the day of the alleged commission of the offence she had been to school



until about 13h30. Once she had taken off her school uniform she left her home to go and visit her friend, Zoleka. Whilst on her way to Zoleka she met with yet another friend of hers, Thandeka. The two of them went to a nearby mosque at Mandalay. In the mosque there was the accused, who she knew as Delley, together with another adult male person whose particulars she did not know. Whilst in the mosque, the accused, who she refers to in her evidence as Delley, came to her, undressed her and had sexual intercourse with her. Thandeka, her friend, went to this other unknown person who, it appears on basis of the complainant's evidence, also had sexual intercourse with her (Thandeka).

[24] The fact of the complainant's earlier inconsistent statement emerged in the course of the accused's inadmissible evidence whilst purportedly testifying in his own defence. For inexplicable reasons the accused's legal representative, who it appears had taken the matter over from another attorney, was unaware of the existence of this statement which appears to have been amongst other documents in her file. Once this statement was found it was handed in to the presiding magistrate who noted that although the statement was signed, it had not been commissioned. This necessitated the magistrate causing the investigating officer to be called.

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[25] The investigating officer in the person of one Inspector Le Roux, confirmed that he obtained the statement from the complainant, confirmed the contents thereof and went on to say that the statement was not commissioned through oversight on his part. Questioned by the court about the discrepancy between the earlier statement and her evidence at trial, the investigating officer could only explain that when the initial statement was obtained from the complainant, she was traumatised. Whilst I accept that the complainant's experience was traumatic, and whilst I accept that women and children are the most vulnerable members of our society, the courts should nonetheless guard against the vulnerability of women and children being a substitute for proof beyond reasonable doubt.

[26] The complainant was not recalled to explain the discrepancy in the statement obtained by Le Roux. The statement concerned was not accepted by the magistrate to form part of the record of the proceedings nor did the magistrate refer to this statement in the evaluation of evidence. As I have already pointed out, this statement clearly casts a considerable doubt on the veracity of the complainant's evidence. The fact that the conflict between the complainant's evidence at trial and the content of the statement obtained by Le Roux was not clarified and the fact that no reference was made on this

aspect of the evidence in the evaluation of evidence further casts doubt if the proceedings in the regional court were held in accordance with justice.

[27] It is for the reasons set out in paragraphs [3] to [26] of this judgment that I could not confirm the accused's conviction which I subsequently set aside.

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N J Yekiso, J