



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 67 OF 2017

ELVIS MWANIKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal against the judgement and sentence of Hon. L. Kassan (SPM) in Mavoko SPM Cr. Case No.474 of 2016 delivered on 11<sup>th</sup> July, 2016)*

JUDGEMENT

1. The appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 297(2) of the Penal Code. The particulars of the offence were that the appellant on the night of 21<sup>st</sup> June, 2016 at Boma Estate- KMC area in Athi River Sub-county within Machakos County while armed with an offensive weapon namely knife robbed Evans Mwangela of cash Kshs 22,000/- and one mobile phone make Nokia Asha all valued at Kshs 27,000/- the property of Mary Mwangela and at the time of such robbery with violence threatened to use actual violence to Evans Kivuti Mwangela.

2. The appellant pleaded guilty to the charge and was sentenced to suffer death. The grounds of appeal as amended thereto are that:-

- 1. The learned trial magistrate erred in law and fact when he sentenced the appellant to death, yet failed to find that no conviction was pronounced*
- 2. The learned trial magistrate erred both in law and fact when he sentenced the appellant to death on a fatally defective charge sheet.*
- 3. The learned trial magistrate erred both in law and fact when he passed an ambushed sentence against the appellant.*
- 4. The learned trial magistrate erred in both law and fact then he sentenced the appellant to death yet to find that his constitutional rights to fair trial were violated.*

3. The appellant submits that after a plea of guilty was entered the trial court did not enter a conviction but instead entered a sentence. The appellant further contended that the charge sheet was duplex. Further the particulars of the charge sheet feature three people, the victim who was robbed of cash, the owner of the phone and the one who was threatened with violence thus these mixed names render the charge sheet defective. It is also submitted that the steps to a conviction based on a plea of guilty were not observed. That there was no examination by a mental expert to declare the appellant fit to stand trial, and he submits that the appeal be allowed, conviction quashed and sentence set aside.

4. Mr. Cliff Machogu, prosecution Counsel, has conceded the appeal. Counsel submits that Section 281 of the Criminal Procedure Code provides for the plea but does not give the steps to take when a court is taking plea. He submitted that the case of **Adan v Republic(1973) EA 445** sets out the steps to be taken in recording a plea and argued that after taking plea, the next step should be conviction, wherefore the trial magistrate did not make a determination on conviction but proceeded to pass the sentence . He argues that this is an error that goes to the root of the criminal proceeding thus rendering the whole process a nullity. Counsel further submitted that mitigation is an important element of a fair trial and the trial magistrate did not give the appellant a chance to mitigate hence violated the appellant's right to a fair trial. He relied on the case of **Sango Mohamed Sango & Another v Republic, Criminal Appeal No 1 of 2013 (2015) eKLR**. In conclusion, he invited the court to find that the plea was not unequivocal and the trial court failed to follow the required procedure thus the conviction and sentence be quashed and that this court make an order for retrial.

5. The facts of the case indicate that the incident occurred at about 9.00am on 21/6/2016. The appellant was arrested on 25.6.2016 and the plea was taken on 27.6.2016 and change of plea took place on 11/07/2016

6. The issues for determination are whether the conviction was unsafe due to failure to conduct a mental assessment test; whether the plea was unequivocal; whether the procedure that the trial court followed was proper and whether the sentence was proper.

7. The appellant has argued in his submissions that it was wrong for the Trial Court to have proceeded with the trial without first calling for a mental assessment report of the Appellant. However this is not in the Grounds of Appeal. However, I find that the Trial Court record does not have any indication that there was an attempt to bring to its attention the suspicion that the Appellant was mentally ill. It also does not have any indication that the Appellant behaved in any way that would have alerted the Trial Court that the Appellant was anything other than mentally sound. Indeed, his mitigation would seem to suggest an ability to logically communicate in a way which would not raise any concern in the mind of the Trial Court as to his mental status.

8. Section 11 of the Penal Code provides as follows:

***Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.***

9. On the other hand, section 162 reads as follows:

***162. (1) When in the course of a trial or committal proceedings the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness.***

***(2) If the court is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, it shall postpone further proceedings in the case.***

10. The law is that every accused person is presumed to be of sound mind under section 11 of the Penal Code. The burden is on the Accused Person to rebut this presumption. However, the Court is obligated under section 162 to take action – for example by ordering a mental assessment – where it comes to the attention of the Court that the Accused Person may be of unsound mind. In this case, the Trial Court cannot be faulted for proceeding as it did in the circumstances. There was simply no material brought to the attention of the Trial Court to suggest that the Appellant was of unsound mind to warrant further inquiry by the Court. In the circumstances, I find this argument unavailable to the Appellant.

11. I shall now address the issue of whether the plea was unequivocal. The learned prosecution counsel has questioned the procedure that the trial court took in eventually sentencing the appellant. The record of the trial Court shows that the appellant stated that he understood English and Kiswahili. The original record of the trial Court indicate that the charge was read over to the appellant in English and Kiswahili by the Court assistant, and the said appellant pleaded not guilty on 27/6/2016 and the matter was fixed for mention on 11/7/16. On the said 11/7/16 the facts were read over to the appellant. The language is not indicated but it can be presumed that the facts were read in English or Kiswahili language. The appellant responded by stating that the facts were true. The trial court entered a plea of guilty and when appellant was warned of the penalty, he stated that he knew and was ready to plead guilty. He was not allowed to mitigate. The charge was read over and explained to him in Kiswahili wherein he stated that all the facts were true and correct. The facts were read over again in Kiswahili and the appellant stated that all the facts were true and correct and the appellant was further warned that he faces the death penalty. The trial court observed that the appellant was acting very normal and there was no reason to doubt his mental status. This leads to the logical conclusion that he was fully aware of the proceedings and fully participated in the taking of the plea. The appellant was then sentenced to death

12. Counsel for the prosecution in his submissions relied on the case of *Adan V Republic [1973] E.A. 445* In that case, the Court of Appeal of East Africa laid down the steps to be taken where there is a guilty plea as follows:

***(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;***

***(ii) The accused's own words should be recorded and if they are in admission, a plea of guilty should be recorded;***

***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;***

***(iv) If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***

***(v) If there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.***

The Court in that case at pages 446-447 observed as follows:

***When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect,***

*the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused reply must, of course be recorded.*

*The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.*

13. Section 207 of the Criminal Procedure Code (Cap 75) states as follows:

*(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty or guilty subject to a plea agreement.*

*(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:*

*Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.*

*(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.*

*(4) If the accused person refused to plead, the court shall order a plea of "not guilty" to be entered for him.*

*(5) If the accused pleads –*

*(a) that he has been previously convicted or acquitted on the same facts of the same offence; or*

*(b) That he has obtained the President's pardon for his offence,*

*The court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.*

14. **Section 169** of the Criminal Procedure Code deals with the contents of a Judgment and from the record the appellant was sentenced on his own guilty plea. No Judgment was written by the trial court.

15. Article 50 (2) of the Constitution provides for the right of every accused person to a fair trial.

16. The circumstances of this case are that the appellant pleaded guilty to the charge. He appears to have understood the allegations against him and opted to admit having committed the offence. The only remaining procedure after the appellant pleaded guilty was for a conviction and for the appellant to mitigate. From the record the appellant made no mitigation and no conviction was recorded by the Court. There was a violation of the appellant's Constitutional rights and the prosecution has submitted that an order for retrial be made.

17. However, a re-trial is not ordered as a matter of course but rather, it is intended to ensure that a fair trial is accorded to a party without causing prejudice to the party against whom such an order is sought to be made.

18. As was stated in the case of Ahmed Ali Dharmasi Sumar vs Republic 1964 E.A 481 and restated in Fatehali Manji vs The Republic 1966 E.A. 343:-

**"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."**

19. In addressing the question of prejudice to be suffered by an appellant when a matter is to be referred for a re-trial, in the case of Joseph Ndungu Kagiri v Republic [2016] eKLR, Mativo J had the following to say:-

**"As held above under no circumstances should prejudice be caused to an accused person. I therefore find that the entire trial was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial, and therefore the entire proceedings in criminal case number Nyeri Criminal Case Number 254 of 2011, Republic vs. Simon Murage Mutahi & Another are hereby declared to be a nullity and are hereby quashed. I therefore find that this appeal is successful. Accordingly, I hereby allow the appeal, quash the entire proceedings and set aside the orders made in the said case."**

20. Notably as was stated in the case of **Ahmed Ali Dharmsi Sumar vs Republic (Supra)** and restated in **Fatehali Manji vs The Republic (Supra)**, in deciding whether a case is suitable for re-trial, each case depends on the particular circumstances. In the present case, the Appellant herein has been incarcerated since 11.7.2016. The complainants are known and hence there is a high chance that witnesses can be traced and or are readily available which could speed up the process of trial if a fresh trial is ordered and in addition, the prosecution has conceded to a retrial being conducted. In addition, from my above analysis, there are **defects in the original trial and hence the need for a retrial.**

21. It is therefore my considered opinion that a re-trial would be the best to afford justice to the parties. It is also noted that the Appellant has barely served a fraction of the sentence is thus not prejudiced by an order for retrial.

22. Given the above scenario, I do find that there is no need to address the issue of sentence.

23. In the result this appeal succeeds. The conviction by the trial court is quashed and the sentence is set aside. The appellant is ordered to be released from prison custody and escorted to Athi River police station from where he is to be produced before the Principal Magistrate's Court at Mavoko on the 29<sup>th</sup> day of **November, 2018** for purposes of retrial.

**Dated, Signed and delivered at Machakos this 27<sup>th</sup> day of November, 2018.**

**D.K. KEMEI**

**JUDGE**