REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.44 OF 2015

(An appeal from original conviction and sentence of Kilgoris PM Criminal Case No. 226 of 2015 by Hon. A.K. Kithinji Ag. SRM dated 2nd March, 2015)

KEPHA OMARI NYABUTO ……..…...…….APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

1. The appellant herein KEPHA OMARI NYABUTO was charged with one count of Robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the offence were that on 25th February, 2015 at [Particulars Withheld] Sub-location, Bassi Central Location in Nyamache Sub-county within Kisii County, jointly with another not before the court robbed J G O of one blanket, one Nokia phone, one calculator, one panga, Kshs. 1,500/= all totalling to Kshs. 5,350/= and during the time of such robbery, used actual violence on the said J G O.

2. The appellant also faced the 2nd count of gang rape contrary to section 10 of Sexual Offences Act No. 3 of 2006 the particulars being that on 25th February 2015 at [Particulars Withheld] Sub-location, Bassi Central Location in Nyamache Sub-County within Kisii County, jointly with another not before the court intentionally and unlawfully caused his penis to penetrate the vagina of J G O without her consent.

3. The appellant also faced an alternative charge to count 2 being the charge of committing an indecent Act with an adult contrary to Section 11 (A) of the Sexual Offences Act no. 3 of 2006. The particulars of the alternative charge were that on 25th February 2015 at [Particulars Withheld] Sub-location, Bassi Central Location in Nyamache Sub-county within Kisii County intentionally forced the vagina of J G O with his penis against her will.

4. The appellant pleaded guilty to both counts and was consequently convicted on his own plea of guilty and sentenced to suffer death according to the law on count 1 while the sentence for the 2nd count was held in abeyance.

5. Notwithstanding his plea of guilty, the Appellant was aggrieved by the conviction and sentence hence lodged an appeal to this court wherein he challenged the manner in which his plea was taken. He contended that he pleaded guilty due to threats which were issued by police officers and community policing. He contended that he was a lay man who did not understand the procedure of law. He therefore prayed that his appeal be allowed sentence set aside, conviction quashed and the case sent back to the subordinate for a retrial. He also argued that the learned magistrate should have considered the circumstances under which he was compelled to plead guilty as he could have been a victim of police

manipulation.

6. When the appeal came for hearing on 3^{0th} March 2017, the appellant, who was unrepresented relied on the grounds on his petition of appeal while Miss Ouko counsel for the state informed the court that the state did not oppose the appeal on the grounds that the charge sheet was defective because at count I, the sections of the **Penal Code** referred to were **Sections 295 and 296 (2)** of the **Penal Code** which sections rendered the charge defective for being a duplex as the sections disclose to two different offences with different penalties contrary to the provisions of **Section 134** of the **Criminal Procedure Code** which provides for the guidelines on framing of charges.

7. Miss Ouko added that the appellant was therefore prejudiced by the two different offences disclosed in the same charge as it was not clear what sentence would be applicable to him should he be convicted. She urged the court to order for a retrial.

8. Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. The said section provides as follows:-

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence."**

9. In the case of **Olel v Republic [**1989] KLR 444, the court held:-

> ***"Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."***

10. A reading of the above section and authority shows that the appellant is barred from challenging the conviction and his only recourse would therefore be to challenge the extent or legality of the sentence imposed on him by the trial court. Courts have however held that conviction on a guilty plea can be challenged where the plea was not unequivocal. In the instant case therefore, conviction having been on a plea of guilty, the only way this Court can address itself on the issue is to determine whether the plea recorded by the lower court was equivocal which would make the conviction unlawful thus allow this Court to address itself on that issue of conviction.

11. As a first appellate court, this court is required to look afresh at the evidence presented before the trial court and evaluate the same so as to determine whether the proper procedure was followed in recording the plea before the appellant was convicted **(see Okeno vs Republic [1972] EA 32)**. In this appeal however no evidence was adduced by the prosecution witnesses as the appellant pleaded guilty to the charges and was convicted on his own plea of guilty. However, even where a guilty plea has been recorded, the appellate court is still under an obligation to scrutinize the proceedings taken during the plea taking with a view to ascertaining whether or not the guilty plea was unequivocal and if the proceedings were properly taken.

12.The correct manner of recording a plea of guilty and the steps to be followed by the court was stated in the celebrated case of ***Adan V Republic,*** (1973) EA 446 where Spry V.P. laid down the procedure at page 446 in the following terms:

> ***"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's reply must of course be recorded."

13. This case was followed by ***Kariuki V R***(1984) 809 where their Lordships reiterated those steps as follows;

a. ***the trial magistrate or Judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;***

b. ***he should then record accused's own words and if they are an admission, a plea of guilty should be recorded;***

c. ***the prosecution may 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;***

d. ***if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused reply.***

See also ***Korir v. Republic*** **[**2006] E.A. 124

14. My task in this appeal is therefore to determine whether the above procedure was followed in the trial court. For this reason, I will reproduce verbatim the facts of the case as read to the appellant in the trial court and his response thereof. The facts as stated by the court prosecutor were that:

"On 25th day of February at 11.30 p.m. the complainant J G was in her home sleeping with her husband and her child. Some men knocked on the door saying they were police officers from Nyamache DC's office. The complainant's husband D O opened the door for them. As soon as he opened the men stormed in while armed with a knife and stick. One of them held complainant's husband and the other held the complainant. The two men commanded complainant and her husband to go to the bedroom. When they got there the accused commanded them to kneel down to kneel beside the bed and cover their heads.

They were warned not to lift their heads at all at the point they started demanding for money. They demanded 20,000/= which they claimed had come from sale of a cow.

Complainant claimed they did not have money. The assailants started beating them and complainant could not bear the beating and he told the accused there are some money in the wallet under the bed.

Accused went under the bed and took the wallet and removed the money. The accused was known by the complainant and she was able to identify him by his voice. Accused took complainant to the table room and held a knife at her ordered her to undress to which she complied. Accused proceeded to have sex with her. As this was happening the other suspect who is still at large was guarding the husband. The ordeal took about 20 minutes and he took her back to the bedroom where the husband was.

Later accused and his accomplice left the room after warning the complainant and his husband not to raise alarm and to remain with their heads on the bed. After 10 minutes complainant's husband noticed they had left. He raised an alarm and neighbours replied and took the complainant to Nyamache district hospital. A P3 form was filled at hospital. The p3 form dated 26/2/2015 is in court. Pex 1. I have the treatment notes dated 26 /2/15 from

Nyamache district hospital. Exh 2. A report was made at Nyamache police station. She knew accused and informed Administration Police from Nyamache Administration camp. They combined the area and were able to arrest accused on 26th February in the afternoon. Accused was well known to complainant. That is all."

15. The appellant was asked to respond to the facts and he stated: ***"facts are correct."***

16. Guided by the legal principles on how a plea of guilty and conviction of an accused person should be recorded by the trial court as set out in the celebrated case of **Adan vs. Republic (1973) EA 445**, I find that the trial magistrate met the requirements for recording guilty plea as the record shows that the Appellant was warned of the consequences of pleading guilty to a capital charge and was clearly informed that he faced a death penalty.

17.I am satisfied that the trial magistrate complied with the directions given in the case of **Adan** (supra) on how a plea should be recorded. The learned trial magistrate recorded what the appellant said in response to the charge and when facts were read to him, he admitted those facts to be true thus the conviction on his own plea of guilty.

18.The appellant contended that he was not warned of the consequences of pleading guilty to the offence of capital robbery and therefore, he stated that his plea of guilty was not properly taken. A perusal of the lower court record however shows that that the trial court warned the appellant as follows:

"COURT

Accused appears not to understand the effect of the plea. He is a Kisii. A Kisii interpreter Mr. Masira executive officer is called to explain the charge and the effects of the plea to the accused. The charge is read again to the accused in Kiswahili which he understands and then also interpreted in Kisii by Mr. Masira Executive Officer which he understands and replies:

Count 1 it is true.

Count 2 it is true."

19. From the record of the proceedings it is clear that the appellant was properly warned of the severe penalty he would face following a plea of guilty to the offence of robbery with violence and that despite the said warning, the appellant still maintained the plea of guilty. It is therefore my finding that the procedure for recording the guilty plea was adhered to by the trial court.

20. The appellant also blamed the police for threatening him with dire consequences if he did not plead guilty to the charges. I however find that having been warned, by the court, of the consequences of a guilty plea, the appellant should have realised that he was staring at a death sentence in the face if he maintained a guilty plea. The appellant did not raise any issue about the threats before the trial court and it is therefore not possible to believe his allegations of threats at the appeal stage.

21. My above findings on the manner in which the plea was taken would have been sufficient to dispose of this appeal but I still have to address my mind to the fact that the state counsel conceded to the appeal on the basis that the charge on the first count was defective for being duplex. I note that count 1 was worded as follows;

"Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code."

22. **Section 295** of the **Penal Code** stipulates as follows:

"295. Any person who steals anything, and, at or immediately before or immediately after the

time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

Section 296(1) of the **Penal Code** provides for the sentence for the felony of robbery in the following terms:

> **"Any person who commits the felony of robbery is liable to imprisonment for fourteen years"**

23. **Section 296(2) of the Penal Code** on the other hand provides:

> **" If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."**

24. Miss Ouko, counsel for the state, submitted that the charge was defective for being duplex as the two cited sections disclose two different offences which attract different penalties and therefore charging the appellant under both sections was in the same count was prejudicial to the appellant's case as it contravened to the provisions of section 134 of the Criminal Procedure Code and it was not clear what penalty would be applicable to the appellant.

25. **Section 134 of the Criminal Procedure Code** provides as follows:

> **"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."**

26. In addition to the above, **Section 135 of the said Code** provides as follows:

> **"(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts, or are part of a series of offences of the same or a similar character.**
>
> **(2) Where more than one offence is charged in a charge or information, a description of each offences so charged shall be set out in a separate paragraph of the charge or information called a count.**
>
> **(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information."**

27. Turning to the present appeal, I am guided by the decision of the Court of Appeal in Joseph **Njuguna Mwaura & 2 Others v Republic [2013] e KLR** ***(Criminal Appeal No 5 of 2008)*** wherein the reasons why charging an accused person with the offence of robbery with violence under sections 295 and 296(2) of the Penal Code would amount to a duplex charge were explained and laid to rest. The said Court, while following its earlier decisions in **Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005)** and ***Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008),*** stated as follows:

> ***"Indeed, as pointed out in*** *Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra)* ***the***

standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person. The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."

28. I am in total agreement with the submissions of Miss Ouko on this point of the charge on count 1 being duplex. I am guided by the findings of the Court of Appeal as stated in the above cited cases that this is the correct proposition of the law, particularly because **section 296(1) of the Penal Code** *provides that a person who commits the felony of simple robbery is liable to imprisonment for fourteen years. I am also of the view that this is not a defect that is curable under section 382 of the Criminal Procedure Code, as the charge, discloses two offences in the same charge namely; simple robbery and robbery with violence, which offences attract different penalties under the law.*

29. *My humble view is that the appellant could not have been in a position to bring the above anomaly to the attention of the court considering that he was unrepresented during the proceedings in the trial Court. It is therefore my finding that this appeal succeeds on grounds that the proceedings were based on a defective charge and t*he only issue that remains to be considered is whether the appeal should be allowed in its entirety or a retrial ordered. Both the Appellant and the state prayed for a retrial.

30. The principles governing whether or not a retrial should be ordered were enunciated by the Court of Appeal of East Africa in the case of **Fatehali Manji v Republic [1966] EA 343** as follows:

"In general, a retrial 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 purposes 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 interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.*"*

31.In **Mwangi v Republic [1983] KLR 522** the Court of Appeal also held thus:

"We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant."

32. In the instant case, the appellant admitted the facts of the case as read to him by the prosecutor during the trial despite warning on the dire consequences of a guilty plea. This Court is therefore persuaded that having regard to the circumstances of this case, the seriousness of the offence and further taking into account the need to balance the interests of both the appellant and the victims of the offence that was committed, a retrial will be appropriate despite the illegality in the original trial proceedings having arisen from the shortcomings on the part of the prosecution in the presentation of the charges in the charge sheet. I therefore allow the appellant's appeal partly and only to the extent of quashing the conviction recorded against him for offence of robbery with violence under section 296(2) of the Penal Code, and consequently, I set aside of the death sentences imposed on him.

33. I however uphold the conviction on the 2nd count of gang rape having found that the plea of guilty was properly recorded in respect to this count. I direct that the appellant be re-tried for the 1st count only and he shall remain in custody and be taken before the Kilgoris Principal Magistrate's Court at the earliest possible time for purposes of sentencing on the 2nd count, should the trial court deem it necessary, and to plead to the appropriate charge(s) on the first count as shall be elected by prosecution.

Dated, signed and delivered in open court this 25th day of May, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mr. Otieno for the State

- Appellant in person.

- Omwoyo court clerk