



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO.42 OF 2015

(An appeal from original conviction and sentence of Kilgoris SPM'S C Criminal Case No. 537 of 2015 by Hon. Wairimu Principal Magistrate dated 18TH May, 2015)

JACKSON EWORI LOKUIAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein **JACKSON EWOI LOKUI** was charged with the offence 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 30th April 2015 at about 10 p.m. at Majengo village, Kilgoris Town in Transmara West Sub-County within Narok County, jointly with another not before the court robbed Raphael Mulatya Makewa of Kshs. 600/= and one sachet of pressure tablets all valued at Kshs. 800/= and immediately before the time of such robbery threatened to use actual violence to the said Raphael Mulatya Makewa. The appellant pleaded guilty to the charge and was consequently convicted on his own plea of guilty and sentenced to suffer death.

2. The appellant has now appealed against the said conviction and sentence and has set down the following grounds of appeal in his petition of appeal:

1. That, your honor, as the appellant, I pleaded guilty of the same offence due to the fact that I was being threatened by the police officers of KILGORIS that if I can't plead guilty of the offence they will shoot me.

2. That, your honor, I am a lay man who does not know the procedure of the law, the learned trial magistrate did not warn me about the outcome of the sentence of the same offence and he decided to convict me to suffer death sentence innocently in the York of jail.

3. That, your honor, I therefore request the honorable court to consider my plea and send me back to RETRIAL so that I may look for a lawyer to represent me during the hearing of the same case.

3. When the appeal came up for hearing, the appellant sought to rely on his written submission wherein he argued that he was a layman and did not know the consequences of pleading guilty to the offence of robbery with violence since the police has misled him that they would assist him with the case if he pleaded guilty to the charges. The appellant faulted the court for failing to warn him of the consequences of pleading guilty and implored the court to revoke the sentence because his fundamental rights under

Articles 47, 49 and 50 of the constitution were contravened. He contended that the death sentence was harsh, manifestly oppressive, inhuman and degrading.

4. Miss Ouko for the state submitted that the facts of the case, as read out to the appellant upon pleading guilty to the charge did not disclose that the offence for which the appellant was charged was actually committed. She added that the facts did not disclose that the appellant was one of the people who emerged from the darkness at 10 p.m. to rob the complainant or if the appellant and the unnamed accomplices had a common intention. She also argued that the appellant was not informed of the sentence attached to the offence of robbery with violence contrary to **Section 296 (2)**.

5. I have considered the petition of appeal and the submission of the appellant and counsel for the state. This is a first appeal and as was held in the case of **Collins Okoyo Kemba & 2 Others vs Republic [2014] eKLR**, the duty of this court is to re-evaluate and re-analyze the whole evidence in a fresh and exhaustive manner before arriving at its own independent decision.

6. In the instant case the appellant pleaded guilty to the offence and this means that there was no need for the prosecution to tender any evidence to support their case.

7. Under the above circumstances, this court will still be under the obligation to analyze the manner in which the plea was taken with a view to determining whether or not it was unequivocal.

8. The principles of recording a guilty plea were laid down in the celebrated case of **Adan vs Republic [1973] EA 445** as follows:

“When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the 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.”

9. In the instant case, the plea was recorded as follows:

“The substance of the charge (s) and every element thereof has been stated by the court to the accused person, in Kiswahili language that he/she understands, who being asked whether he/she admits or denies the truth of the charge (s) replies:-

In Kiswahili

Accused – It is true.

Court

Accused informed of the mandatory death sentence caused by the offence and asked to take a fresh plea with that in mind and he pleads as follows:

Accused – it is true.

Mr. Mugun

The facts are that on 30/4/2015 at around 10.00 p.m.. The complainant called Raphael Mulatya was on his way home with his friend Aranas Kimei they both reside at Majengo. Before this got to the gate this people emerged from the darkness. One of them pulled Francis Kimei behind and the accused caused the complainant to fall down in a ditch which the complainant struggled to stand. The accused person robbed the complainant of his Kshs. 600/= from his left trouser pocket. The accused also took a satchel containing tablets which the complainant had just bought. The complainant screamed and his landlord responded to the call and the landlord identified the accused person. The accused person on hearing the surname and telling the responser sprouted through Majengo village and disappeared. The complainant reported the case the next day and the accused remained at large until 15/5/2015 that police officers which on patrol arrested the accused outside Links Hotel at the time of his arrest the accused person was drunk that is all.

Accused

The facts are true and correct.

Court

Accused convicted on his own of guilt.

Prosecutor

The accused person faced a same similar charge fo robbery in Criminal Case No. 1587/2014 but was discharged under section 2011 criminal Procedure Code. On 19/3/2015 same for that we have no other records.

Accused

I plead for leniency.

Court

As earlier indicated to the accused. The charges made which he was arraigned in court carry a mandatory death sentence. The courts hands are very tied. The accused is sentenced to suffer death as prescribed by the law.

14 days right of Appeal.”

10. From the above extract of the lower court proceedings, it is very clear that the language used by the court during plea taking was indicated as Kiswahili which the appellant understood and he answered to the charges and to the facts in Kiswahili language.

11. Furthermore, the appellant was duly cautioned, by the court, of the consequences of pleading guilty to the capital charge of Robbery with violence which carries a mandatory death sentence whereupon he was granted an opportunity to plead afresh to the charges but he still maintained his earlier plea of guilty. The appellant confirmed that the facts of the case, as read out to him by the prosecutor, were true. In view of the above, I find that the plea was properly taken and I do not accept the submission by the state counsel that the language used by the court was not indicated or that the court did not warn the appellant of the consequences of a guilty plea in capital offence such as the one that the appellants faced before the trial court.

12. I am however in total agreement with the submission of Miss Ouko counsel for the state, that the facts of the case as read out by the prosecution, were vague and did not support the charge of robbery with violence contrary to **Section 296 (2)** of the Penal Code or at all for the following reasons:

Firstly, the said offence allegedly took place at night at 10 p.m. It is alleged that when the complainant screamed upon being robbed, his unnamed landlord responded and identified the appellant. It is however not shown who this landlord was and how he identified the appellant at night considering that it was dark.

Secondly, the facts show that the robber (appellant) allegedly ran away and remained at large for about 2 weeks after committing the alleged robbery and was arrested on 15th May 2015 by police officers who were on patrol. It was not explained how the police were able to identify the appellant as the person who had robbed the complainant a fortnight before his arrest. The facts do not indicate who pointed out the appellant to the police on patrol or if the landlord who had allegedly identified him on the night of the alleged robbery pointed him out to the police at the time of the arrest or identified him at an identification parade. Needless to say, the complainant was reportedly robbed by a group of people and it was not explained how the unnamed landlord was able to pick out one person from the group in the dead of the night. The facts do not disclose that any violence was meted out on the complainant at the time of the robbery.

13. In view of the above foregoing observations, I am not satisfied that the facts of the case supported the charge of robbery with violence contrary to **Section 296 (2)** of the Penal Code or at all. It would therefore be unsafe to uphold the conviction and sentence considering that the plea of guilty to facts that do not disclose an offence or the true identity of the offender cannot be said to be an unequivocal plea of guilty.

14. Consequently, I allow the appeal, quash the conviction, set aside the sentence and direct that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, signed and delivered in open court this 24th day of May, 2017

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Appellant in person

Omwoyo court clerk