REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL NO. 50 OF 2015

KIOKO MUSYOKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. D.G. Karani PM

in Traffic Case No. 129 of 2015 delivered on 26th March 2015

at the Principal Magistrate's Court at Kithimani)

JUDGMENT

Kioko Musyoka, the Appellant herein, was charged in the trial Court with four counts of causing death by dangerous driving contrary to section 46 of the Traffic Act, and a fifth count of carrying excess passengers contrary to section 100(2) of the Traffic Act. The particulars of the four counts of causing death by dangerous driving were that the on 19th January 2015 at about 0830 hours at Kaewa area along Kanyonyo-Embu road, in Masinga District within Machakos County, being the driver of motor vehicle registration number KBU 998U a Toyota probox, he drove the vehicle dangerously causing the death of Peter Mwenga Muthiani; Miriam Monthe Ndambuki; Alice Nduku Musaki; and Purity Betty Josphat.

The Appellant was arraigned in the trial court on 26th March 2015 and he pleaded guilty to the charges. He was convicted on the five counts on his own plea of guilty, and sentenced to serve 4 years in jail for each of the first four counts, which sentences were to run concurrently, and to pay a fine of Kshs 10,000/= and in default to serve 3 months in jail for the fifth count. The sentence in default for the fifth count was also ordered to run consecutively with the sentence imposed in counts one to four.

The Appellant subsequently filed an appeal against the judgment of the trial Court by way of a Petition of Appeal dated and filed in Court on 1st April 2015. The main grounds of appeal are the trial magistrate did not explain to the appellant the substance and legal requirements of the offence charged; the plea was unequivocal; the charge and particulars were not read in a language that the Appellant understood; the court did not record the exact words the Appellant used in court.

The Applicant learned counsel L. N Ngolya & Company Advocates , filed written submissions dated 18th March 2016, wherein it was contended that the trial Court erred in law by convicting the Appellant on a plea that was unequivocal. Further, that there is no evidence on record that the trial Court observed the provisions of section 207(1) of the Criminal Procedure Code as the trial magistrate omitted to state the

particulars of the charge to the Appellant, and instead that words were imposed on the record by a rubber stamp. It was submitted that the plea was mechanically taken and in the circumstances the Appellant cannot be said to have understood the charge he face in Court. Lastly, that the words "it is true" as recorded by the trial Court was not sufficient to amount to a plea of guilty. The Appellant's counsel relied on various judicial authorities including **Adan vs Republic (1973) E.A. 445**

The learned Prosecution Counsel, Rita Rono, opposed the appeal by way of written submissions dated 30th March 2016. It was argued therein that section 207(1) of the Criminal Procedure Code was observed, and from the record the court stated the substance of the charge and elements were read in a language that the Appellant understood. Further, that the facts were read to the Appellant and he confirmed the facts to be correct. Reference was made to decision in **Kariuki V Republic, (1984) KLR 809** which set out the manner in which a plea of guilty is to be recorded. It was submitted that the court adhered to the set out requirements in the said case.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

The prosecution presented the facts of the case as follows. The Appellant was driving the said motor vehicle KBU 998U Toyota Probox ferrying miraa to Kitui. He also had seven passengers on board, and on reaching Kaewa shopping centre along Kanyonyo-Embu Road, he attempted to overtake vehicle registration number KXX 999, a Toyota corolla saloon causing an accident. Both vehicles rolled severally and the driver of the Toyota corolla saloon died on the spot, together with two passengers in the Appellant's vehicle. The prosecution further produced evidence of the said accident including the sketch plans of the scene, inspection reports of the two aforestated motor vehicles, and the post-mortem reports of the deceased.

The issue in this appeal is therefore whether the plea of guilty by the Appellant was unequivocal. The procedure to be applied in taking a plea of guilty were well enunciated in the case *of* **Adan vs Republic, [1973] EA 445** where the Court held 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 an 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 with 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 facts relevant to sentence together with the accused's reply should be recorded."***

The procedure as laid out in ***Adan vs Republic*** (**supra**) is also provided for under *section 207* of the Criminal Procedure Code which provides 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, 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 refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

Coming to the present appeal, I will first address the argument by the Appellant that by having the words as to the reading of the charge being imposed on the record by a rubber stamp, the trial magistrate thereby omitted to state the facts and the plea taking was thus mechanical. Section 197 of the Criminal Procedure Code as follows as regards the recording of evidence by a magistrate:

"(1) In trials by or before a magistrate, the evidence of the witnesses shall be recorded in the following manner—

(a) the evidence of each witness shall be taken down in writing or on a typewriter in the language of the court by the magistrate, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the magistrate, and shall form part of the record;

(b) such evidence shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative:

Provided that the magistrate may take down or cause to be taken down any particular question and answer."

It is therefore not mandatory that proceedings need to be personally handwritten by a magistrate, they can be in writing but under the direction of the magistrate. Standardised stamped writings on the reading of a charge to an accused person or plea forms with the same information are commonly used to expedite the process of recording of the plea taking, and the use of such stamped writings or plea forms does not necessarily preclude the stating or reading of a charge to an accuse person. Their purpose is to confirm on the record that indeed the charge was read to an accused person, and to also ensure that all the requirements of the law as regards plea taking are observed.

On the second argument that the plea by the Appellant was not unequivocal, the record of the proceedings in the trial court indicates that the procedure of taking of the plea of the Appellant on 26th March 2015 was as follows:

"Date: 26.3.2015

Coram

Magistrate: Hon. D. G. Karani P. M.

Prosecutor: PC Wachira

Court Clerk: Amos

Interpretation: English/Kiswahili

Accused present in person

The substance of the charge and every element thereof, has been stated by the court to the

accused person, in the language he understands who on being asked whether he admits or denies the truth of charges

Count 1: It is true

Count 2: It is true

Count 3: It is true

Count 4: It is true

Count 5: It is true

Order: Plea of guilty entered."

The part of the proceedings that is underlined are the writings that were in stamped format. It is apparent from the record that indeed the charges were read to the Appellant as he responded to each Count by using the words "it is true". He could only have been responding by that answer to some proposition put to him, which the record shows were the charges. In addition by answering "it is true" to a charge is in my view an unequivocal admission of the particulars stated in the said charge. Lastly, the Appellant still admitted the facts as read out by the prosecution were correct, when he had the opportunity to express his disagreement if any to the said particulars after the taking the plea.

The procedure used by the trial Court therefore cannot be faulted. I accordingly uphold the conviction of, and sentence imposed upon the Appellant by the trial Court for the with four counts of causing death by dangerous driving contrary to section 46 of the Traffic Act, and a fifth count of carrying excess passengers contrary to section 100(2) of the Traffic Act.

It is so ordered.

DATED AT MACHAKOS THIS 23RD DAY OF JUNE 2016.

P. NYAMWEYA

JUDGE