REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 446 OF 2009 AS CONSOLIDATED WITH CRIMINAL APPEAL NO. 448 OF 2009

REPUBLIC …….....…….RESPONDENT

VERSUS

PETER MUIRURI…….…….....……1ST APPELLANT

JAMES KAMAU …….……..2ND APPELLANT

[Being an appeal from the original conviction and sentence by Mrs Kasera S.R.M. dated 16th October, 2009 in Kibera Case No. 2468 of 2009]

JUDGMENT

1. Peter Muindi Muiruri and James Kamau now 1st and 2nd appellants were 1st and 2nd accused respectively in Kibera Chief Magistrate's Court Criminal Case No. 2468 of 2009. They were charged in the 1st count with robbery with violence contrary to section 296 (2) of the Penal Code. They faced an alternative charge of handling stolen goods contrary to section 322 (2) of the Penal Code. In count 2 they were charged with stealing stock contrary to section 278 of the Penal Code. The alternative charge to count II was handling stolen goods contrary to section 322(2) of the Penal Code. They were convicted of both counts on their own guilty plea and in Count 1 sentenced to suffer death as by law prescribed. On Count II, they were sentenced to 7 years imprisonment.
2. The appellants have now appealed against both conviction and sentence. The 1st appellant (Peter Muindi Muiruri) has set out the grounds of appeal reproduced herebelow:-

1. *That the learned trial magistrate erred in law and fact by convicting me while not observing the provisions of section 207 of the Criminal Procedure Code.*
2. *That the learned trial magistrate erred in law by sentencing me to suffer death without exploring other avenues of punishment available to her.*
3. *That the learned trial magistrate erred in law by using the wrong mode of sentencing.*

3. The second appellant (James Kamau) has on his part listed the following grounds

1. *That the learned trial magistrate erred in law and fact, in basing conviction on plea of guilty:-*

i. *Without seeking to confirm mental soundness of the appellant herein.*
ii. *Without observing that appellants prolonged stay in police custody raise eye-brows on alleged own plea of guilty.*

2. *That, the learned trial magistrate erred in law and facts to convict in count 2, a term of 7 years without photographs of the alleged stolen and recovered rabbits, confirmed herein.*
3. *That the learned trial magistrate erred in law and fact in convicting the appellant, whereas the appellants constitutional rights to a fair trial enshrined in Article 50(2) (b) (c) (g) and (i) of the Constitution 2010 were infringed.*
4. *That the learned trial magistrate erred in law and fact in failing to comply with the provision of section 169 of Criminal Procedure Code.*

4. Both appellants did not make any oral submissions

at the hearing of the appeal on 22nd October 2013, but gave us lengthy written submissions. We have considered the submissions and come to the conclusion that they revolve around two issues namely that their guilty plea was not unequivocal; and, that the death sentence handed down by the trial court was too harsh. We consider the issue whether or not the guilty plea was unequivocal to be central and one on which this appeal must turn.

5. The appeal is opposed by the state. At the hearing, **Ms. Njuguna**, the learned counsel for the respondent submitted before us that the appellants were convicted on their own guilty plea; that the court entered the guilty plea after explaining the substance and every element of the charge to the accused in the Kiswahili language; and, that the accused confirmed the facts read to them. Counsel further submitted that circumstances were conducive for identification as the offence took place at 10.00a.m. On the ingredients of the charge, Counsel submitted that the appellants were armed with pangas; and, that the stolen items were recovered from the appellants.
6. This being a first appeal, we are under duty to reconsider and evaluate evidence afresh with a view to reaching our own conclusion. See **Pandya Vs. R [1957] EA 336 and Okeno Vs. Republic [1972] E.A. 32**. In this appeal however the appellants were convicted on their own guilty plea meaning that a full trial was not conducted. We have therefore scrutinized the record to see whether or not the plea was unequivocal.
7. Section 281 of the Criminal Procedure Code provides that an accused person may plead not guilty, guilty or guilty subject to a plea agreement. The section however does not set out the steps to be followed by a court when taking plea. In **Adan Vs Republic 1973 EA 445**, the Court of appeal set out the steps to be taken in recording plea 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's reply must, of course, be recorded.*

8. The court went on to explain the purpose of the statement of facts:- that it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal. It assists the court to confirm if the accused really understood the position when he pleaded guilty. In **Njuki V. Republic 1990 KLR 334** the court, while citing **Hando S/o Akunaay V. R. (1951) 18 EACA 305,** re-emphasised the need for caution in recording a guilty plea. It held that the court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.
9. The proceedings before the lower court show that the accused were arraigned in court on 15th

June 2009. When charges were read to them, the 1st accused denied the 1st count (robbery with violence) and pleaded guilty to count II (stealing). The 2nd accused on his part pleaded guilty to both counts (robbery with violence and stealing). The proceedings run as follows:-

"The substance of the charge(s) and every element thereof has been stated by the Court to the accused, in the language that they understand, who being asked whether they admit or deny the truth of the charge(s) replies:-

I Accused 1: It is not true

Accused 2: It is true I robbed the complainant his mobile phone while armed with a panga. I threatened to use violence against him.

II Accused 1: It is not true

Accused 2: It is true I stole seven rabbits belonging to Mary Waithithi Waithaka.

Alternative Charge:

Accused 1: Not true

COURT: Accused 2 is warned that he shall be sentenced to hang.

ACCUSED 2: I wish to change the plea in count 1. I did not know that the sentence is death. For Count II, I maintain my plea of guilty. I am 18 years.

COURT: Plea of guilty entered in respect of Count 2 for accused 2.

COURT PROSECUTOR: On 12/6/2009 the two (2) accused persons entered in the compound of the complainant where they stole 7 rabbits valued at Kshs.840/-. As they were going out they were spotted by members of the public. The members of public informed diplomatic police. Diplomatic police officers traced them at a nearby maize plantation. The rabbits were recovered. Accused persons were later charge with this offence.

Accused 2: The facts are correct.

Accused 2 convicted in his own plea of guilty in respect of count II.

COURT: He can be treated as a first offender.

MITIGATION: Nil

COURT: In Count II accused is fined KShs.5,000/- or 3 months imprisonment.

Right of Appeal 14 days.

10. From the above, it is clear that when the court warned the 1st accused that he shall be sentenced to hang, he changed his plea of guilty on Count 1 and maintained his plea of guilty in count II for which he was sentenced to a fine of KShs.5000 or 3 months imprisonment on 15th June 2009. The court recorded a plea of not guilty for both accused in count 1 and set a hearing date for 19th August, 2009. On that day the prosecutor told the court that count 1 and II should have a separate charge. He asked for an adjournment which was granted by the court.
11. On 16th October 2009, the court allowed the prosecutor to substitute the charge sheet under section 214 of the Criminal Procedure Code. The charges were then read to the accused. The court record reads:-

Court: Charge read over and explained to accused in Kiswahili.

Court: Accused warned that offence in Count 1 carries death sentence.

I Accused 1: It is true

Accused 2: It is true.

Alternative

II Accused 1: It is true

Accused 2: It is true.

Court: Plea of guilty entered

The prosecutor then proceeded to read the facts in Kiswahili to which the accused answered

"Facts are correct"

The court entered plea in the following words:

Court: "On your own plea of guilty, accused 1 and 2 are convicted accordingly."

12. The appellants do not dispute having pleaded guilty.

Their contention is that they were confused on the charges. We tend to agree with them that the manner in which the proceedings were conducted is confusing. The record above indicates that the court warned the accused that the offence in count 1 carries death sentence. Both accused went ahead to answer "It is true."

13. The record however does not indicate to what count the accused were pleading. This is because it is not clear whether the prosecutor read the facts attaching to Count 1 or 11 or to the Alternative to Count II as the records shows: The only thing that is clear is that the accused stated that the facts were correct. The court then entered "Plea of guilty entered" It is not clear from the record against which count the plea was recorded. The record merely reads;

"On your own plea of guilty accused 1 and 2 are convicted accordingly".

14. From our analysis of the proceedings, we think that the court made no effort to ensure that the accused understood the charges facing them. It is instructive to note that when plea was taken on 15th June 2009, both accused had pleaded not guilty to Count 1. The 1st accused who had initially pleaded guilty to Count 1 changed his plea after the court warned him that he would be sentenced to hang. The scenario changed after the prosecutor substituted the charge sheet.

15. The logical conclusion which we draw based on the record as demonstrated above, is that the accused did not comprehend the charges as read out to the extent that when the prosecutor read the facts, it was not clear to them, as is still not clear to us now, to which facts the accused pleaded by answering "the facts are correct." Were they the facts relating to Count 1 (robbery with violence) or facts relating to Alternative to Count II (handling stolen property) as the record reflects? We consider that this uncertainty renders the plea equivocal.

16. For a guilty plea to be unequivocal the steps set out in the Adan case *(supra)* must be followed. Further the record must be such that it leaves no doubt as to whether or not the accused understood the charges and confirmed the facts as true. In the result, we find that the plea in this case was not unequivocal. We quash the conviction and sentence.

17. Having quashed the conviction, should we order a retrial? We think not. We consider in the circumstances of this appeal that a retrial is likely to cause an injustice to the accused. As stated by the Court of appeal in **Fatehali Manji V. Republic 1964 EA 481** *"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 an injustice to the accused person".* (emphasis added)

18. We think that the appellants have been in custody for a considerable period and that if they were guilty of the offence charged, must have received sufficient correction and rehabilitation. We allow the appeal.

19. The appellants are set at liberty forthwith unless otherwise lawfully held.

Judgment dated and delivered at Nairobi this 19th day of March 2014.

…… ……

R. LAGAT-KORIR **D.K. NJAGI MARETE**

JUDGE **JUDGE**

In the presence of:

……..: Court clerk

……: Appellant

……: For the appellant

……..: For the State/respondent