REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 306 OF 2010

(From original conviction and sentence in Criminal Case No. 1037 of 2010 of the Senior Principal Magistrate\'s Court at Narok)

FREDRICK PUSHATI NKAWATEI…….…….....
……..APPELLANT

VERSUS

REPUBLIC……....…….RESPONDENT

JUDGMENT

The Appellants pleaded guilty to the charge of preparation to commit a felony contrary to Section 308(2) of the Penal Code *(Cap. 63, Laws of Kenya).* Both were convicted and sentenced to 4 years imprisonment.

Both appealed to this court under Appeals Nos. 306 of 2010, and 308 of 2010 which were consolidated and heard together on 21.11.2011. The Appellant\'s contend that they were induced to plead guilty so that they would receive light sentences, that they never committed the offence for which they were charged, that it is a known and accepted custom among the Maasai community to possess and carry **"rungus"** *(rounded clubs),* and **"simis"** *(short cutting and stabbing swords, often with sharp edges on both sides),* that they were arrested, detained and beaten near their home, and that they were forced to plead guilty. For those reasons the appellants asked for a retrial.

Mr. Omwega learned Senior Principal State Counsel who appeared for the Republic opposed the appeals. The Appellants were convicted on their own plea of guilty after the charges were read in English and translated to them in Kiswahili which they each understood. Counsel, submitted that lack of understanding of the language of the court could be the only ground for ordering a re-trial.

I have considered the appellant\'s submissions as well as those of Mr. Omwega learned State Counsel. I have also studied the record of proceedings and considered the law regarding appeals where an accused pleads guilty. I will commence with the law.

Section 348 of the Criminal Procedure Code *(Cap. 75, Laws of Kenya)* provides that 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 to the extent or legality of the sentence.

The procedure for recording a plea of guilty where an accused pleads guilty is well summarized in the case of **ADAN VS. REPUBLIC [1973] E.A. 445**. It is 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 the facts relevant to sentence together with the accused\'s reply should be recorded.

In this case, both the appellants, and the 3rd accused, Rokonka Kasale, confirmed the facts when they were read to them. However when they were asked to plead mitigation before sentence, the 3rd accused asked to be pardoned, on the ground that he carried a knife because there are animals on the way and that he carried a torch because it was at night, and he was not going to commit any felony as alleged. The trial court *(quite properly in my view)* still entered a plea of not guilty in respect of the 3rd accused, who was later on the evidence found guilty, convicted and sentenced to four years imprisonment, like the appellants in this case. The appellants never disputed the facts as read to them by the prosecution.

The procedural question is the extent and legality of the sentence. The punishment under Section 308 of the Penal Code for the offence of preparing to commit a felony is imprisonment for a term of not less than seven years and not more than fifteen years. The appellants received a lenient sentence of four years, whereas the law prescribes a minimum of seven years.

Section 364(1) (a) empowers this court to enhance the sentence. I therefore substitute the sentence of four years to seven years in accordance with the requirements of Section 308 of the Penal Code.

The Appellants asked for a retrial. Ordinarily a retrial is ordered where an appellant has been tried and convicted, and on appeal, the appellate court considers or is of the opinion that on a proper consideration of the admissible evidence or potentially admissible evidence, a conviction might result. Where an appellant pleaded guilty and confirmed the facts in accordance with the procedure outlined in **Adan vs. Republic (supra),** there is no basis for ordering a retrial, and such an order would patently be contrary to the letter and spirit of Section 348 of the Criminal Procedure Code as stated above.

For those reasons, the appellants' plea for a retrial has therefore no basis, and is rejected.

In summary therefore, the Appellants appeal has no merit at all and is dismissed forthwith. I confirm the conviction, and substitute the sentence of four years to seven years imprisonment as prescribed by Section 308 of the Penal Code.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 27th day of January, 2012

M. J. ANYARA EMUKULE
JUDGE