



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CRIMINAL APPEAL NO. 51 OF 2010**

**THOMAS KIPRONO BITOK.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....PROSECUTOR**

**JUDGMENT**

The appeal is from the Judgment of the Hon. D.K Kemei Senior Resident Magistrate in Eldoret Criminal case No. 1942 of 2010

The Appellant was charged with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code.

That on the 14<sup>th</sup> March, 2010 at Chepyakwai village in Wareng District within the Rift Valley Province jointly with another not before the court while armed with a dangerous weapon namely rungu, robbed Stephen Kipchoge Kebeni of his cash Kshs 6000/= and a National Identity card all valued at Kshs 6000/= and at or immediately before or immediately after the time of such robbery wounded the said Stephen Kipchoge Kebenei.

The Appellant was convicted on his own plea of guilty and was sentenced to death as provided by the law.

The Appellant being aggrieved with the judgment preferred this appeal and listed four (4) Grounds of Appeal in his petition of appeal. The grounds are as set out hereunder;

- 1) The learned trial Magistrate erred in Law in convicting the appellant on an equivocal plea of guilty.
- 2) The learned trial magistrate erred in law by not showing how he came up with decision that the appellant understood Kiswahili well enough to plead.
- 3) The learned Magistrate erred in Law in convicting the Appellant on facts which don't tally with the charge.
- 4) The learned Magistrate erred in Law by failing to ensure that the appellant understood that the only available penalty is death.

At the hearing of the Appeal the State was represented by Learned State Counsel Mr. Chirchir and Appellant was represented by Mr. Lel.

Learned Counsel conceded the appeal at the hearing on the grounds that the plea of guilty was equivocal as the Appellant in mitigation asked for a pardon and the trial magistrate should have taken note of the

change in plea.

Counsel for the State further submitted that there was ample evidence to support a conviction and the witnesses were available therefore the matter he prayed be sent back to the lower court for a retrial.

Counsel for the Appellant was of the view that the Appellant be acquitted as he had been incarcerated for a period of two (2) years and would be prejudiced by a retrial.

Counsel referred the court to the decision of the Court of Appeal **ADAN –VS- REPUBLIC (1973) E.A** at pages 447 where it was held and we quoted;

***“.....we were at first inclined to order for a re trial but the Appellant has already been in prison for over a year we felt that this might lead to a grave injustice.....”***

Counsel therefore prayed that the appeal be allowed, the conviction be quashed, sentence be set aside and the Appellant be acquitted.

We have perused the Record of Appeal and heard both Counsel for the Appellant and Respondent’s oral submissions.

We refer to the case of **BRAGANGA –VS- REPUBLIC (1957) E.A** where it was held that an appellate court should not order for a retrial unless it was satisfied that there was sufficient evidence on record which might support the conviction of the Appellant.

We find that there is ample evidence from the record to sustain a conviction especially on the issue of identification.

Counsel for the State also submitted that there was ample evidence against the Appellant and that the witnesses were still available.

We find that the plea was indeed equivocal. We have taken into consideration the serious nature of the offence, the mandatory death sentence it carries and also the fact that the Appellant has been in jail for only two (2) years.

We shall in the interest of justice allow the appeal, quash the conviction and set aside the sentence.

We refer the case back to the lower court for a retrial before a magistrate of competent jurisdiction.

**DATED AND DELIVERED AT ELDORET THIS 23<sup>rd</sup> DAY OF FEBRUARY 2012.**

**F. AZANGALALA**

**A. MSHILA**

**JUDGE**

**JUDGE**