REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 533 OF 2003

(From original conviction and sentence in criminal case No. 4273 of 2003 of the Principal Magistrate's Court at Nyahururu - Hon. Kathoka Ngomo)

DAVID KARANJA MBUGUA……...……..…...……APPELLANT

VERSUS

REPUBLIC……...…..…….....…RESPONDENT

JUDGMENT

The appellant was charged with the offence of robbery with violence and was on his own plea of guilty, convicted and after reading of the facts, he confirmed that **"it was true"** and his conviction was confirmed. The Appellant was subsequently sentenced to death.

Aggrieved with his conviction, the accused has appealed to this court by a Petition of Appeal filed on 25th November 2003, and a Supplementary Grounds of Appeal dated and filed on 22nd December, 2010. There were altogether six grounds of appeal namely -

(1) that the trial magistrate erred in fact and in law in failing to appreciate that the actions of the appellant as set out by the prosecution lacked the necessary mens rea,

(2) that he was advised to plead guilty,

(3) that the magistrate did not consider his mitigation,

(4) that the learned trial magistrate erred in law in convicting the appellant on a "plea of guilty" that was equivocal and/or not properly taken,

(5) that the learned trial magistrate erred in law in failing to take such precautions and administer such warning so as to ensure that the appellant understood the nature and the consequences of the charge he was pleading guilty to before he entered a plea of guilty and thereon sentenced the Appellant,

(6) that the learned magistrate erred in law and fact in failing to appreciate the fact that the Appellant had a reasonable defence to the charges and particulars as read out to him in the lower court.

And for those reasons, the Appellant prayed that his appeal be allowed, and that the conviction be quashed and the sentence be set aside.

When this appeal came before us for hearing on 23rd March 2011, Mr. Kanyi Ngure learned counsel for the appellant reiterated the above grounds of appeal, and emphasized in particular that where an accused pleads guilty to a serious charge as robbery with violence whose mandatory sentence is death it is incumbent upon the trial court to warn the accused among other rights that he had a right to an Advocate of his choice, that the court ought to have inquired into the mental status of the appellant, that he ought to have been given time and opportunity to communicate with an Advocate and other persons whose assistance was necessary *(as for instance envisaged in Sections 49(1)(c) and 50(2)(g) and (h)* of the current Constitution, and Section 72(d) of the old constitution.

Counsel relied on the case of **PAUL MUTUNGU VS. REPUBLIC [2006] eKLR** and **JAMES MOHAMED MUYA VS. REPUBLIC** *(Mombasa H.C. Cr. Appeal No. 240 of 2003).*

In response to Mr. Ngure's submissions Mr. Omutelema, learned Senior Principal State Counsel, conceded to the appeal, on the grounds that the record was silent as to what the appellant stated after being warned, and that in a case of this nature where the response of **"it is true"** is not adequate to convict and sentence an accused. There ought to have been unequivocal plea of guilty. Counsel however submitted that the facts show clear intention to commit the robbery and asked for a re-trial.

The appeal herein raises two issues, **firstly** what is unequivocal plea, and **secondly,** when or under what circumstances should a re-trial be ordered by an appellate court.

The manner of taking a plea of guilty is clearly set and explained in the case of **ADAN VS. REPUBLIC [1973] E.A. 445**, and reiterated in the case of **PAUL MUTUNGU VS. REPUBLIC** *[supra]* and reiterated in the case of **BOIT VS. REPUBLIC [2002]1K.L.R. 815 -**

"There is no statutory provision to the effect that a person charged with an offence the penalty for which is death cannot plead guilty to such a charge. But as the court remarked in Kisang's case, such cases are rare. They are indeed the exception rather than the rule. That being so, the courts have always been concerned that before a plea of guilty to such a charge is accepted and acted upon by any court, certain vital safeguards must be strictly complied with - and it must appear on the record of the court taking the plea that those safe-guards have been strictly complied with - and those safe-guards are that:

(i) The person pleading guilty fully understands the offence with which he is charged. The court before whom he is taken to the pleading guilty must in its record show that the substance."

In this case, although there is an attempt by the learned trial magistrate to comply with the principles set out in the above cases, they fell short of the requirements of those principles. The **second** question was whether we should order a re-trial.

The principles or considerations which an appellate court will consider in ordering or not ordering a retrial are set out in the case of **FATEHALI MANJI VS. REPUBLIC [1966] E.A. 343** where the Court of Appeal said -

(1) A re-trial, in general will be ordered when original trial was illegal or defective,

*(2) a retrial **will not** be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of filling gaps in the evidence in the first trial 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 mean that a re-trial should be ordered,*

(3) each case must depend on its own facts and circumstances and an order for a re-trial should only be made where the interests of justice require it.

"Interests of justice" is a double-edged sword. It cuts both ways. There is the interests of the liberty of the accused, *(in this case the appellant),* and equally important the welfare of the complainant

against whom the violent robbery was committed, and in addition the welfare of society which has entrusted its security to the state machinery.

In this case, there appears to be adequate evidence upon which to base a successful prosecution against the appellant and we find no basis for suggesting that the prosecution will be filing any gaps in its evidence.

For those reasons, we allow the appeal, quash the conviction, set aside the sentence, but direct that there be a re-trial of the appellant by another magistrate at Nyahururu Principal Magistrate's Court.

Dated, signed and delivered at Nakuru this 3rd day of June 2011

M. J. ANYARA EMUKULE
JUDGE

W. OUKO
JUDGE