



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

Criminal Appeal 173 of 2008

JOHN OTIENO OJWANG.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted on his own plea of guilty of robbery with violence contrary to *section 296(2) of the Penal Code* and sentenced to death. The particulars of the charge were that on the night of 25th August, 2008 at Kaburini area of Homa Bay township in Homa Bay District within Nyanza province he jointly with others not before the Court robbed Kevin Owino Anyach of motor bike make TVS Max 100 Red Frame number 623 FB 3671K50348 Engine no. 0133K710 94357 worth Kshs. 95,000/= and at the time of such robbery killed the said Kevin Owino Anyach.

The appellant was not satisfied with the conviction and sentence and preferred this appeal. His main ground is that he did not plead guilty to the charge and refers to the copy of proceedings as certified by the Senior Resident Magistrate at Homa Bay who conducted the matter. In answer to the charge, the record indicates the appellant stated “*it is not true*” against which the court indicated “*plea of not guilty entered.*” It then proceeded to warn the appellant of the implications of pleading guilty to the charge. This is followed by the prosecutor’s narration of the facts in support of the charge. In answer to the facts, the appellant replied “*It is true I killed the deceased. I took the motorbike from him.*” He was convicted on own plea of guilty. The prosecutor indicated he was a first offender. He mitigated and was subsequently sentenced to death. This was the only sentence provided by law for the offence.

The claim by the appellant that he did not plead guilty to the charge has received our anxious consideration. Fortunately, the original record is available and states clearly that when the substance and elements of the charge were stated to the appellant and he was asked whether he admitted them or not, he replied:-

“It is true.”

The court then recorded:-

“Plea of guilty entered.”

We are persuaded that this record reflects what transpired. This is consistent with the warning given to the appellant about the implication of pleading guilty. The prosecutor was allowed to narrate the facts to which the appellant was asked to respond because he had admitted the charge. What he stated in response to the facts has been indicted in the foregoing. We find that the certified copy of proceedings was not accurate and deprecate in strong terms the conduct of the trial magistrate in signing the certificate without assuring himself of the accuracy of the copy.

The complaint by the appellant that the charge sheet was defective is without merit. The statement of the charge indicated he was being charged with robbery with violence under *section 296(2) of the Penal Code*. The particulars of the charge substantially informed him that he had robbed Kevin Owino Anyach on the night of 25th August, 2008 at Kaburini area in Homa Bay of a motorbike, whose particulars were given, and that at the time of such robbery he had killed the said Kevin Owino Anyach.

The facts that were narrated by the prosecutor were basically as follows. Martin Shikuku Wanyonyi was owner of the motor cycle in question and its rider was the deceased. He last saw the deceased on 25/8/08 at 5 p.m in Homa Bay town. On 26/8/08 at about 8.30 a.m Walter Ouko Oyogo and Paul Opondo Ochieng were going to work when they found the body of the deceased at the hospital cemetery. They reported to Homa Bay police station. Inspector Kirui, Sgt Amollo and P.C. Ndolo went to the scene and found the body had two deep cuts on the neck. They found blood stains 2 meters from where the body lay. After attention by scenes of crime personnel, the body was moved to the mortuary where Boda Boda operators came and identified it to be that of the deceased. At about noon Wanyonyi came to report that the deceased had gone missing the previous day with the motor cycle and that he had learnt he had been found

dead. In the meantime, Migori police station received a report that someone was being subjected to mob justice after he had taken this same motorcycle to a garage and when the cycle had blood stains. P.C. Benard Githiga and other officers went and rescued the person being beaten. He was the appellant. The cycle had blood stains. The appellant was taken to Migori District Hospital where he was admitted. The recovery was circulated and this is when Homa Bay police station informed Migori police station of the incident and officers came with Wanyonyi who produced documents showing he owned the cycle. When post mortem was done on the body of the deceased the cause of death was shown to be severe bleeding following two large and deep cut wounds round the neck and a third cut on the right side of the face. He had suffered multiple skull fractures as a result. The appellant was charged after investigations.

The appellant heard these facts narrated which he accepted to be true and stated:

“I killed the deceased. I took the motor bike from him.”

The prosecutor indicated he was a first offender. In mitigation, he stated:

“I want to be taken to hospital for further treatment. I pray to serve sentence in another prison. There are people who are threatening to harm me at Homa Bay G.K.prison.”

We raise this mitigation because the appellant, in the Grounds of Appeal, complained that the trial court did not consider that he had been beaten and injured and required treatment before being arraigned. Mr. Mutai for the state responded that the issue of the appellant’s health had not been raised by him and also that any such state of health did not disadvantage him. The prosecutor indicated the appellant was beaten by members of the public who had found him with this motorcycle. When police rescued him, they took him to Migori District Hospital where he was admitted. That shows he received serious injuries. He was not charged until 4/9/2008. At mitigation he was still asking for further treatment. We have considered these facts quite carefully but are of the view that, despite the injuries, the appellant was in a state of mind where he followed the events at plea and accepted to have committed the offence charged. We have borne in mind the requirements of *section 207 of the Criminal Procedure Code* regarding the procedure of taking plea and what the then East African Court of Appeal stated in the case of *Adan.V. Republic [1973] EA 445*, and have come to the conclusion that the plea was satisfactorily taken.

The result is that the appeal is dismissed in its entirety.

Dated, signed and delivered at Kisii this 3rd Day of February, 2010.

D. MUSINGA

JUDGE

A.O.MUCHELULE

JUDGE

3/2/2010

Before A.O.Muchelule-J

Court clerk-Bibu(Kiswahili)

Mr. Mutai for State

Appellant-present

COURT: Judgment in open Court.

A.O.MUCHELULE

JUDGE

3/2/2010