REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Criminal Appeal 210 of 2007

CHARLES NYAGA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of D.W. Nyambu SRM in PMCC Court at Chuka in Criminal Case No. 1433 of 2007 delivered on 10th April 2008)

JUDGMENT

The appellant was charged before the lower court with the offence of grievous harm contrary to section 234 of the penal Code. When the plea was taken by the court in the first instance, the court proceedings reflect thus:-

"INTERPRETATION ENGLISH/KISWAHILI/KIMERU

Accused: Present

The substance of the charge(s) and every element thereof has been stated by the court to the accused person, in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies in Kimeru:- Not true."

A not guilty plea was recorded. The proceedings then show that later, presumably the same day, that the accused stated:-

"I want to plead guilty."

Thereafter, the proceedings reflect thus:-

"Charge read over and explained to the accused person who understands the substance and thereof replies in Kiswahili:- TRUE."

A guilty plea was entered. On the facts being narrated by the prosecution, the accused/appellant confirmed that they were correct. The learned magistrate after convicting the appellant sentenced him to 3 years imprisonment. This was after considering the appellant's mitigation. The appellant being dissatisfied with the conviction and sentence has filed this appeal. The appellant has raised the following grounds in his appeal:-

1. ***That the learned trial magistrate erred in law in convicting the appellant without satisfying himself that the accused verily understood the contents of charge as during the initial appearance of the accused to plead the charge was read in Kimeru but later as per the records the charge was read in Kiswahili wherein the accused pleaded guilty, clearly a language which he did not understand.***
2. ***That the procedure adopted by the learned magistrate is as far as the conduct of the plea by the appellant was concerned was flawed in law.***
3. ***The learned trial magistrate erred in law and in fact by failing to indicate whether the facts of the charge were interpreted to the appellant as the same were not interpreted to the appellant in a language that he clearly understood.***
4. ***That the sentence imposed by the learned magistrate was excessive regard being had to the nature and circumstances of the evidence tendered."***

I begin by saying that I reject the argument that the learned magistrate failed to show the language in which the 2nd plea was taken. This is because the language of the court was clearly indicated at the beginning of the proceedings as, *"English/Kiswahili/Kimeru"*. That was in my view compliant to the provisions of section 198 (1) of the Criminal Procedure Code which provides as follows:-

"198. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."

The argument raised on ground number 2 in the petition of the appellant is in my view merited. When the plea was first taken as reproduced above in this judgment, the substance and element of the charge were read out to the appellant. However, when the plea was taken later and it is not clear how much later it was, the proceedings did not show that the substance and elements of the charge were read out to the appellant as can be seen above in this judgment. The Court of Appeal in the case **Adan V. Republic** [1973] E.A considered what ought to be done when plea is taken. The court stated:-

> ***"The courts have always been concerned that an accused person should not be convicted on his plea unless it was certain that he really understood the charge and had no defence to it.The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education and does not speak the language of the court. For this reason, it has long been a rule of practice that where a plea appears to be one of guilty, it must be recorded in the words of the accused.***
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> ***The word "guilty" is one to be treated with the greatest caution: it is a technical expression and it was said in Byarufu Gafa V. R. [1950] 17 E.A.CA. 125, and M'Mwenda V. Republic [1957] EA 429 that there is no word exactly corresponding to it in any of the languages of***
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> ***Uganda or Kenya respectively.It might be added that while the idea of stealing is one universally known, it does not follow that every language has a word corresponding to the English word "steal" which excludes a taking under a bona fide claim of right."***

In that case, the Court of Appeal then gave directions on how plea should be taken. It stated:-

> ***"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."***

That case has received approval in many other cases. The Court of Appeal in the case **Cyrus Muriithi Kamau & Ano. Vs. Republic** Criminal Appeal No. 87 & 88 of 2006 supported the holding in **Adan's** case where it stated:-

"As far as we are aware, there is no law, except as provided in section 207 and 208 of the Criminal Procedure Code, which provides that even where an accused person is pleading not guilty to a charge, the magistrate recording that plea must record it in the exact words used by the accused in pleading not guilty. In recording a plea of "not guilty" all a court is required to do is to make sure that the accused person understands the charge upon which he is being called to plead to.The position is wholly different where an accused person is taken to be pleading guilty to the charge. In such a situation, the principles set out by the Court of Appeal for East African in Adan V. Republic [1973] E.A 445 are applicable."

Bearing in mind what was held in **Adan's** case and considering the plea recorded by the learned magistrate, I find that the appellant's plea was equivocal because the learned magistrate did not explain the essential ingredients of the offence the appellant faced. In view of that, the appellant conviction is hereby quashed. The learned state counsel requested for a retrial. He however did not address the court whether witnesses would be available. Having considered the matter however, and because the appellant is said to be suffering from a serious illness, I find that the interest of justice will not be served by ordering a retrial. In the end, the appellant's conviction in PM Chuka Criminal Case No. 1433 of 2007 is quashed and his sentence is hereby set aside. I hereby order the appellant to be set free unless he is otherwise lawfully

held.

Dated and delivered at Meru this 8th day of October 2010.

MARY KASANGO
JUDGE