(*From the original conviction and sentence by the Chief Magistrate Hon. A. Muchelule in Cr. C. No.7427of 2007 at Eldoret***)**

CHARLES MASHETI GILBERT

CYRUS ARUNGA ……. APPELLANTS

VERSUS

REPUBLIC …….... RESPONDENTS

J U D G M E N T

CYRUS ARUNGA and **CHARLES MASHETI** were charged with robbery with violence contrary to section 296(2) of the Penal Code before the Chief Magistrate's Court at Eldoret in CM.CR.CASE No. 7427/2007. The particulars of the offence were that on the 28th day of June, 2007 at Sirenda (A) Village, Lugari District within Lugari Location in Lugari District within Western Province jointly while armed with a Rungu they robbed Dan Amenya of a bicycle make Jet valued at Kshs.3000/- and at or immediately before or immediately after the time of such robbery wounded the said Dan Amenya. The two pleaded guilty and were duly convicted and sentenced to death, the only punishment allowed by law for the offence charged.

They have each filed separate appeals the 2nd accused having filed his first and being HCCR.A. No. 49/2007 and the 1st accused is the appellant in HCCR.A. No. 50/2007. The two were consolidated and heard together at trial. Each appellant had filed their home-made Petitions of Appeal and their Advocates improved on them by filing supplementary petitions of Appeal. The grounds upon which the appeals are brought are broadly that the proceedings were conducted in a language not familiar to the appellants and the court did not ascertain that the appellants understood the said language, that the facts did not support the charge, that the plea of guilty entered was not unequivocal and that plea of guilty was not investigated as to its correctness and why it was offered and whether the appellants were in full command of their mental faculties when they pleaded guilty.

It was contended that the taking of plea was unprocedural as the record shows that the plea was taken then the magistrate warned of the consequences of a guilty plea then the plea was taken again. The language used, English/Kiswahili is also attacked on the ground that the court did not establish whether the appellants understood any of the two languages. The further submission was that even if the facts

read to the accused persons were true the same do not constitute the offence of robbery with violence as no P3 form was produced to indicate if there were any injuries. The sentence was faulted on the ground that the trial magistrate did not state the section of the law under which he was sentencing the appellants contrary to section 169(2) of the Criminal Procedure Code which provision is couched in mandatory terms.

The appeal was opposed as lacking in merit. Counsel for the state submitted that the plea was unequivocal. He did not fault the trial magistrate in the manner of plea taking and said that the magistrate could have been surprised by the guilty plea making him warn the appellants of the consequences of a guilty plea and he read the charges yet again but again the appellants pleaded guilty and admitted that the facts were true and even mitigated giving their ages. He added that the variance between the charge and the facts could be cured by Section 214(2) of the Criminal Procedure Code. He contended that it was not the duty of the magistrate to establish the mental state of the appellants as Section 11 of the Penal Code presumes everybody sane. He supported the conviction.

What is clear is that the appellants were not asked what language they understood so that the charge would be read and ingredients thereof explained to them in that language**. See ADEN vs. Republic (1973) E.A. 445.**

It is also clear that the appellants were not warned of the consequences of a plea of guilty before plea was taken. While there may not be any law requiring the court, as a mandatory action, that it establishes the mental state of an accused person before plea is taken, we think that this is an important step that should always be taken as it enhances the justice of the trial and does not take anything away from a good trial. **Refer to CHARLES OTIENO OMUGA V. Msa. Cr. App. 145/98 and ELIJAH AWAY DEKIAH V.R. Nrb Cr. App. No. 87/2000**

Unless the charge was amended there was no need to take the plea twice as was done in this case. The trial court was obviously trying to rectify the mistake committed of taking plea before the warning of plea of guilty was given. The correct procedure is to give the warning before the plea**.**

S. OSIKE EMONGONYANGA & 2 OTHERS V. R. Cr. App. No. 69/1990.

We think sufficient reasons have been shown to prove that this conviction was unlawful and the same must be quashed, which we hereby do. We also set aside the sentence and order that the appellants be remitted for a retrial before a magistrate of competent jurisdiction in Eldoret.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF OCTOBER, 2009.

J.L.A. OSIEMO **P.M. MWILU**

JUDGE **JUDGE**

In the presence of;