



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Criminal Appeal 53 of 2008

REGAN OTIENO OTIENOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From Original Conviction and Sentence of UKWALA SRM'S Court

in

Criminal Case No.32 of 2008.)

CORAM

MWERA, KARANJA JJ

MUSAU FOR THE STATE

APPELLANT IN PERSON

COURT CLERK GEORGE/LABAN INTER/ENG/KIS/LUO

J U D G E M E N T

In the lower court at Ukwala the appellant herein was charged under section 296(2) of the Penal Code in that on 20th February 2007 at North-East Ugenya, Siaya he robbed **Joseph Ogutu Adhiambo** of shs.1000/= and during the incident killed the said **Joseph Ogutu Adhiambo**.

After trial the lower court convicted the appellant and sentenced him to suffer death as by law required. He appealed claiming that the complainant did not testify to confirm the charge. We should admit that this ground baffled us in the light of the charge which stated that the complainant was killed in the incident. It was added in the grounds that no exhibit was recovered from the appellant while no medical evidence was presented to prove that the complainant's blood was found on his clothes. The prosecution evidence was said to be contradictory and its case was not proved beyond a reasonable doubt. It was further intimated that the appellant's defence was not properly evaluated.

When the appeal came before us, the Republic through the learned Senior Principal State Counsel, Mr. D. Musau conceded it on the ground of a procedural defect: the entire record did not show that the appellant was ever called upon to plea to the charge against him. Mr. Musau urged us to allow the appeal but order for a retrial. He told us that the offence took place in 2007 and the case was completed in 2008. Witnesses could be found to testify.

The appellant opposed a retrial on the grounds that it would only mean more time in remand.

On the issue of whether a plea was taken in this case or not we examined both the original lower court file and the typed script closely from the time the appellant was presented to court to the end of the proceedings. At no time was the charge against the appellant read and explained to him to say whether it was true or not – before the hearing got under way or proceeded. Section 207 of the Criminal Procedure Code mandates:

“ 207(1). The substance of the charge shall be stated to the accused person by the court, and the shall be asked whether he pleads guilty or not guilty subject to a plea agreement.”

When the accused person does not admit the truth of the charge then the court proceeds to hear the case. The above goes to protect the rights of an accused person under the Constitution (see section 77 (2) (b)) with regard to a fair trial. So taking a plea is a fundamental first step in the process of prosecuting in a criminal trial. If taking a plea is omitted it remains that the accused person has no idea about the offence he is being prosecuted for. He is thus prejudiced in the trial. Such proceeding should not let to stand and/or found a conviction. That was the case here and accordingly we allow this appeal on account of that procedural misstep. The conviction is quashed and the sentence imposed set aside. The appellant will however not be set at liberty forthwith. He shall remain in custody until a retrial is conducted as soon as practicable.

We came to this conclusion bearing in mind that a retrial should not accord the prosecution, as it were, to plug, any holes in its case. We have gone over the evidence before the lower court and we are satisfied that the appellant will not be prejudiced on this account. On the contrary, with the State confident that it will avail witnesses in this not-so-old case, we were of the mind that a conviction will probably result after the retrial. The victim died and in the interests of justice we therefore allow the appeal and order a retrial before another magistrate of competent jurisdiction. The appellant shall remain in custody as the police move with due speed to have his retrial started and proceeded with accordingly.

Judgment accordingly

Delivered on 10th November 2009.

J. W. MWERA

J. R. KARANJA

J U D G E

J U D G E

JWM/mk.

