REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 398 of 2003

(From original conviction(s) and Sentence(s) in Criminal Case No. 8800 of 2003 of the Chief Magistrate's Court at Makadara (Mrs. Gandani – SRM)

JOEL ONDONGO YONGO…...……..……..APPELLANT

VERSUS

REPUBLIC……..……....RESPONDENT

J U D G M E N T

JOEL ONDONGO YONGO was the third accused in the trial before the lower court. He pleaded guilty to a capital charge of ROBBERY WITH VIOLENCE contrary to Section 296(2) of the Penal Code. The details of the charge were as follows: -

"***Robbery with violence contrary to Section 296(2) of the penal Code.***

On the 24th day of April 2003 along Temple road in Nairobi within the Nairobi area jointly with others not before court and while armed with dangerous weapons namely iron bars robbed one FRANKLIN MUTWIRI of cash kshs.300/- and a siemens C-25 mobile phone all valued at Kshs.6,300/- and at or immediately before or immediately after the time of such robbery used actual violence."

The Appellant was sentenced to death following his plea of guilty. He now challenges the conviction on the basis that he was never warned of the consequences of pleading guilty to the charge. When this appeal came up for hearing before us, **Mrs. Kagiri** State Counsel, conceded on the basis that the plea was not properly taken. Learned State Counsel submitted that the record did not show whether the Appellant was warned of the consequences of pleading guilty to the charge. Learned counsel submitted that the trial court had a duty to warn the Appellant of the mandatory death sentence for the capital charge he was facing before accepting the plea of guilty. Learned Counsel submitted that since the Appellant was unrepresented during the plea, the court ought to have given that warning.

The Appellant's first ground of appeal was in similar terms. The Appellant contended that the learned trial magistrate erred in law and in facts by failing to warn him of the consequences of pleading guilty to the capital charge. The Appellant's second ground of appeal was that the charge was defective and that

consequently the plea of guilty was equivocal and should be quashed. The Appellant has in his written submissions relied *inter alia* on the Court of Appeal for Eastern Africa decision of **TOMASI MUFUMU vs. REPUBLIC 1959 EA 625**. In the cited case, the Appellant had challenged his conviction on a plea of guilty to murder on the grounds that he was unaware that the sentence for the offence was death. It was held: -

"***It was clear that the Appellants plea was not an unequivocal plea of guilty to murder and might well have been a plea of killing upon provocation and this vitiated the conviction."***

In the same decision, the Court observed *per CURIAM* as follows: -

"***it is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself also and record that the accused understands the elements which constitute the offence of murder and understands that the penalty is death."***

We have perused the record of the proceedings in the instant case and are satisfied that the learned trial magistrate did not warn the Appellant of the death sentence for the charge of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2**) of the **Penal Code** before accepting the plea of guilty. We have also perused the charge and its particulars as laid before the court vis-à-vis the facts of the case as led by the prosecution. There was material discrepancy between the particulars of the charge and the facts as given by the prosecution. We have already quoted the particulars of the charge in this judgment. The facts of the case were as follows: -

"***On 24/4/2003 the Complainant was walking along Tembo Road in Nairobi. On reaching the junction of Tembo road in Ronald Ngala there was a traffic jam so he stopped. The accused person came in a lorry. The accused 3 hit him on the leg forcing him to go down. The other accused person joined him and they smeared Complainant with human feaces. They then ransacked and robbed him of Kshs.300/- and a cell phone worth Kshs.6,300/- accused was arrested by members of public. He went to hospital and reported to the police station thereafter. Accused persons were charged with the offence."***

A cursory look at the particulars of the charge and the facts of the case discloses discrepancies which go to the very substance of the charge. The charge alleges that the Appellant and his two co-accused committed the offence together with other persons who were not arrested, while the facts of the case suggests that all who were involved in the robbery were before the court. More importantly however the particulars of the charge as regards the weapons used in the robbery are not supported by the facts of the case.

We have also considered the facts of the case as given by the prosecution. Those facts are gibberish. It is not clear from those facts which of the 3 accused persons before the court arrived at the scene in a lorry, which of the 3 hit the Complainant, who smeared the Complainant with feaces, who robbed him and who was arrested at the scene. It is also not clear whether there was common intention between the accused persons to commit the robbery. Given the fact that only the Appellant pleaded guilty to the charge and that eventually his co-accused were acquitted under **Section 210** of the **Criminal Procedure Code**, these discrepancies become material and affect both the charge against the Appellant and the plea he gave. A capital robbery charge is only committed where the person charged was either armed with an offensive or dangerous weapon, or was in company with one or more other persons or used or threatened to use actual violence on the Complainant. None of these ingredients of the offence were met by the prosecution going by the facts of the case as they gave it. Consequently the plea of guilty entered in this case was equivocal and in the circumstances the conviction is vitiated, the conviction irregular. **OLUOCH vs. REPUBLIC [1985] KLR 549** and **ADAN vs. REPUBLIC [1973] EA 445** followed.

We therefore quash the conviction and set aside the sentence.

Mrs. Kagiri has asked us not to order a retrial on the grounds that the Appellant's co-accused were

acquitted for lack of evidence under **Section 210** of the **Criminal Procedure Code** and that to order a retrial was therefore unnecessary.

We agree with the learned State Counsel. It is not only unnecessary to order a retrial but more importantly the interests of justice does not require the same and further that such an order will only serve to expose the Appellant to suffering and prejudice. **AHMED JUMA vs. REPUBLIC [1964] EA 481, PIUS OLIMA & ANOTHER vs. REPUBLIC C.A. No. 110 of 1991** (unreported) and **MWANGI vs. REPUBLIC [1983] KLR 522** followed.

We decline to order a retrial. The Appellant should be set free unless he is otherwise lawfully held.

Dated at Nairobi this 23rd day of January 2007.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE

Read, signed and delivered in the presence of;

Appellant

Mrs. Kagiri for the Respondent

CC: Tabitha

…….

LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE