



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG, J.)

CRIMINAL REVISION NO. 373 OF 2007

KEN NDALI..... APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An application for revision of the proceedings in Makadara Criminal Case No. 1473 of 2007 which led to conviction and sentence by Chief Magistrate Mrs. M. W. Wachira dated

23rd March, 2007)

RULING ON REVISION

The applicant was charged with the offence of robbery contrary to s.296(2) of the Penal Code (Cap.63), the particulars being as follows:

“KEN NDALI: on the 8th day of March, 2007 at around 2.15 p.m. at Kariobangi North Estate within Nairobi Area jointly with another not before the Court, while armed with a dangerous weapon namely a pistol robbed LAWI CYRUS WANDUGO of a mobile phone, make Nokia 8210 and cash Kshs.1,500/= all valued at Kshs.15,500/= and at, immediately before or immediately after the time of such robbery threatened to use actual violence to the said LAWI CYRUS WANDUGO.”

Plea was taken before the Ag. Chief Magistrate Mrs. M. Wachira on 23rd March, 2007. The applicant who was unrepresented by counsel pleaded guilty after he was informed by the Court that the offence charged was a capital offence, punishable by death. It is recorded in the trial Court’s proceedings as follows:

“The substance of the charge and every element thereof has been stated by the Court to the accused person, in the language that he understands who being asked whether he admits or denies the truth of the charge replies in Kiswahili, ‘It is true’.”

The trial Court further recorded:

“The accused is cautioned again that he is charged with a capital offence and on conviction, [the] punishment is death. The substance of the charge [is] read over and explained to [the] accused

once more who on being asked if he admits the offence states, 'It is true'."

The prosecutor thereafter gave an account of the facts, on the basis of which the charge had been laid. The complainant, one **Lavis Silas Wambugu**, had, on 8th March, 2007 returned to his home in his motor vehicle, Toyota Corolla registration No. KAD 176N; and as he attempted to get into his carport, he came up against the applicant who, while armed with a pistol, ordered him to surrender all belongings he had on him. The appellant robbed the complainant of a mobile telephone, of make Nokia, and cash in the sum of Kshs.1,500/=. Thereafter the applicant was joined by another intruder, the applicant passed on the pistol to this other, and the two took off, as they laughed. The complainant identified the appellant to the Police, who arrested the appellant, confined him at the Kariobangi Police Station, and brought a charge against him under s.296(2) of the Penal Code.

When the learned Chief Magistrate sought the applicant's response to the statement of facts, he said: "The facts are correct."

The trial Court recorded a plea of guilty; recorded the representation of the prosecutor that the applicant was a first offender; recorded also the fact that the applicant made no statement in mitigation; and sentenced the applicant to suffer death in the manner prescribed by law.

Learned counsel for the applicant, **Mrs. Kingoo-Wanjau** now seeks a revision of the conviction and sentence – by setting aside the plea and the sentence, on the ground that "the [applicant] did not have the legal capacity to plead, as he is a man of unsound mind and there is need for him to be certified as mentally fit before a plea is taken."

Learned counsel has sworn an affidavit dated 25th April, 2007 in which she deposes that the applicant has been suffering from a mental disease since 2004, and has been attending psychiatric clinic at the Mathare Mental Hospital. (She attaches official documentation to validate this averment). The deponent avers that the applicant when he repeatedly pleaded guilty to the capital charge in this case, is unlikely to have understood the charge and the implications of pleading as he did. Learned counsel urges that a fresh plea be taken, upon the applicant being treated fully and being certified fit to plead, by a psychiatrist.

The mother of the applicant, **Grace Kanini Ndali** who had been in Court when the applicant pleaded guilty to the charge laid against him, swore a further affidavit in which she deposes that the applicant suffers from a mental disease and has been undergoing treatment at the Mathare Mental Hospital. The deponent believes that the applicant had not at all understood the nature of the trial proceedings when he pleaded guilty to the charge of capital robbery.

I have given anxious consideration to the application made on the applicant's behalf by learned counsel, as well as to the content of the two affidavits, with their validating annexures. There can be no doubt that the applicant is afflicted with mental ailment, and has so been, since 2004 and throughout the period when he is said to have committed the offence which was the basis of the charge in the trial Court.

It follows that the applicant had no capacity in law to plead to the charge; and thus the plea which was then taken, the conviction and the sentence must be set aside as a nullity.

I will order, in the circumstances, that the applicant be held in custody and accorded psychiatric treatment as necessary, and upon certification of his fitness to plead, he shall then be brought before the trial Court, and for plea-taking by a different Magistrate from the one who first took the plea.

Orders accordingly.

DATED and DELIVERED at Nairobi this 10th day of May, 2007.

J.B. OJWANG

JUDGE