REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal 187 of 2005

MOHAMED SHIRE WARSUGI…….....……APPELLANT

VERSUS

REPUBLIC…….....……..RESPONDENT

JUDGMENT

The Appellant, Mohamed Shire Warsugi was charged before the Chief Magistrate at Mombasa with the offence of robbery with violence contrary to section 296(2) of the Pena Code. The particulars of the charge were that on the 2nd day of October 2005 at Kwahola village Changamwe in Mombasa District within Coast Province, jointly with others not before court, while armed with iron bars he robbed Felix Mwaka Kitonga of Sh. 1000/= and at or immediately before or immediately after the time of such robbery, he threatened to use actual violence on the said Felix Mwaka Kitonga. He pleaded guilty to the charges. He was accordingly convicted but because he was 18 years old the trial court ordered that he be held at the President's pleasure. He has now appealed to this court against the said conviction and sentence.

The Appellant's counsel Mr. Hassan submitted that the Appellant did not unequivocally plead guilty to the charge. That, he said, is clear from the record. If the Appellant had understood the charge and the plea had been unequivocal, he could not have asked for leniency.

Mr. Hassan also submitted that there is nothing on record to show that the Appellant was warned and understood the seriousness of the charge before he pleaded.

Miss Mwaniki, learned state counsel, on the other hand did not think highly of the appeal and in fact urged us to enhance the sentence. According to her the plea was unequivocal. She said that the record shows the charge was read and explained to the Appellant in the language he understands and he unequivocally pleaded guilty.

Miss Mwaniki further submitted that it is only an accused person who is under the age of 18 years who can, under section 25(2) of Penal Code, be detained during the President's pleasure. The Appellant in this case was 18 yeas old and should therefore have been sentenced to death as provided by law. Although she had not served the Appellant with the notice of enhancement of sentence she urged us to act under section 354 (3) (b) of the Criminal Procedure Code and alter the Appellant's sentence to one of death.

In the alternative she submitted that if we find that the Appellant did not unequivocally plead guilty to the charge then we should order a retrial.

Having read the lower court record we are of the view that although the Appellant may very well have been explained the seriousness of the charge, as it is clear that the charge was read and explained to him twice, the record, however, does not clearly indicate that.

When an accused person is charged with a serious offence like the capital robbery that the Appellant in this case faced and he evinces an intention of pleading guilty to the charge the trial court is under duty to ensure that the accused person is warned of the seriousness of the charge and the sentence it carries. It should then make a very clear record that the accused has, before pleading guilty, been warned of the

seriousness of the offence and told in no uncertain terms that on pleading guilty he will be sentenced to death. That should come out clearly so that anybody reading that record later is left in no doubt at all as to whether or not the accused clearly understood the charge before he pleaded guilty. Nothing should be left to conjecture. As we have said the record in this case does not show that the Appellant clearly understood the seriousness of the charge and the consequence of a plea of guilty to it. The learned Chief Magistrate may have warned him but he did not record that. In the circumstances we allow this appeal quash the conviction and set aside the sentence.

The learned state counsel has asked for a retrial. A retrial is normally ordered where the interests of justice so demand and where there is evidence which, on a full and proper consideration might result in a conviction –**Braganza – Vs – republic [1957] EA 854.** In this case the Appellant was charged with a serious offence, capital robbery. Although we do not know whether or not the prosecution has evidence against having not had an opportunity to present it we cannot assume it has none. The interest of justice in this case demand that a retrial be ordered and we accordingly order that the Appellant be retried before another magistrate.

DATED and delivered this 29th day of March 2006.

J. K. SERGON

JUDGE

D. K. MARAGA

JUDGE