REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 133 of 2002

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 899 of 2002 – G. A. Ndeda [C.M.]

EDWARD MACHARIA KARIUKI……….......................….………..APPELLANT

VERSUS

REPUBLIC…………………............................……….…..………RESPONDENT

JUDGMENT OF THE COURT

The appellant, Edward Macharia Kariuki was charged with the offence of robbery with violence contrary to **Section 296(2)** of the **Penal Code**. The particulars of the charge were that on the 29th of April 2002 in Nakuru town, jointly with others not before court and while armed with dangerous weapons namely pistols, robbed Musa Njue Rungiri of Kshs 15,400/= and motor vehicle registration number KAG 469 Toyota Corolla white in colour and at or immediately before or immediately after the time of such robbery used actual violence to the said Musa Njue Rungiri. The appellant was further charged with two counts of being in possession of a firearm and ammunition without a firearm certificate contrary to **Section 4(1) as read with Section 3(2) of the Firearm Act**. The particulars of the offence were that on the 29th of April 2002 at Nakuru town, the appellant was found in possession of one American browning revolver S/No. 2002915 RIA and five rounds of .45mm calibre ammunition without a firearm certificate. The appellant pleaded guilty to all the charges. In respect of the first count he was sentenced to death as is mandatorily provided by the law. In respect of each of the two counts he was sentenced to serve seven years imprisonment. The said sentences were ordered to run concurrently. The appellant was aggrieved by his conviction and sentence and appealed to this court.

In his petition of appeal, the appellant raised six grounds of appeal challenging the decision of the trial magistrate in convicting him. He faulted the trial magistrate for convicting him on a plea of guilty that was not unequivocal. He was aggrieved that the trial magistrate had not explained to him the substance and the elements of the charge in a language that he could understand as required by the law. He was aggrieved that the trial magistrate had not warned him of the consequences if he pleaded guilty to the charge whose punishment was the mandatory death sentence. He was further aggrieved that he was not medically examined before the said plea was taken. At the hearing of the appeal, the appellant, with the leave of the court, presented to the court written submissions urging this court to allow his appeal. Mr. Koech for the State made oral submissions urging this court to dismiss the appeal. He submitted that the plea of guilty recorded by the subordinate court was unequivocal. The appellant had therefore properly and legally admitted the charges. He urged this court not to disturb the finding of the trial magistrate.

The issue for determination by this court is whether the plea of guilty as recorded by the trial magistrate was unequivocal. As the first appellate court, it is our duty to re-evaluate and scrutinize the record of the subordinate court in order to determine if the plea of guilty recorded was unequivocal. The law as regard the recording of a plea of guilty is provided for by **Section 207** of the **Criminal Procedure Code.** The considerations that have to be put in mind by a trial court when recording a plea of guilty was enunciated by the Court of Appeal in the case of **Adan –vs- Republic [1973] E.A. 445** at page 446 where it was held that;

"***When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea into 'not guilty' and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, of course, be recorded. The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It is not infrequently happens that an accused person, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction."***

In the present appeal, the charge was read to the accused in a language which he understood. Although the language that the plea was taken was not recorded, the record clearly shows that the appellant understood the charge. On the first count when plea was read to him, he stated as follows:

"***It is true that the pistol was not mine. It was for the person who died but we were together."***

In respect of the other two charges he replied:

"***It is true".***

After the facts of the case were explained by the prosecutor the appellant replied:

"***Facts are true. I was with others. Some ran away and others were killed."***

On re-evaluation of the said plea of guilty recorded by the subordinate court, we have no doubt that the appellant understood the charge and pleaded guilty to the charge. He gave answers which indicated that he clearly understood the charge and the nature of the offence that he was facing. However, the trial magistrate was required in law to explain to the appellant the consequences of his admitting an offence that carried a mandatory death sentence. As was held by the Court of Appeal in the case of **David Mutai Kosgei –vs- Republic - CA Criminal Appeal No. 95 of 2005 (Eldoret) (***unreported***)** at page 6 of the said judgment:

"***However, in cases where a charge carries with it the death penalty, the courts have set out other additional precautions to be taken and recorded by trial courts where an accused person is taken to be pleading to such a charge. That is the foundation underlying cases such as Boit –vs- Republic [2002] 1 KLR 815. In that case, the court stated:-***

'***As far as we are aware there is no law in Kenya which would prevent a person charged with an offence punishable by death from pleading guilty to such a charge…'***

But the court then went on to set out other safeguards applicable to such a situation and those safeguards are:-

(i) Where the offence is one punishable by death the court recording the plea of guilty must show in its record that the person pleading guilty understands that as a consequence of his plea he will face a sentence of death.

(ii) The record of the trial court must show that the warning has been administered and the appellant's response to it.

Once these safeguards are complied with and an accused person still maintains his plea of guilty, there is no law to prevent the trial court from convicting and imposing the death sentence."

In the instant appeal, it is clear that while the trial magistrate complied with the requirements laid down in the ***Adan case***, she failed to comply with the additional requirements that required her to warn the appellant of the consequences of pleading guilty to an offence whose sentence would be the mandatory death sentence. The appellant therefore pleaded guilty to the charge not knowing that he would be sentenced to death. In the circumstances of this case, we would allow the appeal, but in part. The appeal against conviction and sentence in respect of the two offences under the **Firearms Act** are hereby dismissed. The appellant will serve the sentence of seven years imprisonment that was imposed by the trial magistrate. The said sentences shall take effect from the 13th of May 2002 when the appellant was convicted by the trial magistrate. The said sentences shall run concurrently.

In respect of the plea of guilty recorded in regard to the charge of robbery with violence contrary to **Section 296(2) of the Penal Code**, the said conviction of the appellant by the trial magistrate is set aside because the trial magistrate did not warn the appellant of the consequences of pleading guilty to an offence whose sentence would be a mandatory death sentence. The appeal by the appellant is therefore allowed. His conviction is quashed and the death sentence set aside. However we order that the appellant shall be retried in view of the serious nature of the offence that he faced. The appellant shall therefore be taken before the Chief Magistrate's Court, Nakuru on the 14th of July 2006 so that he may take a fresh plea on the capital robbery charge.

It is so ordered.

DATED at NAKURU this 6th day of July 2006.

M. KOOME

JUDGE

L. KIMARU

JUDGE