REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
Criminal Appeal 732 of 2003

(From original conviction(s) and Sentence(s) in Criminal case No. 5554 of 2003 of the Chief Magistrate's Court at Makadara (Mr. C.O. Kanyangi – S.P.M.)

PATRICK MAINA WANGUI… ……..……..APPELLANT
VERSUS
REPUBLIC…… ……...RESPONDENT

J U D G M E N T

PATRICK MAINA WANGUI pleaded guilty to a charge of **ROBBERY WITH VIOLENCE** contrary to **Section 296(2**) of the **Penal Code.** He was sentenced to death as prescribed in the law. He challenges the conviction on grounds that the learned trial magistrate did not warn him of the consequences of pleading guilty to a capital charge. He also said he was 18 years old.

The appeal was conceded. **MISS OKUMU** learned counsel for the State submitted that apparently the Appellant was 16 years old when he was convicted on admission of the capital charge. That the conviction was improper for two reasons; one, the charge did not disclose an offence since the year the offence was allegedly committed was not indicated; two the particulars of the charge and the charge were not in tandem. The charge was simple robbery yet particulars of charge support capital robbery. She submitted that there were gaps in the prosecution case and ordering a retrial will give the prosecution unfair opportunity to fill gaps in their case.

We have carefully considered this appeal and analyzed the proceedings. The plea of guilty entered was equivocal. Not only is the charge defective for being wrongly framed, the facts given by the prosecution did not support the charge. We agree with the learned State Counsel that the proceedings were defective and the plea equivocal.

For an offence which calls for the death penalty, it is important that the trial magistrate warns the accused of the consequences of pleading guilty to the charge. We think that failure to warn an accused person of the consequence is fatal and renders the plea equivocal. For that reason we quash the conviction and set aside the sentence.

On the issue of a retrial, learned counsel felt that ordering one would give the prosecution unfair advantage of rectifying the gaps in their case and especially the charge. We agree. However, there is a more stronger reason why a retrial cannot be ordered. The Appellant was 16 years of age at the time the plea was taken. The learned trial magistrate infringed on the Appellant's rights under the constitution and also **Section 190** of the **Children's Act** by imposing an illegal sentence. We believe that ordering a retrial would compound the illegality committed in this case and highly prejudice the Appellant. We decline to order a retrial. The Appellant should be set at liberty unless otherwise lawfully held.

Dated at Nairobi this 14th day of December 2005.

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LESIIT, J.

JUDGE

…….

MAKHANDIA

JUDGE