



REPUBLIC OF KENYA



KENYA LAW
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**Elijah v Republic (Criminal Appeal 33 of 2022)
[2024] KEHC 1924 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 1924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 33 OF 2022
HI ONG'UDI, J
MARCH 1, 2024**

BETWEEN

ONYANCHA ELIJAH APPELLANT

AND

REPUBLIC RESPONDENT

(being an appeal from the conviction and sentence in the Principal Magistrate's Court at Ogembo in Criminal Case No. E1922 of 2022 by Hon. C. N. Sindani – Principal Magistrate)

JUDGMENT

1. Onyancha Elijah the appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296 of the penal code. The particulars being that the appellant on the 5th day of December, 2022 at Motebwomera village in Kenyanya sub-county within Kisii county robbed Yulles Osebe Ondari of one blanket and one radio make Sonitech all valued at Ksh 3,200/= and immediately after the time of such robbery uttered words of threat to kill her.
2. On his first appearance in court on 7th December, 2022 he admitted the charge and was convicted. He was on the next day sentenced to suffer death.
3. Being aggrieved by the conviction and sentence he filed this Appeal on the following grounds:
 - i. That the appellant pleaded guilty to the charges of robbery with violence for he did not know the repercussions and the learned magistrate failed to inform the appellant the reasons for the detention which is a gross violation of article 49 of *the constitution*.
 - ii. That the learned trial magistrate erred both in law and fact by not withstanding that he was not issued with the required documents, e.g statements that could have enabled him to prepare for the case before basing conviction and failed to note that the appellant was compelled to confess so as to be forgiven.



- iii. That the trial magistrate faulted both in law and facts when seemingly based the conviction without warning the appellant on the consequences of pleading guilty to the charges of robbery with violence given that he was not found in possession of any stolen property.
 - iv. That the trial magistrate equally faulted both in law and fact when seemingly overlooked and objected the appellant's defense without cogent reasons yet the same was remarkably comprehensive in casting considerable doubts to the strength of the prosecution case.
4. The Appeal was canvassed by written submissions.
 5. The Appellant's submissions were filed on 21st November, 2023. Generally, he submitted that the plea was not unequivocal for the reasons that:
 - i. Nothing about the charge was explained to him
 - ii. He was hoodwinked into admitting the charge
 - iii. He never understood the language used in court
 - iv. He was not warned of the consequences of pleading guilty
 - v. He was not represented.
 6. Prosecution counsel Mr. Justus Ochengo opposed the Appeal on the following grounds dated 26th October, 2023.
 - i. The plea was unequivocal
 - ii. The charge and facts were read in Kiswahili language
 - iii. The seriousness of the charge was explained.
 - iv. Having been convicted on his own plea of guilty he could only appeal against sentence.
 - v. That since he pleaded guilty and saved the court's time the prosecution conceded on the sentence being reviewed.

Analysis and Determination

7. This being the first appeal the court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. In *Njoroge V Republic* [1989] KLR 313 the Court of Appeal held:

“On first appeal from conviction by a magistrate the appellant is entitled to have the appellate court's own consideration and views on the evidence as a whole and its own decisions thereon”.
8. In this case the matter did not proceed to hearing, because the appellant admitted the charge. This court is therefore called upon to determine if the plea was unequivocal.
9. What then is an unequivocal plea? In the case of *Adan V Republic* [1973] E.A 445 the Court of Appeal laid down in a simple and plain manner how pleas of guilty should be recorded and the steps which should be followed. These were as follows:
 - i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;



- ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
 - iii. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
 - iv. If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.
 - v. If there is no change of plea a conviction should be recorded and a statement of the facts to sentence together with the accused's reply should be recorded.
10. Before this court is a clear record of what transpired in the lower court when the appellant was presented on 7th December, 2022 before the Principal Magistrate. Record shows there was a court clerk Language Ekegusii/Kiswahili
- The charge was read and explained to him and he pleaded guilty. The court went further to explain to him the offence and its seriousness. The appellant still admitted it. A plea of guilty was then entered and the prosecution proceeded to state the facts which the appellant confirmed to be correct.
11. He was thereafter convicted on his own plea of guilty. He was given an opportunity to mitigate. Sentencing was set for the next day.
12. On 8th December, 2022 the appellant assured the court that he was not changing plea and he was then sentenced to death.
13. Having set out what transpired on 7th and 8th December, 2022 and having considered the grounds of appeal and parties' submissions, I am not in agreement with the appellant's complaints about the plea taking. The learned trial Magistrate followed the laid down principles and I find that the plea was unequivocal.
14. Coming to sentence, even the State does not support it. Its not clear why the trial court did not call for a pre-sentencing report before passing sentence in such a serious offence.
15. The stolen items were valued at Ksh 3,200/= . The facts show that the appellant is a grandson to the complainant. He did not break into the house. A pre-sentencing report would have explained to the court what was the real issue between the appellant and grandmother.
16. Considering the relationship between the appellant and complainant and the offence committed I find the death sentence to be too harsh.
17. He has been in prison since 7th December, 2022 (1 year plus 2 months).
- I hereby set aside the death sentence and substitute it with three (3) years imprisonment from the date of conviction.
18. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

