REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

R. MWONGO, J

CRIMINAL APPEAL NO 13 OF 2016

(Being an Appeal from the Original Conviction and Sentence in Criminal Case No 91 of 2016 in the Principal Magistrates Court, Engineer, Hon Mutegi, - SRM)

JOHN MAINA MBURU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein was charged and convicted with two counts of Robbery with Violence contrary to **Section 296(2)** of the **Penal Code**. He was sentenced to death. He has appealed against the judgment of Hon Mutegi, SRM, on the following grounds:

> ***"1.THAT, the learned trial magistrate erred in law and fact when he convicted and sentenced me in the present case yet failed warn the appellant herein on the consequences of the penalty.***
>
> ***2.THAT, the learned trial magistrate erred in both law and fact when he convicted me in the present case failing to find the appellant herein was not in his clear state of mind.***
>
> ***3. THAT, the appellant herein was confused by the investigating officer to plead to the charge.***
>
> ***4. THAT, the learned trial magistrate erred in law and fact in convicting me failing to refer the appellant herein to be checked by the psychiatrist before convicting and sentencing him to death.***
>
> ***5. THAT, I pray to be furnished with a copy of the trial record to enable me raise more reasonable grounds and further pray to present during the hearing of this appeal***."

2. The Appellant filed written submissions on 4th June 2018, and relies on them. He states in his amended grounds of appeal contained in his submission, that he pleaded guilty to the charges, but that: the plea was not unequivocal; the learned Magistrate misdirected himself on the principles and procedure of taking plea; that he did not understand the charges against him or the severity of the said charges and that the sentence meted out was excessive in the circumstances; that the learned Magistrate did not consider the Appellant's mitigation and that he was mentally incapacitated at the time.

3. The DPP opposes the appeal on the grounds that the Appellant entered a plea of guilty in respect of each of the counts. He took the court through the proceedings highlighting the process under which the learned Magistrate took the plea up to the point of sentencing the Appellant. Counsel referred to **section 348** of the **Criminal Procedure Code** which provides as follows:

> ***"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of that sentence."***

4. That provision has not been interpreted by the courts to be an absolute bar to an appeal where the Appellant has pleaded guilty. In **Wandete David Munyoki v Republic [2015] eKLR** the Court of Appeal: Makhandia, Ouko & M'inoti, JJ.A. stated:

> ***"It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in* Ndede v R [1991] KLR 567*, this Court held that the court is not bound to***

accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there has been inordinate delay in bringing him to court from the date of arrest. <u>The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed.</u>" **(emphasis added).**

5. On the basis of the above provision and the Appellant's assertions in the amended grounds of appeal, it is necessary to examine in detail the process through which the Appellant was taken at the time of plea taking.

6. The proceedings show that the Appellant was charged as Accused No 2. On 3rd February, 2016, he was arraigned in court with others. According to the proceedings, the charge was read over and explained to the accused persons – in accordance with **section 207** of the **CPC** – *"in Kiswahili language which they understand"*. This was in pursuance of the standard set out in **Adan v Republic [1973] EA.** The Appellant, being unrepresented, the court was required to ensure that the charges were explained to him. The record shows that the charge was explained. The procedure to be applied on the taking of a guilty plea was explained in the case *of* **<u>Adan vs Republic,</u> [1973] EA 445** where the Court held 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 facts relevant to sentence together with the accused's reply should be recorded."

7. I have looked at the charges that were read out. They contain the key elements of the offence of robbery, that is: stealing, the use of violence or threat to use it, the fact that the Appellant was armed with a knife and was accompanied by others, and in count two that he did in fact wound the complainant.

8. Next, the court was expected pursuant to **Baya v Republic [1984] KLR 657**, to ensure that each accused person was individually addressed and given the opportunity to respond to the charges. The proceedings show that on Count 1 the Appellant answered*: " It is true"*, and similarly on count 2 he answered: *"It is true"*. **Section 207(2)** of the **CPC** requires that if the accused admits the truth of his admission shall be recorded as nearly as possible in the words used by him and the court shall then convict him and pass sentence. In **Ombena v R Criminal App No 36 of 1981**, the Court of Appeal held that where the accused is charged with more than one count, the court should record a plea on each count separately.

9. In my view, there was compliance in this regard by the learned Magistrate. The plea recorded by the learned Magistrate was specific to each accused person and was not a general assertion of guilt or a general entry of "guilty for all", a situation warned against by the Court of Appeal in **Kariuki v R [1984] KLR 809.**

10. The next expectation of the law with regard to the plea-taking procedure was to ascertain whether the accused persons were in a proper state of mind when taking plea. The proceedings show that the lower court directed that the Appellant, with others, be taken to Gilgil Mental Hospital for psychiatric evaluation. A mention was fixed for 10th February to receive a Doctor's Report and for directions.

11. One week later, on 10th February, 2016, the Appellant and other accused persons returned to court. The proceedings show that: *"The Doctor's Report are in Court. It shows that Accused persons…..Accused 2... are fit to stand trial"*. The proceedings then show that the court ordered that the: *"Charges be read afresh in Kiswahili language to accused 2, 3 &4"*. This was done, and the following recorded by the learned Magistrate:

"Count 1..…Accused 2 it is True….

Count II……Accused 2 It is True…"

12. The facts were then read out in court and are replicated at pages 6 and 7 of the Record. I have also perused the original handwritten record of proceedings and note that the Facts are written out in long hand by the learned Magistrate. The facts were read out as follows:

"On 30 January 2016 at 8:30 p.m. the complainant Daniel Njoroge Kamau who is also a businessman at Wanjohi Trading Centre was on his way home when he was waylaid by four men at Wanjohi river who robbed him a Samsung mobile phone worth Ksh 2,300/= and assorted shopping of Ksh 450/=

The 4 men were also armed with a knife. The complainant was able to identify the 4 men using a torch. The men were people he used to see them around Wanjohi town. He managed to escape and went back to the town. He met a group of people whom he informed what had happened. At 8:40 p.m. the other complainant Joseph Mwaura Macharia, was on his way home when he was

also waylaid by a gang of 4 men armed with a knife who robbed him of a Nokia Asha 200 mobile phone worth 2000 shillings and cash of Kshs 2,000/= and cash Ksh 40/=. The complainant was only able to identify one of them as Kuria.

On being released he ran towards one Wanjohi town where he met the 1st complainant and the group of people and narrated his ordeal. The group decided to track the gang and after a short distance they met the gang near the Wanjohi river. The said gang was arrested by the members of public and were identified as Samuel Kuria Wairimu, John Maina Mburu (Accused 2), Paul Wanjama Mbugua and Hiram Chege Nganga, all from Wanjohi. AP officers from Wanjohi AP Camp were alerted they went to the scene and re-arrested the 4 men especially the 2nd accused person. They searched the 4 men and managed to recover 2 mobile phones make Samsung N6, Paul Wanjama's pocket and a Nokia Asha 200 from John Maina Mburu's pocket Accused No 2. The knife was also recovered from the 2nd accused person. The phones are in court. The Samsung N6 as Exhibit 1 and Nokia Asha 200 as Exhibit 2. The officers managed to disarm the 2nd accused person. The knife is in court. It is a kitchen knife as Exhibit 3. The officers then escorted the 4 suspects to Kipipiri Police station where the charges against all of them were preferred. That is all."

13. The Magistrate then went on:

"Court: Accused 2, are those facts true?

Accused: The facts are true

Court: Plea of guilty in both Count I and II entered as against the second accused person"

14. What the authorities have consistently required is that the plea should be unequivocal. Where the accused says it is true, that may not amount to an unequivocal plea if it appears that the accused disputes some element of the offence See: **Jackson Akhonya Makokha v R Court of Appeal Kisumu, Criminal App No 131 of 2012**.

15. The question whether the plea was unequivocal in this case, is answered in the positive in that: the statement of facts discloses the offence of robbery with violence, and there is no evidence of the Appellant having disputed any of the facts. Is the court convinced beyond doubt that the accused intended to plead guilty? I think so. The Charge on each of the counts was read out, and the accused pleaded guilty to each. The appellant was then taken for psychiatric evaluation and found to be of sound mind. At the next hearing, the facts were then read out and the accused stated that the facts were true.

16. The Appellant has also argued that the learned Magistrate failed to warn him of the severity of the sentence should he plead guilty. It is true that the record does not indicate that the Magistrate warned the Appellant of the sentence. Is there a legal requirement for such a warning?

17. In **Job Ntabo Ratemo v Republic [2015] eKLR** in a defilement case, the Court of Appeal in Nairobi after considering the law and authorities on the procedure for taking a proper plea held:

"Under the above cited case law and Section 207 of the Code, there is no duty placed upon the court to explain the penalty imposed on the offence charged. All that is required of the Court is to ensure that the charge and all the essential ingredients of the offence are explained to the accused in a language that he understands which was done in this case. The minimum sentence for the offence of defilement as life sentence is prescribed in law, and thus leaves no room for discretion by the Court. The two lower courts cannot be faulted for finding as they did." (Emphasis supplied).

In light of foregoing authority, there is no legal requirement placed on a court to warn the accused of the nature or severity of the sentence to be meted.

18. The final submission of the Appellant is that the sentence meted was too harsh given the mitigation of the Appellant at the time of sentencing, and that the trial court did not call for evidence before sentencing the accused. He argues that the court's hands are not tied to giving only the sentence of death.

19. The Appellant's mitigation was that: *"I am praying for forgiveness. I will not repeat again."* The Appellant argued that the trial court did not comply with sections 216 and 329 of the Criminal Procedure Code before passing sentence. These provisions both require that the court, before passing sentence, shall receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

20. In my view there is nothing specific in the appellant's mitigation that would have altered the learned Magistrate's consideration of sentence. Nor, in light of the mandatory penalty would any evidence have made a difference to the sentence to be meted. **Section 296 (2)** of the **Penal Code** provides for a mandatory death sentence for the offence of robbery with violence as follows:

"If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons …..he shall be sentenced to death" *(Emphasis supplied)*

21. Accordingly, I do not see any reason to interfere with the learned Magistrate's decision in this case, and the appeal is hereby dismissed.

Dated and Delivered at Naivasha this 18th Day of October, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. John Maina Mburu the Appellant

2. Mr. Koima for the State

Court Clerk – Quinter Ogutu