REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 691 OF 2010

BETWEEN

JOSEPH NDOLO MUTISYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in the Chief Magistrate's Court

at Kibera Cr. Case No. 1558 of 2009 delivered by Hon. Onyango,

SRM on 30th November, 2010).

JUDGMENT

Background.

1. The Appellant herein was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 4th April, 2009 at KEPHIS in Karen within Nairobi Area Province, being armed with an offensive weapon namely a panga and a knife robbed Mary Musimbi Kerenda her mobile phone make Samsung, a handbag and cash Kshs. 100/- all valued at Kshs. 4,500/- and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Mary Musimbi Kerenda.The Appellant was found guilty and sentenced to death. He was dissatisfied with both the conviction and sentence against which he preferred the instant appeal.

2. His grounds of appeal were set out in a Memorandum of Appeal, amended by an application filed on 29th November, 2017. They are; that he was not properly or adequately identified, that the prosecution evidence was riddled with contradictions, that the court erred in relying on the evidence of an exhibit, a knife, that was not produced in court, that Articles 50(1)(e), (g), (h), (4), (5)(b) and 47 of the Constitution were violated and that the conviction was against the weight of the evidence adduced.

Determination.

3. The Court is thankful for the helpful submissions, both written and oral, made by learned counsel, Mrs. Mwangangi for the Appellant and Ms. Nyauncho for the Respondent. However, this is a matter that I shall not decide based on the submissions. Upon perusal of the record of appeal the court noted an apparent error that called into question the manner the Appellant's plea was taken, or altogether whether any plea was taken. The Appellant was first arraigned in court on 8th April, 2009 when the proceedings were recorded as follows:

> ***"The substance of the charge(s) and every element thereof has been stated by the court to the accused person, in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies in Eng/Kiswahili;***
>
> **Accused:** ***It is true but she recovered her things.***
>
> **Court Prosecutor:** ***Accused to be taken for treatment***

Court: ***Accused to be escorted to KNH for treatment***.

Mention 9/4/09 for plea. Remanded at Karen Police Station."

4. When the matter came up for hearing on 9th April, 2009 the proceedings were recorded as follows:

"Accused: I was taken to hospital.

Court- Charge read over and explained to accused person in Kiswahili which he understands

Accused- It is true.

Court – Hearing 12/6/09 Court 3

Mention 23/4/09

Remanded in custody"

5. The matter was subsequently mentioned on 23rd April, 2009 and the Appellant was absent. The hearing was nevertheless set for 12th June, 2009 and a production order issued for a mention on 7th May, 2009. On12th June, 2009 the Court Prosecutor indicated that he had one witness present and the accused person submitted that he was ready to proceed. The matter was however not reached. On 9th September, 2009 the matter was heard and the evidence of PW1 recorded.

6. It is clear that on the two occasions the Appellant was presented for plea, only the plea-taking process was initiated but not completed. To be specific, after the Appellant indicated that he would plead guilty, the court never recorded the nature of the plea taken; that is whether the Appellant had pleaded guilty or not guilty. Instead, he was subjected to a trial even after indicating that he would plead guilty.

7. At this stage, I note that two things went entirely wrong, one that the procedure of taking plea was not followed and so the plea was not unequivocal. Two, the fact of subjecting the Appellant to a trial when indeed no plea was taken.

8. With respect to the first aspect, Section 207 (1) and (2) of the Criminal Procedure Code sets out the process of taking pleas as follows;

"(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making an order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded."

The said procedure was candidly expounded on in the well celebrated case of **Adan Inshair Hassan v Republic[1972] JAL 12** as follows;

"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 person 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 to "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 fact 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 not infrequently happens that an accused, 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."

9. Therefore, where an accused enters an equivocal plea of guilty the court must restate the charges facing him/her with the goal of ascertaining the correct plea. If the accused again enters a plea of guilty the court shall follow the procedure set out in **Adan Inshair Hassan case(Supra)** and satisfy itself as to the unequivocal nature of the plea whereupon the plea of guilty shall be entered. If the plea is still equivocal the court shall enter a plea of not guilty and order that the matter proceeds to trial.

10. With the half-baked plea taking process, I safely conclude that it was not only unequivocal but subsequently subjecting the Appellant to a trial clearly violated his right under Article50(2)(b) of the Constitution which requires the accused to be informed of the charge with sufficient detail to answer it.

11. In the present matter, the unequivocal nature of the Appellant's plea was not interrogated nor a plea of not guilty entered before the matter proceeded to trial. This was a grave defect that rendered the trial a mistrial at its inception. The proceedings, subsequent conviction and sentence were therefore a nullity. The proper order to make, consequently is that a retrial be conducted.

12. However, before making such an order the Court must consider some cardinal factors as was held by the Court of Appeal in **Opicho *v. Republic[2009] KLR 369,*** *viz.:*

> ***"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even were a conviction is vitiated by a mistake of the trial court for which he prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial shall only be made where the interest of justice require it."***

13. The paramount consideration in ordering a retrial is whether the same would result in a conviction. The brief circumstances of the case were that the complainant was walking to work when the Appellant ambushed her whilst wielding a panga. He asked for her handbag before fleeing into bushes. She started screaming and people walking on the road chased him and apprehended him. They recovered the handbag with everything still intact. The Appellant was attacked by a mob but police who showed up rescued him. He was escorted to Karen Police Station and charged accordingly. His sworn defence was merely that he was walking on the road and was arrested for no apparent reason.

14. My reevaluation of the evidence drives me to conclude that the Appellant indeed committed the offence. This is true because, firstly, he was arrested whilst fleeing from the scene and the complainant aptly identified him. He was also at the time of arrest in possession of the stolen handbag. Secondly, he used a panga to threaten the complainant who was forced to release her handbag. And so, even if no injury was sustained by the complainant, the mere proof of one of the ingredients of the offence of robbery with violence under Section 296(2) of the Penal Code sufficiently establishes the offence. He nevertheless stole a handbag before it was recovered from him.

15. All the same, it is clear that the circumstances of the case were not grave as the complainant did not sustain any injuries and the stolen goods were recovered. Having regard to the current jurisprudence that the death penalty is no longer mandatory, the circumstances of the case would not warrant a death sentence. See **Francis Karioki Muruatetu & another *v.* Republic[2017]eKLR.** In fact, the period that the Appellant has spent in remand since he took plea on 8th April, 2009, being more than nine years is more than sufficient sentence. As such, a retrial would not serve the interests of justice.

16. In the result, I find that the appeal succeeds. I quash the conviction, set aside the death and order that the Appellant be forthwith set free unless otherwise lawfully held.

Dated and delivered at Nairobi this 3rd October, 2018.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Munyao h/b for Mrs Mwangangi *for the Appellant.*

2. *Miss Atina for the Respondent*.