



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**  
**CRIMINAL APPEAL NO. 94 OF 2015**

**JOHN KALAMA CHEA ..... APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

(From the Original Conviction and Sentence in Criminal Case No. 147 of 2013 of the Chief Magistrate's Court at Malindi – N. Shiundu, Ag. SPM)

**JUDGEMENT**

The appellant was charged with the offence of oathing contrary to section 5 (1) (a) of the Prevention of Organised Crimes Act 2010. The particulars of the offence were that the appellant on the 2<sup>nd</sup> day of February, 2013 at Dabaso Village of Gede Location within Kilifi County, jointly with other before Court was found present at and consented to the administering of an oath or engagement in the nature of an oath purporting to bind the said John Kalama Chea to engage in an organized criminal activity namely breach of peach.

The trial court sentenced the appellant to life imprisonment after the appellant pleaded guilty to the charge. The grounds of appeal are that: -

- i. The trial court did not inform the appellant the consequences of pleading guilty
- ii. The appellant was informed by the police that he would be acquitted if he pleaded guilty.
- iii. The trial court did not accord the appellant adequate time to reflect on the plea.
- iv. The trial court ought to have referred the appellant for mental assessment before taking the plea.
- v. The appellant was not represented by an advocate contrary to Article 50 (2) of the constitution.

In his submissions, the appellant submit that it was his first time to be in court when the plea was taken. The trial court ought to have informed him the consequences of pleading guilty as the sentence is harsh. It is submitted that Article 50 (2) of the Constitution requires the accused to be informed of the charges with sufficient details to answer it. Had he been informed of the sentence, he would not have pleaded guilty. Therefore, the plea was equivocal.

It is further submitted that the trial court did not give the appellant time to reflect on his plea. The court could have given the appellant about fourteen (14) days to reflect on his plea. Article 50 (2) (c) calls for giving accused persons adequate time and facilities to prepare their defences. The appellant is illiterate and a layman in law. Further, the appellant was not represented by an advocate yet Article 50 (2) (h) provide for representation of an accused by an advocate.

The appellant relies on the case of **MUSEMBI MULWA V REPUBLIC Mombasa High Court Criminal Appeal No. 134 of 2005** and that of **MOHAMED ABADADA V REPUBLIC, Mombasa Court of Appeal Criminal Appeal No. 372 of 2012**. The appellant further submitted that his co-accused were acquitted of the charges in October, 2014. He has reformed and has a diploma in Biblical studies.

The State opposed the appeal. It is submitted that the appellant pleaded guilty to the charge. The facts were read over and the appellant pleaded guilty. It was up to the appellant to retain an advocate. He was given ample time to prepare. The appellant was charged alone and there were no co-accused as per the charge sheet. The appellant was not forced to plead guilty.

The record of the trial court indicate that the appellant was arrested on 22<sup>nd</sup> February, 2013. He was arraigned before the court on 25<sup>th</sup> February, 2013. The charge was read over to the appellant in Kiswahili and he pleaded guilty. The facts of the case were that on 22<sup>nd</sup> February, 2013 police got information that some people were at Dabaso forest planning to engage in criminal activities. Police proceeded to the scene and the suspects ran away. The appellant was unfortunate and was arrested and charged. The appellant informed the court that the facts were correct. The trial court convicted the appellant. In mitigation, the appellant stated that he was thirty years old and sought forgiveness.

Given the record of the trial court, I do find that the plea was unequivocal. The information was read over to the accused. The response in Kiswahili was captured. The facts were equally read over and the appellant responded “**Maelezo ni ya ukweli**” – The facts are correct. The appellant contends that he ought to have been informed of the consequences of pleading guilty. The sentence is harsh and that he ought to have been given ample time to prepare. The ample time being referred to under Article 50 (2) (c) is in relation to a person who has not pleaded guilty. Such an accused need to be given ample time to prepare himself in his defence of the charges. In this regard, the case may not proceed on the same date of the plea as the accused may need more time to read the witness evidence as well as engage an advocate. Where an accused pleads guilty to the charge, there is no defence and therefore such an accused cannot rely on Article 50 (2) (c) of the Constitution. Similarly, such an accused cannot ask for the right to be represented by an advocate as the accused would be accepting the charge. The accused may seek time to engage an advocate to mitigate on his behalf. That was not the case in this current appeal. The appellant pleaded guilty to the charge and the facts. He was accorded time to mitigate. I do find that the conviction is proper.

The next issue relates to the sentence imposed by the trial court. Section 5 (1) of the Prevention of Organised Crimes Act states as follows: -

**(1) A person who –**

**(a) is present at and consents to the administering of any oath or engagement in the nature of an oath purporting to bind the person who takes it to belong to an organized criminal group or engage in an organized criminal activity;**

**(b) administers an oath or engagement in the nature of an oath purporting to bind the person who takes it to belong to an organized criminal group or engage in an organized criminal activity;**

**(c) takes any such oath or engagement in the nature of an oath; or**

**(d) by use of physical force, or be threat or intimidation of any kind nature of an oath, commits an offence and shall on conviction be liable to imprisonment for life.**

The operating words under section 5 (1) is that upon conviction the accused shall be **“liable”** to imprisonment for life. Where the word liable is used, then the prescribed sentence does not become mandatory or the minimum. The term liable simply denotes that the accused is likely to suffer the sentence imposed by the law but that does not mean that he **“shall”** suffer that specific sentence.

Several punishing sections of the Penal Code (cap 63) uses the word **“liable”**. Section 296 (1) of the Penal Code provide that any person who commits the offence of robbery is liable to imprisonment for fourteen (14) years. Similarly, section 298 provides that any person who commits the offence of assault is liable to imprisonment for five years. Section 205 of the Penal Code provides that any person who commits the offence of manslaughter is liable to imprisonment for life. Section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 provides that any person who traffics in narcotic drugs is liable to a fine of Kshs.1 million or three times the market value of the drugs and in addition to imprisonment for life.

All the above provisions does not make it mandatory to sentence the accused to the maximum prescribed sentence. The picture is different when the word **“shall”** is used in the provisions providing the sentence. Section 204 of the Penal Code provides that any person convicted of murder **“shall”** be sentenced to death. The same applies to section 296 (2) of the Penal Code which provides that anyone convicted of robbery with violence **“shall”** be sentenced to death. Section 40 (3) of the Penal Code provides that anyone convicted of treason shall be sentenced to death. It all depends on how the word **“shall”** is used. If the law provides that a convict **“shall be liable”** to a specific sentence instead of **“shall be sentenced to”**. Then the court is not mandated to impose the maximum in the former position whereas the latter calls for the maximum sentence.

At times the law specifically provides for the minimum sentence. The Sexual Offences Act No. 3 of 2006 is a good example. Section 8 (1) of that Act states that any person who is convicted of defiling a child of less than **eleven years shall be sentenced to life imprisonment**. That becomes the minimum sentence. Section 8 (3) of the same Act states that if the victim of defilement is between the age of twelve and fifteen years, the convict shall be sentenced to **“not less”** than twenty years imprisonment.

In the current appeal, the appellant was charged with the offence of oathing. He pleaded guilty. No weapons or oathing items were found at the scene. The appellant saved judicial time by pleading guilty. He was a first offender. I do find that life imprisonment is not proportionate to the offence. The circumstances of the case does not call for such punishment.

The appellant has now served about four (4) years in prison. He has reformed. He exhibited his Diploma in Biblical Studies issued on 19<sup>th</sup> November, 2015. I do find that the appellant has reformed and the period already served in prison is sufficient punishment.

In the end, the appeal on conviction is disallowed. The life imprisonment sentence is set aside and replaced with the period of four (4) years already served. The appellant shall be set at liberty unless otherwise lawfully held.

**Dated and delivered in Malindi this 16<sup>th</sup> day of February, 2017.**

**S.J. CHITEMBWE**

**JUDGE**