REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 19 OF 2015

[From original conviction and sentence in Criminal Case No.1231 of 2015 of the Principal Magistrate's Court at Nyamira]

JARED OMARIBA OSORO……APPELLANT

VERSUS

STATE……RESPONDENT

J U D G M E N T

This is an appeal from the order of conviction and sentence of the Principal Magistrate Court Nyamira, Eunice Kagure Nyutu, dated 19th day of October 2015 in **Criminal case No.1231 of 2015.**

The appellant, Jared Omariba Osoro, was initially charged with robbery with violence contrary to **Section 295 as read with Section 296 (2) of the penal Code.**

The particulars thereof were that at Nyakenimo sub-location in Nyamira County, jointly robbed Naftal Ochari, one Sonitec phone, one packet of Super-match cigarette and cash of Kshs.2000/= all valued at Kshs.4900/= and at the time of such robbery he used actual violence to the said Naftal Ochari.

When he appeared in court on 19th October, 2015 to plead to the charge, the accused Jared Omariba Osoro pleaded guilty to the charge as read to him. The court therefore entered plea of **GUILTY.**

The accused was convicted on his own plea of guilty.

And accordingly he was sentenced to a mandatory sentence known to this offence.

He was sentenced to death. He was also given 14 days Right of Appeal on 19th October 2015.

Upon being advised by his legal counsel he demurred, hence this appeal.

In his petition of appeal dated 30th October 2015 he sets out several (8) grounds of appeal namely:

1. The learned Magistrate erred in Law and fact by failing to ascertain whether the charges were properly read out and explained to the appellant in a language that he understood owing to the gravity of the offence and the accompanying sentence in the event of a conviction.

2. The learned magistrate erred in law and fact by failing to ascertain whether the appellant was in a proper state of mind while pleading to the charges owing to the seriousness of the offence of

robbery with violence and the accompanying sentence in case of a conviction, compared to the casual manner in which the appellant took plea.

3. The learned magistrate erred in law and fact by failing to find that the appellant was drunk and confused to a point that his judgmental capacity had been impaired and or interfered with at the time of taking plea in that he didn't understand the nature of the process he was being subjected to, he taught it was a village baraza where there is no procedure.

4. The learned magistrate erred in law and fact by failing to notice that the appellant had no legal representation in proceedings involving a serious offence and advise the appellant of getting legal representation at that juncture, as right enshrined in the constitution of Kenya 2010.

5. The learned magistrate erred in law and fact by not finding that the appellant had been seriously beaten, tortured and threatened by the villagers and the police during arrest to a point that he was in a state of shock, despair, confusion and disoriented at the time of taking plea, meaning he could not make proper judgement of his action while at the dock.

6. The learned magistrate erred in law and fact by failing to appreciate that the appellant was facing a capital offence carrying a death penalty on conviction and the same could not be dealt with in a summary manner the way she did at the point of taking plea without allowing the same to proceed to trial and call for evidence to support or corroborate charge.

7. The learned magistrate erred in law and fact by not finding that the appellant's co-accused Charles Makori Arama had already pleaded not guilty on the same charge arising from the same offence and circumstances and convicting the appellant on his own plea of guilty would in effect have a direct bearing on the outcome of the proceedings during the hearing of the 2nd accused's case.

8. The learned magistrate erred in law and fact by not finding that the police at the point of taking plea had not carried out any investigations and only relied on the facts and statements, if any of the complainant to convict while this is a capital offence which calls for proof beyond reasonable doubt to convict, and sentence accordingly.

He however, summarized those grounds into six grounds only.

In his submission, Morara Onsongo for the appellant referred to the court to **Section 348 of Criminal procedure** Code. It says:

> "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 of the sentence"

Be that as it may, counsel referred the court to **Criminal Appeal No.58 of 2013, Wadete David Munyoki –versus- Republic,** as a way exception to **Section 348 of C.P.C**., this 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 circumstances such as injury the accused person may be confused or there have been inordinate delay in bringing him to court from the date of arrest. 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".

The second principle we must remind ourselves of in addition to the procedure laid down in **Adan –versus- Republic [1973] E.A 445**, is that before basing a conviction on a plea of guilty in a capital offence the trial court must warn the accused person of the consequences of entering such plea. ***See Bolt –versus-Republic [2002] lKLR 815.***

Therefore based on the above legal principle, he submitted that his client having been rescued from being lynched by the mob was beaten senselessly and he became unconscious before the police intervened and

rescued him.

Additionally, he was also drunk.

Having been arrested on 18th October 2015 at 7 o'clock was on 19th October 2015 harried to court to take a plea. His mind was neither clear nor stable. It appeared safe to agree to anything the court asks just to save himself from further physical suffering.

The other co-accused with whom he was charged pleaded not guilty. His trial is yet to commence.

The appellant had no legal representation. The offence he faced attracted mandatory death, sentence. ***Article, 50 of the constitution, 2 (g) and (h) is very clear, that is, 2 (g)*** "Every accused person has a right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly"

The accused person was not informed of his right to legal representation.

Again –

> (h) To have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right.

The accused again was not neither assigned counsel nor informed of this right promptly.

Counsel submitted that robbery with violence is a capital offence, carries with it a mandatory death sentence.

Therefore the circumstances have shown that the plea of guilty was entered due to coercion and was not freely entered.

It is good practice to accord the accused person an opportunity and time to reconsider and reflect on his plea. The period for doing this must depend on the good judgment of the trial court, but should be within reasonable time.

The counsel urged the court to set the plea as entered aside and order for a re-trial of the 1st accused along with the 2nd accused in the case of ***Fatehali Manji –versus- Republic [1966] E.A 343***:- The court held:

> "In general a re-trial be ordered and only when the original trial was illegal or defective …….., each case must depend on its own facts and circumstances and an order for a re-trial should only be made where the interest of justice require it"

The learned counsel for the respondent was not averse to the order of re-trial.

He urged the court to make appropriate order.

Accordingly this appeal succeeds and therefore the order of the Lower Court decision delivered on 19th October 2015 upholding the conviction and sentence of the trial court is set aside with the result that the conviction is quashed and sentence set aside. The appellant will be presented before a magistrate with jurisdiction in the Magistrate's court for the purposes of a fresh plea and trial within fourteen (14) days from the date hereof.

Dated at Nyamira this 10th day of February, 2017.

C. B. NAGILLAH

JUDGE

In the presence of:

Kaburi hold brief for Omwega for the Appellant

Ochieng for the respondent

Mobisa Court Clerk.