REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL 89 OF 2015

NICHOLAS MUETI MWEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the conviction and sentence of Hon. E. Onzere, RM

in Criminal Case No. 212 of 2015, delivered on 21st April 2015 in the

Senior Resident Magistrate's Court at Kilungu)

JUDGMENT

The Appellant has filed a Petition of Appeal dated 8th June 2015, wherein he appeals against his conviction and sentence of seven (7) years imprisonment for the offence of robbery contrary to section 296(1) of the Penal Code. The grounds for his appeal are that the learned trial magistrate erred in fact and law when she failed to appreciate that the Appellant did not understand the language of the Court; when she convicted the Appellant on an equivocal plea and on facts which the Appellant disputed; and when she failed to take into account the Appellants mitigation and that he was a first offender when passing sentence.

The Appellant was arraigned before the trial Court on 20th April 2015 when the charge was read to him and he pleaded guilty. The particulars of the charge were that on 10th January 2015 at Nunguni Market, Kisekini sub-location, Kikoko location in Kilungu Sub-county within Makueni County, jointly with another person, he robbed John Muasya Wambua of Kshs 4,000/= and a Samsung mobile phone worth Kshs 10,000/=.

The facts were then narrated by the prosecutor to which the Appellant replied:

> **"We did not beat up the complainant. The other facts are true"**

The trial magistrate then ruled as follows:

> **"The offence the accused is charged with is that of robbery and as such his denial that he did not beat up the complainant does not affect his plea. The denial would have been relevant if the case was one of robbery with violence. In the premises, the accused is convicted on the charge of robbery on his own plea of guilt"**

The Appellant's learned counsel, Kamolo & Associates argued in submissions dated 27th July 2016 that there is no indication from the record which language the Appellant understood, and cited the decision **in Onkoba vs Republic**, **Criminal Appeal No. 325 of 1989** in support of this position. Further, that the Appellant disputed the facts and his plea was therefore not unequivocal and should be set aside. Reliance was placed on the decision in **Kariuki vs Republic ,Criminal Appeal No. 22 of 1984** in this regard.

Ms. Rita Rono, the learned Prosecution counsel, opposed the appeal in submissions she filed dated 9th August 2016, wherein she urged that the plea was unequivocal and that the record shows that the charge was read to the Appellant in a language he understood.

My findings on the grounds raised are that firstly, the record of the trial Court indicates that the charge was read out to the Appellant in Swahili to which he replied in Swahili that *"ni kweli*" ("it is true"), and he therefore not only understood the Swahili language, but also the charge that was read to him. However, and notwithstanding this finding, I have to agree with the Appellant that there was an obvious irregularity in the recording of the plea of guilty for the following reasons. The procedure to be applied on the taking of a guilty plea was explained in the case *of* **Adan vs Republic, [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."***

This procedure was reiterated by the Court of Appeal in **Kariuki vs Republic (1984) KLR 809** .

The elements of a charge, the particulars thereof and the facts giving rise to the charge are a package so to speak, when it comes to the recording an unequivocal plea of guilty. Consequently, the facts giving rise to the charge are required to be read immediately after the admission of a charge to ensure that the Accused person fully understands the facts that he or she is pleading to that constitute the offence he or she is accused of, and is still at liberty after the facts are read to dispute the same and plead not guilty. This also enables the trial court to relate the facts to the offence charged, and determine if they disclose the occurrence of the alleged offence, before proceeding to convict an accused person.

Therefore, two errors are manifest in the proceedings before the trial Court. First of all, the Appellant did dispute the facts as narrated, which meant that his was an equivocal plea of guilty, and the trial magistrate ought to have changed his plea to not guilty. Secondly, the ruling given by the trial magistrate as to the effect of denial of the facts by the Appellant was erroneous, as violence is a key ingredient of both simple robbery as well as robbery with violence. Robbery is a form of aggravated theft and it is essentially stealing with violence. If there is no violence involved one is charged with the offence of stealing. Therefore there must be some use of or threat of violence immediately before during or after the time of a theft, for an offence of robbery to be established. Robbery with violence is an aggravated robbery in which the elements set out in section 296(2) of the Penal Code should be in addition present. Therefore the disclaimer by the Appellant that he did not beat up the complainant was an indication that he was not admitting to the offence of robbery.

The Appeal is therefore allowed for the foregoing reasons, and taking into account that the Appellant has

been in custody since 19th April 2015, he is hereby set at liberty unless otherwise lawfully held.

Orders accordingly.

DATED AT MACHAKOS THIS 8TH FEBRUARY 2017.

P. NYAMWEYA

JUDGE