**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**CRIMINAL APPEAL NO. 3 OF 2015.**

**ABDULAZIZ OTSIENO MARKO :::::::::::::::::::::: APPELLANT.**

**VERSUS**

**REPUBLIC :::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT.**

***(Being an appeal from original conviction and sentence of E.S. Olwande - SPM. in Criminal Case No. 1253 of 2014 delivered on 24th December, 2014 at Butere.)***

**JUDGEMENT**

**Introduction.**

1. The appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars of the charge were that on the 25th day of November, 2014 at Masava Villa Indangalasia location in Matungu sub-county within Kakamega County jointly with others not before court while armed with an AK 47 rifle robbed JOHN WESONGA ODWAKO of Ksh. 500,000/= and immediately after such robbery used actual violence by shooting the said JOHN WESONGA ODWAKO.

2. He was convicted and sentenced on his own plea of guilty. He was sentenced to death.

**The appeal.**

3. He has appealed against the said conviction and sentence of death on the following homemade grounds:-

*(1) That I was confused and did not understand the charge that was read to me;*

*(2) That the trial magistrate did not for warn me of the consequences of saying yes;*

*(3) That I was advised by the police to go and say yes in court and I will be released only to find myself being taken to prison for an offence I never committed;*

*(4) That I pray for a full trial so that the truth be known and justice prevail.*

He wants the appeal allowed, conviction quashed and a full trial ordered.

**Submissions.**

4. The appellant has filed submissions wherein he claims that he was confused and did not understand the charge that was read to him. He claims to have been tortured by CID officers after his arrest and that they advised him that in order to gain his release he should answer "yes" to the charge read to him. He also claims to have been in pain because of the torture and therefore he did not consent to plead guilty to the said offence. He has also indicated in his submissions that he was not a first time offender but had just been released after serving five years imprisonment but was arrested again on the 12th December, 2014 at Butula AP Camp and taken round various police stations and that he learnt of the robbery case at Mumias.

5. Mr. Oroni from the office of the Director of Public prosecution opposed the appeal. He submitted to the court that when charges were read to the appellant he pleaded guilty and the trial court warned him severally as required on the consequences of pleading guilty before he was convicted and sentenced on his own plea.

**Determination.**

6. The court has considered in depth the rival submissions by the state and the appellant. Being a first appeal this court is under a duty to reconsider and evaluate evidence afresh with a view to reaching its own conclusions. See **Pandya vs. Republic [1957] E.A. 336** and **Okeno vs. Republic.** In this appeal however the appellant was convicted on his own plea of guilt. The trial was not conducted. I have therefore scrutinized the record to see whether or not the plea was unequivocal.

7. Section 281 of the Criminal Procedure Code provides that an accused person may plead not guilty, guilty or guilty subject to a plea agreement. The section has not set out the steps to be followed by a court when taking plea. In **Adan vs. Republic 1973 E.A. 445**, the Court of Appeal set out the steps to be taken in recording plea 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 formally enter a plea of guilty. The magistrate should then 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 natural respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."***

8. The court went on to explain the purpose of the statement of fact; that it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal. It assists the court to confirm if the accused really understood the position when he pleaded guilty. In **Njuuki vs. Republic (1990) KLR 334** the court while citing **Hando S/O Akunaay vs. R. [1951] 18 E.A. C.A 305** re-emphasized the need for caution in recording a guilty plea. It held that the court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.

9. The proceedings before the lower court show that the appellant took plea on the 16th December, 2014. The charge and all elements were read over and explained to the accused in Kiswahili, a language he confirmed he understood and he responded in Kiswahili (nikweli) "**It is true".** The trial court went ahead and explained to him the implications of a plea of guilty and the sentence. The charge was read again and again the elements were explained to him. Facts of the case were read to the appellant again on 19th December, 2014. The trial court advised the appellant to think about the plea he made on 16th December, 2014 and was again informed of the consequences of pleading guilty to the charge but still pleaded guilty. He was taken for an assessment of his mental status before sentencing. The report showed that

appellant was void of features of mental illness and that he was fit to take plea. The report is dated 22nd December, 2014. The trial court gave the appellant time to mitigate and considered the same before sentencing.

10. For a guilty plea to be unequivocal the steps set out in the **Adan Case (Supra)** must be followed. Further the record must be such that it leaves no doubt as to whether or not accused understood the charges and confirmed the facts as true. The trial court in this case did its best to explain the charge to the accused and also tell him of the consequences of pleading guilty.

11. The appellant in his mitigation did not raise the issues he is now raising to this court. His mental status was confirmed to be fit. He was also given quite some time to think about his decision by the trial court but he maintained that he did the act and pleaded guilty. This court finds that the plea was unequivocal. He meant what he said and it was recorded. I find what he is raising in the appeal to be an afterthought. He should have raised them at the time he was mitigating.

12. The appeal is found to have no merit and the same is dismissed, conviction and sentence are upheld.

**SIGNED, DATED AND DELIVERED** at **KAKAMEGA** this **10TH** day of **NOVEMBER**, 2016.

**C. KARIUKI**

**JUDGE.**

**In the presence of:-**

**.....In person .....for the Appellant.**

**.....Ng'etich .....for the Respondent.**

**.....Anunda ..... Court Assistant.**