



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CRIMINAL APPEAL NO. 12 OF 2013**

**BETWEEN**

**STEPHEN OMONDI.....1<sup>ST</sup> APPELLANT**

**PAUL OTIENO.....2<sup>ND</sup> APPELLANT**

**FREDRICK OKOTH KICHE.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***[Appeal from the Conviction and sentence in Criminal case of the Chief Magistrate's court dated 12.6.2013 at OYUGIS: HON. G.M.A. ONG'ONDO ESQ., - AG. CM***

**IN**

***AG. CM'S C. OYUGIS NO. 391 OF 2013]***

**JUDGMENT**

1. The three appellants were on 11<sup>th</sup> June, 2013 arraigned before the Ag. Chief Magistrate at Oyugis and were jointly charged with another who has not appealed with preparation to commit a felony Contrary to **Section 308(2)** of the Penal Code. They were also each separately charged with possession of narcotic drugs Contrary to **Section 3(1)** as read with **Section 2(a)** of the Narcotic Drugs and Psychotropic Substances Control Act. They pleaded guilty to the charges facing them but as the prosecution was not ready with the facts it was ordered that the facts be read on the next day. They were in the meantime granted bond but only the 4<sup>th</sup> accused forth a surety who was examined and approved.
2. When they appeared before the trial Magistrate again the charge was read to them again and once again they all pleaded guilty on the joint charge and on the separate charges the trial magistrate then convicted them and sentenced them to four years imprisonment each with hard labour on the joint charge and to four years imprisonment each on the separate charges. He ordered that the sentences run concurrently.

Being aggrieved they appealed.

3. They filed separate appeals which were however consolidated and heard together. The grounds of appeal are:-

1. **“That the learned trial magistrate misdirected herself grossly in law and in fact by convicting the appellant on a charge not properly understood by the appellant in that:-**

- a. **The interpretation was in three languages that confused the appellant**
- b. **What the appellant responded to on the 12<sup>th</sup> June, 2013 was not the same as what he has (sic) been asked to respond to on the 11<sup>th</sup> June, 2013**
- c. **The words as they are imputed to have been agreed to by the appellant are not as unequivocal as the honourable court relied on them.”**

They then urge this court to order that they take fresh plea and to have the charges against them determined on merit. As was submitted by Mr. Oluoch, counsel for the Respondent, they do not complain against the sentence at all.

4. This appeal was canvassed before me on 10<sup>th</sup> February, 2014. The appellants were represented by Mr. Nyauke while Mr. Oluoch appeared for the State (Respondent) Mr. Nyauke reiterated the grounds of appeal. He contended that on 11<sup>th</sup> June, 2013 interpretation was English/Kiswahili/Dholuo and it is not clear who between Fred and Cobi was interpreting in these languages and neither is it language to who the proceedings were interpreted in either of those languages. He contended that the record does not indicate whether the appellants were asked which language they understood best.

Regarding 12<sup>th</sup> June, 2013 he submitted that even on that day there were two interpreters in court and whereas the record shows the interpretation was in Dholuo there is no record to show that the appellants understood Dholuo. He contended that they did not understand the substance of what is indicated on the face of the record. That on the face of it it is noted that they were not sure whether the weapons they had constituted the offence charged.

5. The appeals were vehemently opposed. Mr. Oluoch submitted that the conviction was based on the proceedings of 12<sup>th</sup> June, 2013 and that interpretation was from English to Dholuo. That the appellants pleaded in Dholuo and the proceedings of 11<sup>th</sup> June, 2013 do not count. He submitted that Dholuo is the same language that the appellants told this court that they understand. Further that there was no error or defect on the face of the record to warrant this court to interfere with the finding of the lower court and even if there was the same would be curable under **Section 382** of the Criminal Procedure Code. He concluding by stating that by dint of **Section 348** of the Criminal Procedure Code this appeal does not lie. He urged this court to dismiss the appeal.
6. In reply Mr. Nyauke submitted that given the facts the appellants each had a panga, knife and axe which does not add up. That that arithmetic should convince this court that they did not understand what they were being asked. That the language was the issue and it was not clear to them when they were answering this question. He urged the court to set the appellants free but should it please order a retrial.
7. The manner in which a plea of guilty should be taken and the steps to be followed were laid in **ADAN V. REPUBLIC** and those steps were repeated by our own court of Appeal in **KARIUKI V. REPUBLIC [1984]KLR P. 809** where at page 810 the court stated:-

2. ***The manner in which a plea of guilty should be recorded is:***

- a. ***the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused’s language or in a language he understands;***
- b. ***he should then record the accused’s own words and if they are an admission, a plea of guilty***

*should be recorded;*

- c. *the prosecution may 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;*
- d. *if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – ADAN V. REPUBLIC [1973]EA 445.*

In my view all those steps were followed by the trial magistrate before he entered a plea of guilty and subsequently convicted the appellants. The relevant proceedings would be those of 12<sup>th</sup> June, 2013. On 11<sup>th</sup> June, 2013 when the appellants first took plea the prosecution was not ready with the facts. It is clear from the record of the court that only two languages were used in court on 12<sup>th</sup> June, 2013. Those were English to Dholuo and that the interpreter was Dholuo. When this court asked the appellants what language they wanted us to proceed in they said Dholuo. They cannot therefore be heard to say that they did not understand Dholuo when they appeared before the lower court. Not only was the substance of the charge and every element of it stated to them in Dholuo but they also responded in Dholuo. The facts were then narrated and they admitted those facts. When they were convicted they were asked to mitigate. The record shows that they fully understood the proceedings. To say that the arithmetic does not add up would be splitting hairs. The plea herein was for all intents and purposes unequivocal. The appeal clearly has no merit and would not even lie by dint of **Section 348** of the Criminal Procedure Code. It is dismissed and the sentence imposed by the lower court confirmed.

**E. N. MAINA**

**JUDGE**

Signed, dated and delivered at Homa Bay this 13<sup>th</sup> day of March, 2014

**In the presence of:**

Mr. Nyauke for all 3 appellants.

Miss Valarie for State.

All 3 appellants.

Risper - Dholuo Interpreter.