



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA Criminal Appeal 3 of 2008

KASENA JUMA BAMBAYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Kasena Juma Bambaya, the appellant, was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that the appellant on the 7th day of January 2008, at Shimanzi area, Makupa in Mombasa District within Coast Province, robbed Nelson Oduor Ogala of his mobile phone make 02 valued at Kshs. 12,000/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Nelson Oduor Ogala.

The appellant appeared before B. N. Olao, Chief Magistrate on 10th January 2008 and pleaded guilty to the charge. The prosecutor then stated the facts of the offence and when the appellant was invited to react to those facts, he stated that “it is true I violently robbed him and injured him.” The Learned Chief Magistrate then convicted the appellant on his own plea of guilty and after taking the appellant’s mitigation sentenced him to death.

The appellant was dissatisfied with his conviction and sentence and has appealed to this court on the primary ground that his plea was not unequivocal.

Mr. Monda, the Learned Senior State Counsel does not support the conviction of the appellant on the ground that the appellant was not warned of the consequences of conviction. The Learned Counsel urged us to order a retrial. He submitted that witnesses would be readily available and the appellant would not be prejudiced in any way.

Counsel for the appellant opposed a retrial, contending that the appellant would indeed be prejudiced in view of the fact (according to him) that the appellant was originally charged with simple robbery under section 296 (1) of the Penal Code.

We concur with the Learned Senior State Counsel that the appellant does not appear to have been adequately warned of the consequences of conviction. The record shows that the court read the charge more than once to the appellant and informed him of the sentence. In our view mere re-reading of the charge and information was not enough. In our view, the Learned Chief Magistrate should have specifically cautioned and warned the appellant of the consequences of pleading guilty to the charge as it attracted a mandatory death sentence on conviction. If the appellant had been sufficiently warned, he would not have stated in mitigation that he should be forgiven and that he would not repeat the offence.

That statement in mitigation clearly suggested that the appellant did not appreciate the offence he had been charged with. We agree with Mr. Monda that to that extent, the plea was equivocal and he had rightly conceded the appeal.

With regard to the retrial sought by the Learned Senior State Counsel, Mr. Magolo, Learned counsel for the appellant submitted that a retrial would prejudice the appellant since he had been originally charged with simple robbery which charge was irregularly amended to robbery with violence. With respect to Mr. Magolo, we think that complaint was not well taken. The charge which was read to the appellant when he appeared before Hon. B. N. Olao was that of robbery with violence contrary to section 296 (2) of the Penal Code. It is that offence to which he pleaded and was subsequently convicted. We do not therefore think that a retrial will prejudice the appellant especially as we have been assured that witnesses are available and the retrial will be conducted with dispatch.

In the premises, we allow the appeal, quash the conviction and set aside the death sentence against the appellant. The appellant is to be retried on the same charge before a different magistrate. He is to remain in custody till such retrial.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2009.

F. AZANGALALA

M. ODERO

JUDGE

JUDGE

Read in the presence of:-

The Appellant and Mr. Onserio for the State.

F. AZANGALALA

JUDGE

6TH OCTOBER 2009