



**IN THE COURT OF APPEAL  
AT NAIROBI**

**CORAM: KWACH, AKIWUMI & SHAH, JJ.A.)**  
**CRIMINAL APPEAL NO. 69 OF 1990**

**BETWEEN**

**1. OSIKE EMONGONYANG'A**

**2. ALEXANDER BWIRE GABRIEL**

**3. JOHN ODIKINYI OKAPOTE.....APPELLANTS**

**AND**

**REPUBLIC.....RESPONDENT**

(Appeal from a conviction and sentence of the High Court  
of Kenya at Nairobi (Aragon & Tank, JJ.) dated 6th April,  
1989

in

H.C.CR.A. NOS. 1301-1303 OF 1987)

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**JUDGMENT OF THE COURT**

Of the three appellants, the second appellant having died, his appeal abated by virtue of the provisions of Rule 68(1)(a) of the Rules of this Court. We then proceeded to hear the appeal brought by the first and third appellants.

The grounds of appeal of substance which were argued by Mr. Mugikoyo and Mr. Mbutia for the first and third appellants respectively, really amounted to this that the plea of guilty by each of the appellants to the charge of robbery with violence contrary to section 296(2) of the Penal Code, and which upon conviction, carried the mandatory death sentence, was not voluntary or unequivocal and further, that the appellants should have been warned beforehand of the consequences of actually pleading guilty to the offence charged.

The appellants had on 29th May, 1987, been jointly arraigned in a retrial before the Senior Resident Magistrate at Bungoma, on the charge of robbery with violence after their original trial and conviction of the same offence, had been set aside. In all, they had at the time of their retrial, been in custody for six years. On 29th May, 1987, when the retrial began, the appellants, after the charge had been read and explained to them, each pleaded not guilty. Thereafter, the case was mentioned before the Senior Resident Magistrate nine times until 15th October, 1987, when the retrial was to begin. On that date, the appellants asked for copies of the proceedings of the original trial. The first appellant also requested that a Teso who hailed from the Chakol Area of South Teso, attend the retrial to interpret the proceedings for them. The Senior Resident Magistrate adjourned the hearing until the next day and ordered that his court clerk, one

Helen Amke, who was a Teso, would act as interpreter. On the next day, 16th October, 1987, the prosecutor applied for the retrial to be adjourned to enable him to obtain from the subordinate court in Kakamega where the original trial had taken place, exhibits essential to his case. This application for adjournment was opposed by the third appellant who said that he had been in custody for a long time. The Senior Resident Magistrate, however, granted the adjournment sought by the prosecution and fixed new dates for the hearing of the retrial nearly six months later namely, from 6th to 8th April, 1988. It is no wonder that the third appellant in expressing his disgust over this, asked for the proceedings relating to the order of adjournment that had been granted, so that he could appeal against that order.

On 30th October, 1987, the appellants were again brought before the Senior Resident Magistrate for the mention of the case against them. He confirmed that the retrial would take place as he had already decided, this time, some five months later, from 6th to 8th April, 1988. It was then that the appellants who it would be remembered had by then been in custody for over six years, each told the learned magistrate they would like to change their original plea of not guilty to the charge that had been preferred against them, to one of guilty. Instead of the Senior Resident Magistrate then proceeding to have the charge read and explained to the appellants and then taking their pleas, he, without giving any reasons at all, for doing so, adjourned the case to 13th November, 1987, not so that the pleas of the appellants would then be taken, but merely so that he could reiterate that the retrial would be from 6th to 8th August, 1988. He then ordered that the appellants be remanded in custody until that date. It was after this had happened, that the now apparently frustrated appellants on the same 13th November, 1987, must have repeated to the Senior Resident Magistrate their desire to change their plea, for as the record of proceedings before the Senior Resident Magistrate shows, the charge was then read and explained to the appellants each of whom admitted the offence and its ingredients in the following words:

"I admit the charge. I violently robbed the complainant who was shot to death during the robbery."

It is, however, important to note that after the appellants had expressed their desire to change their plea and before the charge was read and explained to them, the Senior Resident Magistrate did not according to the record of the proceedings, warn the appellants of the dire consequences of their pleading guilty to the offence with which they had been charged namely, being mandatorily sentenced to death. The appellants were, however, not then convicted and the case was adjourned till 17th November, 1987, when the prosecution would give detailed facts constituting the offence charged so that the appellants may admit or deny them. On 17th November, 1987, and before the detailed facts of the charge were given, the charge was again read and explained to the appellants. Again, before this, the learned magistrate according to the record of proceedings, failed to warn the appellants of the dire consequences as already explained, that would befall them if they pleaded guilty to the charge. Anyway, the appellants each pleaded guilty to the charge in the same words as they had employed on 13th November, 1987, and after the detailed facts of the offence had been narrated, also admitted them. The Senior Resident Magistrate then sentenced each of the appellants to death on their plea of guilty to the charge of robbery with violence.

It has been necessary to set out at some length, the circumstances leading to the plea of guilty made by each of the appellants who were unrepresented, in order to determine whether that plea was voluntary or unequivocal. It could be said that the long period in which the appellants had been incarcerated followed by the further delay in the hearing of their retrial, may have persuaded them to change their original plea of not guilty to one of guilty. But from the record of proceedings before the Senior Resident Magistrate, by which we are bound, we see no evidence of that and are satisfied that the charge was read and its ingredients properly explained to the appellants in Teso language by Helen Amke and that each of them had employed such words in admitting the offence as to show that they well knew what the charge was all about when they voluntarily and unequivocally admitted having committed the offence. Indeed, they had twice pleaded guilty to the charge. After the detailed facts of the offence which was interpreted into Teso by Helen Amke, had been given, each of the appellants clearly admitted them. We do not think that the case of *Mohamed Yusuf v. R* (1957) E.A.C.A. 551 applies to the present appeal. We therefore find no merit on the ground of appeal that the plea of guilty by the appellants was equivocal or involuntary.

But what has given us considerable unease, is the further argument advanced in support of the present

appeal that the fact that the appellants had not been warned of the dire consequences that would befall them if they changed their plea of not guilty to one of guilty, rendered their plea of guilty defective and the retrial a mistrial. We think that there is merit in this argument. In the case of David Mundia Onkoba v. Republic Criminal Appeal No. 14 of 1990, this court had as will be demonstrated, regarded with satisfaction the warnings which the trial magistrate had given to the appellant in that case as to the mandatory death sentence which he would be bound to impose upon the appellant if he changed his plea of not guilty to the charge of robbery with violence, to one of guilty. This court in that appeal noted with obvious approval that:

"The principal magistrate then informed the appellant of the mandatory sentence of death prescribed for that offence and asked him if he understood that. After the appellant confirmed that he had understood all that was explained to him the Principal Magistrate then asked him if he still wished to plead guilty to that offence for which the magistrate could only sentence him to death the appellant replied. Yes, because I committed this offence.... In fact as we pointed out earlier, and as did the learned judges, the Principal Magistrate was reluctant to accept a plea of guilty. Time and again he had warned the appellant of the mandatory sentence of death which the law prescribed."

We think that this is the proper course which the Senior Resident Magistrate ought have followed before accepting the appellants' plea of guilty to the offence of robbery with violence. If this warning had not been given in the Onkoba case (*supra*), we venture to think that this court would not have in that case, dismissed the appeal of the appellant therein.

In his dissenting judgment in the recent case of Joseph Boit Kemei and Samuel Ruto Kiptoo v Republic Criminal Appeal No. 7 of 1995, Shah, J.A., on the need to warn an appellant as to the consequences of continuing with his appeal when he stood the chance of the death sentence being substituted by this court from which there could be no appeal, for a lesser sentence which had been imposed by a lower court, had this to say:

"If I were to find that the appellants were properly convicted contrary to section 296(2) of the Penal Code... the appellants would be sentenced to death for the first time (emphasis added) by this court from where they have absolutely no chance of a further appeal and when they were not warned of such consequences, it would in my view be abhorrent to my sense of justice to suddenly, out of the blue so to speak, sentence them to death when they have had no chance at all either to withdraw their appeal or consider the devastating effect of such a decision."

This dictum of Shah, J.A. is, *mutatis mutandis*, apt to the situation that is apparent in the present appeal. Granted that the Senior Resident Magistrate's court is not a court from the decision of which, no appeal lies, it must still be remembered that the appellants were unrepresented; that since they had not been warned of the dire consequences of their plea of guilty to the offence charged, they had been as it were, sentenced to death "out of the blue so to speak"; and had thus, had no chance to change their minds about pleading guilty as charged or to consider the devastating effect of their decision to plead guilty.

There is a paucity of local authorities to support our view that the defect in the retrial which we have already noted, is enough to render the retrial a mistrial. In the case of Mangwera s/o Msakazi v. Rex 18 E.A.C.A. 150, the Court of Appeal for Eastern Africa when dismissing in 1950, the appeal then before that court, held *inter alia*, that:

"In the circumstances it was not improper for the Judge to accept what was said by appellant as constituting an unequivocal plea of guilty to murder. There is no statutory provision invalidating a conviction on a capital charge on an accused person's own plea where it does amount to an unequivocal admission of guilt.

But the Court considered it generally inadvisable particularly where the accused did not speak English for the trial Judge to accept a plea of guilty on a capital charge."

Three years later in 1953, the same Court of Appeal for Eastern Africa in the case of Chacha s/o

Wamburu v. Reginam 20 E.A.C.A. 339, held that:

"There is no general rule that a plea of guilty should not be accepted from an African in a capital case; but precautions are necessary."

But much much earlier than these two cases is the case of R v Ibrahim bin Saleh (1921-28) 1 T.T.L.R. 69, referred to in A Digest of East African Criminal Case Law 1879-1954, compiled and edited by I Rosen and assisted by F. de F. Stratton. We have unfortunately, been unable to lay our hands on this authority, but according to the Digest (supra), it was held in that case that:

"It is undersirable to record a plea of guilty on a capital charge."

But we will go further than the three colonial authorities that we have referred to. No matter what may have been the case before, it is to us now well settled and for obvious good reasons, that a court these days should not and will not as a matter of course, accept a plea of guilty to a charge of murder which carries the mandatory capital sentence, without first warning the accused person of, and explaining to him fully, the consequences of his plea of guilty. Similary in this day and age, where the mandatory sentence upon conviction of the offence with which the appellants were charged is the death sentence, we are of the view that even if the plea of guilty is to be accepted, it must only be done after due warning has been given to the accused person of the consequences of pleading guilty, so that he may fully consider the full implications of the step that he wishes to take.

Mr. Okumu for the respondent, has drawn our attention to the following observation made by the Senior Resident Magistrate after convicting the appellants on their plea of guilty and before passing the death sentence on them:

"The three accused persons have each voluntarily pleaded guilty to this very serious charge of robbery with violence. This court has warned them of the seriousness of the charge and the consequences of pleading guilty to the charge. However they also voluntarily admitted the facts as stated by the prosecutor. This is a very serious offence."

If the record of proceedings before the Senior Resident Magistrate had contained anything to show that he had warned the appellants that they would be convicted and sentenced to death if they changed their plea of not guilty to one of guilty of the offence of robbery with violence, we would have accepted his observation that the appellants had indeed, been so warned by him. But the record of proceedings with respect to both the two occasions when the appellants had pleaded guilty to the charge, does not contain any warning whatsoever from the Senior Resident Magistrate to the appellants about the consequences of their changing their plea of not guilty to one of guilty. We fear that in these circumstances, it cannot be said on the mere observation of the Senior Resident Magistrate when he was about to pass the death sentence on the appellants, that he had actually and properly warned the appellants as he had claimed. Such an important step as this should be carefully recorded and not left to conjecture.

This particular lapse in the retrial of the appellants was not argued before the superior court whose dismissal of the appellants' appeal to that court from the conviction and sentence of the Senior Resident Magistrate, has led to the present appeal before us. But this lapse has been argued before us and as must be obvious by now, in our view, makes the plea of guilty defective and the retrial of the appellants a mistrial. We have no option but to allow the appeal before us, set aside the judgement of the superior court affirming the conviction and sentence of the Senior Resident Magistrate, and to quash and set aside the same.

We have considered whether having allowed the present appeal, another retrial should once more, be ordered. We are not inclined to do so for the following reasons. The appellants have been in custody since 1981, which is now, fifteen years ago; they have also undergone the harrowing experience of a trial and a retrial in the subordinate court. It would be wrong in the peculiar circumstances of this case to send the appellants back there for yet another retrial so many years after the offence was allegedly committed and when it is not certain that the memory of prosecution witnesses can be trusted.

In the result, the appeal of the appellants is allowed and they are hereby set free unless otherwise lawfully held in custody.

Dated and delivered this 2nd day of August, 1996.

**R. O. KWACH**

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**JUDGE OF APPEAL**

**A. M. AKIWUMI**

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**JUDGE OF APPEAL**

**A. B. SHAH**

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**JUDGE OF APPEAL**

I certify that this is true

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**DEPUTY REGISTRAR**