IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Gicheru & Cockar JJ A)

CRIMINAL APPEAL NO 41 OF 1990

BETWEEN

DAVID MUNDIA ONKOBA .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Porter & Mbaluto, JJ) dated 17th November, 1989

in

HCCRA No 325 of 1989)

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JUDGMENT

This appeal arises from the dismissal of the appellant's appeal to the Superior Court against a conviction and the mandatory sentence of death that was imposed following his plea of guilty before the Principal Magistrate to a charge of robbery with violence contrary to section 296(2) of the Penal Code.

Briefly the facts are that on 8th September, 1986, the appellant pleaded not guilty before the Principal Magistrate to count No 1 of robbery with violence contrary to section 296(2) of the Penal Code, and count No 2 of causing grievous harm. Hearing was fixed for 28 and 29th October and the case was put down for mention on 22nd September, 1986. On that day at the request of the appellant he was re-charged and he pleaded guilty to count No 1 that is to the charge of robbery with violence contrary to section 296(2) of the Penal Code. 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." The matter could not proceed further that day because the court prosecutor did not appear to have the full facts in his possession. So the proceedings were adjourned for 4 days to 26th September, 1986. On that day the Principal Magistrate again asked the appellant if he still wished to plead guilty to that offence for which the only penalty the Magistrate could impose on him was death. The appellant replied.

> "Yes I still wish to plead guilty because I know that I am guilty."

The court prosecutor then stated the facts which briefly are as follows. The 15 years' old deceased, Robina Omolo, was employed as a house girl in one Mr Nyanga's house at Kericho. Mr Nyanga worked at Homa Bay while his wife was a typist with Ministry of Works in Kericho. The deceased looked after the house and the children. On the fateful day at 8.30 am Mrs Nyanga left for her place of work. She also took her school going children with her to leave them at school. The deceased was left home alone with the baby. At 9.00 am the appellant entered the house and inside the main bedroom cut the deceased's throat with a pen knife thereby causing her immediate death. Thereafter he started packing several items of clothing in a suit case. He also took one Trident radio cassette and one Singer sewing machine. In the process many other items got scattered. At about 9.15 am a neighbour Alice Onkoba came to that house to collect milk and met the appellant in blood-stained clothes as he emerged from the bedroom. Onkoba got frightened and fled. The appellant chased her and cut her seriously before she escaped. The appellant appeared to have discarded his blood stained shirt and shoes inside the house and had worn a fresh shirt which belonged to the house. At about 10.00 am the appellant met one Richard Laboso who was looking after cattle near Kericho Tea Secondary School whom he asked for water to wash his hands. Laboso, who had got worried at the sight of the appellant's blood-stained trousers, talked to a teacher Moses Ngeno. The appellant also asked Ngeno for Shs 5/= so that he could board a bus for Sotik. The appellant was taken to a toilet in the school where he could wash his hands. In the meantime the police were contacted and they came and arrested the appellant. On the same day, the Trident radio cassette, the Singer sewing machine and other items stolen from the house were recovered in a bush away from the house where they had been hidden.

To the Magistrate, the appellant acknowledged that he had understood the facts and that they were true. His intention was to get his wife Alice Onkoba who had deserted him after he was jailed. He added that it was true that he killed that girl when he was struggling with his wife Alice Onkoba. The learned Chief Magistrate very properly found that the appellant had changed his plea. He entered a plea of not guilty and fixed the hearing for 28th and 29th October, 1986. Two mentions followed, that is on 10th October, 1986, and 23rd October, 1986.

We observe that interpretation on 22nd and 26th September was in Kiswahili. But on 23rd October, 1986 when the appellant appeared before the Court for the second mention he informed the Court in English that he still wished to admit the offence of robbery. When the Court reminded him that he had mentioned the other day that his intention was to capture his wife the appellant said:-

> "That is not true. I wanted to rob that family. I robbed that girl whom I killed (for) those items like the radio cassette and sewing machine."

The Court then asked him.

> "Do you also understand that if you are convicted of this offence which you are admitting then I shall sentence you to death?"

The appellant replied:

> "Yes I understand. I am prepared for it."

The Court then referred him to the facts which had been stated by the prosecutor and which were all read out to the appellant as recorded. At the end the appellant said:

> "Yes I admit them as true."

The Principal Magistrate thereupon recorded his being satisfied that the appellant had pleaded guilty to the offence in count No 1 and accordingly convicted him. The appellant said nothing in mitigation and he was given the mandatory sentence of death. It will be observed that the entire proceedings on the final day that is on 23rd October, 1986, took place in English. In his appeal to the Superior Court the appellant had filed numerous grounds of appeal. The 1st Appellate Judges considered each of them. They were not persuaded by any of the grounds and in consequence the appeal was dismissed.

The grounds of appeal to this Court, filed by the appellant in person and which were adopted by Mr Maosa, are more or less a repetition of the grounds of appeal to the High Court and may be summarized as follows:-

1. The lower courts did not consider the length of period he had been kept in police custody – 44 days, before he was brought to Court (In actual fact this period was 47 days).
2. In the absence of an interpreter in Kisii language, the use of Kiswahili, of which he had only a meager knowledge, had caused miscarriage of justice.

3. The lower courts had accepted the report in the P3 form to the effect that he was mentally sober and fit. Had that been so he would not have kept on changing his plea.

4. The 1st Appellate Court had found as a fact that he had not understood the proceedings before the Principal Magistrate. It had, therefore, erred in upholding the conviction.

Starting with the fourth ground first as summarized above, we would like to correct the appellant that the 1st Appellate Court did not make any such finding even to suggest that the appellant had not understood the proceedings before the Principal Magistrate. In fact on p 34 of the record (p 12 of the 1st appellate court's typed copy of the judgment) this is what the learned judges stated:

> "In this case there is every indication from the record that the appellant participated in the proceedings to the fullest, even the most remarkable extent, in both Kiswahili and English. We cannot accept that language played any part or caused any difficulty here."

That disposes of ground No 4 of the appeal. The learned Judges thereafter continued to make their finding in respect of the mental state of the appellant which is pertinent to the 3rd ground of appeal as summarized above. This is what they said:

> "The appellant said that he had a 'mingle up of mind' in the court below. But he had been medically examined, and found to be mentally alert and fit. The learned Principal Magistrate explained the position to him on repeated occasions; it cannot be said that the position was not made clear to him, or that he did not accept it."

We would at this stage observe that on the direction of this court given at the request of Mr Maosa, who conducted the appeal in this Court on behalf of the appellant, Dr C K Munene, consultant psychiatrist at Mathare Hospital, examined the appellant on 21st February, 1992. His report dated 17th March, 1992, which is in the file, indicates that in the appellant's past medical and psychiatric history there was nothing to suggest mental illness. On mental examination, his appearance and behaviour were normal; his mood was appropriate and he had no thought disorder or abnormal beliefs. In Dr Munene's view the appellant was mentally normal. So the view of the judges of 1st Appellate Court are fully supported by the report from the consultant psychiatrist.

In his submissions before us Mr Maosa merely made a passing reference to the number of days the appellant had spent in police custody, his main target being the language that was used for interpretation which in his view had left the plea not unequivocal. As regards the number of days he had spent in police custody it is to be noted that the appellant was arrested on 23rd July, 1986, and was brought to the Court for the first time, 47 days later, on 8th September, 1986. He spent in police custody a period of a month and 17 days. There was no explanation given by the prosecutor for keeping the appellant in police custody for this inordinately long period. We do not agree with the views of the 1st appellate judges that the Court before which the plea is taken is not required to look into such long periods of remand in police custody before accepting a plea. In *David Mbewa Ndede v Republic* Criminal Appeal No 1 of 1989 (unreported) this Court observed:

> "We would add that where as happened in this case at the time of the taking of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to Court from the date of arrest etc then an

> explanation of the circumstance must form an integral part of the facts to be stated by the prosecution to the Court. The Court should then put that explanation to the accused and inquire of him if it affects his plea."

We would add that an absence of an acceptable explanation to the Court taking plea for keeping an appellant in police custody for such a long period can be a strong ground of appeal to set aside the plea. In this particular case, however, we observe that the appellant did not complain to the Principal Magistrate that he had been kept in police custody for 47 days or that he had been ill-treated. From the proceedings we are satisfied that had the Principal Magistrate been given any cause to suspect ill-treatment of the appellant then, in view of the reluctance with which he had accepted the plea of guilty, he would most certainly have entered a plea of not guilty. The complaint relating to 47 days in police custody, therefore, in this case loses all the merit it had.

Coming now to the issue of language used for purposes of interpretation, Mr Maosa contended that the record did not show whether or not the appellant had been asked which language he would prefer to use. The appellant, therefore, did not have an opportunity to participate in the proceedings or appreciate fully what was happening. His plea, therefore, was not unequivocal. The 1st Appellate Judges went into this question in great depth. We can add nothing more to what they have said and found and with which we fully concur. A perusal of the record amply confirms that the appellant had not encountered any language-related difficulty and had understood and participated intelligently in all the proceedings conducted in English on the final day that is on the 23rd October, 1986, and interpreted to him in Kiswahili on other days previous to that. Infact 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 had prescribed. The Principal Magistrate, in our view, would never have accepted a plea of guilty if he had not been fully satisfied that that was how the appellant intended to plead. There is no substance in this appeal. The plea of guilty was unequivocal. The sentence of death that was passed is mandatory. The appeal is dismissed. That is our order.

Dated and delivered at Nairobi this 14th day of December, 1992.

J.M GACHUHI

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JUDGE OF APPEAL

J.E GICHERU

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR