REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI(MILIMANI LAW COURTS)

CRIMINAL APPEAL NO 325 OF 1989

BETWEEN

ONKOBA..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from original conviction and sentence of the Principal Magistrate's Court at Nakuru (ICC Wambilyangah Esq)

in

Criminal Case No. 1649 of 1986)

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November 19, 1989, the following Judgment of the Court was delivered.

The appellant was convicted in the court below of robbery contrary to section 296 (2) of the Penal Code and was sentenced to death. He now appeals against conviction and sentence.

This is an unusual case in that the appellant pleaded guilty in the court below, and this being a capital offence both the learned Principal Magistrate and ourselves feel uncomfortable with the situation.

The appellant was arrested on 23.7.86, the same day of the offence. His apprehension was not reported to court until 8.9.86 according to the charge sheet. He was apparently in police custody for something like 47 days therefore.

When he came up to court on 8.9.86 the charge was read to him and he pleaded not guilty to an offence of robbery and to an offence of grievous harm. He was remanded to 22.9.86, and on that occasion he asked for the charges to be read to him again and this was done, whereupon he pleaded guilty to the first count of robbery.

The learned Principal Magistrate pointed out to him that there was a mandatory sentence of death, and he said that he understood, and still wished to plead guilty because, as he said, "I committed the offence".

The matter was adjourned to 26.9.86 as the prosecutor was caught short by this unexpected turn of events, and on that date the learned Principal Magistrate again asked the appellant if he realized that the death sentence was mandatory, and whether he wished to maintain a plea of guilty. The appellant said "Yes, I still wish to plead guilty because I know that I am guilty."

The facts were then given by the prosecutor. In brief they were that the deceased worked for Mr & Mrs Nyanga who live in Kericho. She was left alone in the house on the day in question 23.7.86, looking after the baby. The appellant went to the house at 9 a.m. and found her in the bedroom with the baby, and cut her throat with a pocket knife. He then started to steal items from the house which he put in a suitcase, and also scattered other items around.

At 9.15 a.m, Alice Onkoba, a neighbour, went to the house, and heard noise from the bedroom. She saw the appellant coming from the bedroom, and he looked frightened, and his clothes were bloodstained, so she ran away.

The appellant followed her and cut her, she fled and reported to another person who took her to the Police Station.

When the police arrived they found a pocket knife stained with blood and also shoes and shirt which were bloodstained and which belonged to the appellant.

The appellant turned up at 10 a.m near Kericho Town Secondary School. The witness who met him thought he looked worried and had blood stained trousers, and he was asked by the appellant to fetch water so that he could wash his hands. The witness reported the matter to the headmistress and in the end the appellant was allowed to wash his hands in a toilet in the school while the headmistress rang the police who arrested him there. He was wearing a shirt which was taken from Ms Nyanga's house.

He was taken to hospital for examination as to his mental state and he was found to be aged 24 and mentally alert and fit.

After these facts were given the appellant said that he understood them and that they were true. However, he explained that his intention was to get his wife Alice Onkoba who had deserted him after he was jailed. He said that he killed the girl while he was struggling with Alice Onkoba.

The learned Principal Magistrate quite rightly entered a plea of not guilty in those circumstances and fixed the matter for hearing. The matter was mentioned on 10th October and on the 23rd October the appellant came to court for mention but said, in English this time:-

> "I still wish to admit the offence of robbery".

The court said:-

> "But you mentioned the other day that your intention was to capture your wife".

The appellant said:-

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

The court reminded him that if he was convicted he would be sentenced to death and the appellant said that he understood that and was prepared for it. The court asked him if he still pleaded guilty to robbery as charged

"Yes I do".

The learned Principal Magistrate then read his record of the facts given on the previous occasion to the

appellant and he said “Yes I admit them as true”.

The learned Principal Magistrate in his notes on sentence said the following:-

> “This accused has pleaded guilty to the offence despite my warning that he would be sentenced to death. He has persisted in wanting to plead guilty. Can the court refuse him from doing so when he himself wants to and fully knows and has been adequately warned about the consequences that flow on him after being convicted. At any rate he committed a ghastly offence which must be haunting him. He slew the young and helpless maid without mercy and should suffer the consequences of it. I sentence the accused to suffer death as provided by the law”.

We have noted the conduct of this matter by the learned Principal Magistrate, and we wish to compliment him on the care with which he considered this matter. It is obvious that he was concerned in accepting a plea of guilty on a capital charge, very rightly in our view, and took every chance he could to convert the plea of guilty into a plea of not guilty so that he could have an opportunity of considering the evidence in the matter. We would not wish anything that we have to say in this matter to be construed as a criticism of his efforts.

The appellant now seems to have changed his earlier view, and in his grounds of appeal, submissions in writing, and submissions *viva voce* before us, he has made the following points, which we paraphrase:-

> 1. What he committed was murder and he ought to have been charged with it. His admissions were to that effect, and therefore his plea to robbery should not have been accepted. We do not think there is anything in this ground in view of his admissions before the court below.
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> 2. That s. 296(2) does not relate to cases in which someone is killed, but only to cases in which people are beaten and injured. We do not think that there is anything in this ground either.
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> 3. He indicates that he did not really know what was going on in court. But the record showed that the learned Principal Magistrate did everything he could to explain what was happening and what was going to happen, and he answered in clear and uncompromising terms. We do not think from the record that this could be so.
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> 4. The appellant raises the question of the language in which the charge was read to him: on the first occasion the record has it that the charge was read in Swahili. He pleaded not guilty. When the charges were read to him a second time, that was also in Swahili. On the third occasion the appellant himself elected to speak in English.

The matter turns on the question of language. The reason for this is that the appellant replied to the charge “Not guilty”, and following *Wanjiru v R* [1975] EA 5, and *Lusiti v R* [1977] KLR 143, that plea required further investigation. However, failure to conduct that investigation can be cured under s 382 of Criminal Procedure Code if the facts are then read out and the appellant agrees to them, providing the facts amount to the offence before the court. That is of no use however unless the appeal court can be satisfied that the appellant understood the facts.

There are other and more basic reasons.

S. 77(2) of the Constitution is the basis for the procedure and the requirements for a person who has been charged with a criminal offence:-

> (b) shall be informed as soon as reasonably practicable in a language which he understands and in detail, of the nature of the offence charged.

We are of the view that this provision relates to what shall be done by the police in the Police Station, so far as normal procedure goes at any rate.

> (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.

It should be noticed:

> (1) That the Constitution does not require the language of the trial to be recorded. And
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> (2) That the Constitution does not require the proceedings necessarily to be conducted in the first or home language of the appellant, but in a language he understands.

S. 207 (1) of the Criminal Procedure Code provides for the taking of a plea in the subordinate court, but does not refer to interpretation.

The language of the subordinate court are English and Swahili: the language of the High Court is English.One can expect the Subordinate Court to proceed in English or Swahili: in practice charges are drawn in English, and the Court usually, although not always, proceeds in that language. Any other languages used are translated to the language of the Court. This usually, although not always, applies to Swahili as well.

In *Adan v Rep* which has become the leading authority on the way to take a plea, it is required that the charge and all the essential ingredients of the offence should be explained to the accused in <u>his language or a language he understands.</u>

> "The courts have always been concerned that an accused person should not be convicted on his plea unless itwas certain that he really understood the charge andhad no defence to it. The danger of a conviction on anequivocal plea is obviously greatest where the accusedis unrepresented, is of limited education, and does not speak the language of the court."
>
> When a person is charged, the charge and the particulars should be read out to him, <u>so far as possible in his own language</u>, but if that is not possible, then in a language which he can speak and understand."

It seems to us that the question at the root of all this is the question of whether the appellant understood the charge.

Where it is recorded that there was interpretation at the request of the appellant, and into what language there was interpretation and by whom it was done, there is no problem. This is why it is good practice to make a record of such matters.

But of course, when conducting an appeal, this court is bound by the record before it. It must appear from the record that the appellant understood what was being said in the court below.

Now it can be argued that *"omnia esse rite acta praesumuntur"*, that is that no magistrate would conduct proceedings in such a way that he was aware of the fact that an appellant did not understand what was going on, but did nothing about it.

But these are cases in which already the magistrate has failed to go further into the matter than a plea of "it is true" or "guilty", or as in this case "not guilty:" it would be wrong therefore to apply such a presumption.

The question of whether an appellant understood the proceedings in the court below must appear from the record, in order that we may use our discretion under s 382 of the Criminal Procedure Code in support of

the conviction.

Since the whole point is whether the appellant understood what was going on, we would not always expect to see an application by the appellant in the court below for interpretation.

But in some cases it is clear from the record that an appellant took an active part in the proceedings, and in others that he did not. In some cases the appellant will add details to the facts given by the prosecutor, or make a sensible plea in mitigation, which often is able to show, from the record, that he understood what was going on.

In other cases the reply to the charge may be "it is true" followed by "agreed" to the question as to whether he admits the facts, followed by nothing in mitigation. Cases like that are of concern: it is from the record that the appellant followed the proceedings in the court below.

That is why it is good practice to record the question of interpretation: if that is done it would be unlikely that the appeal court would decide that although interpretation was provided, it was in a language which the appellant did not understand.

Nor can it necessarily be assumed that any person before the subordinate court can be taken to understand English, anymore than he can necessarily be taken to understand Swahili. It all depends upon what appears from the record. As is said in *Adan's* case:-

> "It might be added that while the idea of stealing is one universally known, it does not follow that every language has a word corresponding to the English word "steal" which excludes a taking under a bona fide claim of right."

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 Swahili and English. We cannot accept that language played any part or caused any difficulty here.

> 5. 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.
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> 6. The appellant also said that he was 44 days in Police Custody, and was beaten up during that time. There is nothing in the record to that effect, and, bearing in mind the decision in *Olel v Rep* which not only was the decision of a three Judge Bench, but was also a decision of a court which included a member of this court, it would be perverse not to follow it, until it is further considered. The burden of that decision is that if the matter is not mentioned in the court below, then it cannot be mentioned on appeal, and that the court below is not required to look into such long periods of remand in Police Custody before accepting a plea. We do not think therefore that this assists us in this matter.

Those briefly are the grounds put before us by the appellant and we think, for the reasons given, that none of them assist us in this matter. The plea is unequivocal in this case. But we think it right for us to go further yet, as the appellant is unrepresented.

Rosen (as he was then known) and Stratton in a *Digest of East African Criminal Case Law* quote the following cases on this subject:-

> 1. "It is undersirable to record a plea of guilty in a capital charge.
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> *R v Ibrahim bin Saleh* (1921 – 28) 1 TTLR 69

and

> "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 it is generally inadvisable particularly where the accused does not speak English for the Trial Judge to accept a plea of guilty on a capital charge" (this at a time when the only capital charge in normal use was murder, triable before the High Court where the language involved was English")
>
> *Mangwera s/o Msasaki v R,* (1951) 18 E.A.C.A 150

and

> "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."

Chacha s/o Wamburu v R (1953) 20 E.A.C.A 339.

In *Tomasi Mufumu v R*, (1950) E.A 625, the Court of Appeal for East Africa said in Kampala:-

> "….it is very desirable that a trial judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is an unequivocal plea, but should satisfy himself and record that the accused understands the elements which constitute the offence of murder … and understands that the penalty is death."

We have no doubt in this case that the Learned Principal Magistrate followed, and was aware of, *Mufumu's* case and he is to be complimented for that.

It is always open to a magistrate to require the prosecution to prove their case, providing it is a matter which falls within the exception to S 207 (2) of the Criminal Procedure Code:-

> "207 (2) if the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary."

In this case, final plea was unequivocal. On our own reading of the record we suspect that the learned Principal Magistrate would have liked to direct a plea of not guilty if only he could find a way to do so.

But the record shows that he made every possible enquiry advised by the relevant case law, and the replies of the appellant left him no way out whatever. There is no basis upon which we can interfere with the decision of the learned Principal Magistrate who acted properly and with care throughout these proceedings.

For those reasons, therefore, we dismiss the appeal.

Dated and Delivered at Nairobi this 19th day ofNovember , 1989

D.C PORTER

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JUDGE

T. MBALUTO

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JUDGE

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

DEPUTY REGISTRAR