



IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Kneller JA, Chesoni & Nyarangi Ag JJA)

CRIMINAL APPEAL 30 OF 1984

BETWEEN

1. KING KATANA

2. SULUBU BAYA.....APPELLANTS

AND

REPUBLIC.....RESPONDENTS

(Appeal from the High Court at Mombasa, Bhandari J)

JUDGMENT

The two appellants were originally jointly charged with murder contrary to section 204 of the Penal Code. However, on December 5, 1983, the information for the joint charge of murder was amended by substituting the offence of manslaughter contrary to section 202 as read with section 205 of the Penal Code, in place of the offence of murder. According to the record of the proceedings before the High Court, (Bhandari J) the first appellant (King Katana) replied to the charge and said:

“We killed him, but that was not intentional.”

The original record of the proceedings does not show that the other appellant replied to the charge in his own words. Yet the trial judge entered a plea of guilty to a charge of manslaughter in respect of both appellants. The appeal of each is against sentence. Each disputes the age assessment of “well over and above 20 years” made by a Radiologist. The facts as narrated by the learned State Counsel included the rather important assertion that the appellants broke open the door of the deceased, entered the house and, using a huge club beat the deceased on the head inflicting fatal injuries. But each appellant disagreed, and said the deceased was outside the house. The joinder of the two appellants in one charge is in the circumstances supportable under section 136(a) of the Criminal Procedure Code (CPC). Section 207(1) of the CPC provides as follows:

“The substance of the charge shall be stated to the accused person by the court and he shall be asked whether he admits or denies the truth of the charge.”

Note the mandatory language. Compliance with the section entails the explanation of the charge and all its essential ingredients to the accused in his vernacular or in some other language he understands. The

accused's own words in reply should be correctly translated into English and then carefully recorded. If the words are an admission a plea of guilty should be recorded – see *Adan v Republic* [1973] EA 445.

The first appellant did not state if he admitted or denied the charge. His reply to the charge was at the very least equivocal and did not amount to a plea of guilty to the charge. We would say it is wholly undesirable for an accused person to use the plural when replying to a charge. There is such ambiguity in the plea of the first appellant that it ought to be taken as a plea of Not Guilty. *Matu s/o Gichimu v Republic*(1951) 18 EACA 311.

There is nothing in the record of the High Court to show that the other appellant admitted or denied the truth of the charge. There was no ground whatsoever for entering a plea of guilty in respect of the second appellant. Learned State Counsel did not quite properly support the conviction and the sentences and urged that a retrial should be ordered. The first appellant said the deceased was beaten by many people. He asked the court to set him free so that he can return to school to resume his studies. In the alternative, he asked the court to put him on probation. The other appellant, Sulubu Baya, asked to be put on probation.

We have considered the proceedings before the High Court and we are of the view that the appellants did not have a satisfactory trial. The irregularities mentioned above have occasioned a failure of justice and are not curable under section 382 of the CPC. This court is sitting to hear this appeal as a first appellate court, and will therefore follow the principles set out in the case of *Fatehali Manji v Republic* [1966] EA 343 in relation to the ordering of retrials.

An order for re-trial is the proper order to be made when an accused has not had a satisfactory trial: *R v Vashanjee L Dossani* (1946) 13 EACA 150 and Criminal Appeal No 132 of 1983 of this court. Accordingly, the two appeals are allowed, the convictions quashed, the sentences set aside and a re-trial shall be held by some other judge at the High Court, Mombasa for the two appellants. In the meantime, the two shall be kept in remand. Appropriate steps shall be taken to obtain an accurate assessment of the ages of the two appellants before the re-trial is concluded. Those are the orders of the court.

Dated and Delivered at Mombasa this 18th day of July 1984.

A.A.KNELLER

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JUDGE OF APPEAL

Z.R.CHESONI

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AG. JUDGE OF APPEAL

J.O.NYARANGI

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AG. JUDGE OF APPEAL

I Certify that this is a true copy

of the original.

DEPUTY REGISTRAR