IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, OUKO & GATEMBU, JJ.A)

CRIMINAL APPEAL NO. 74 OF 2016

BETWEEN

ELGIVIA BWIRE OLIACHA.....APPELLANT

VERSUS

REPUBLIC ……..…….....RESPONDENT

(*Appeal from a Judgement of the High Court of Kenya at Nairobi (Msagha, J) dated 24th September, 2014*

in

H.C.CR. APP 289 of 2011)

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JUDGMENT OF THE COURT

The case of **Adan V R**, (1973) EA 446 and several others after it have firmly established the procedure of recording a guilty plea in criminal trials. In that case the court made it clear that;

> **"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."** (Emphasis supplied)

This and the detailed steps enumerated in **Section 207** of the Criminal Procedure Code are intended to safeguard the accused person's right to a fair trial.

This is how this question arose. Following an attack, suspected to have been perpetrated by terrorists on 24th October 2011 at Kaka Bus Stage along Race Course Road in Nairobi, the appellant was arrested. It was further alleged that he led the police to what they believed to be his house where they recovered weapons and ammunition. In the blast at the bus stage several members of the public, including Patrick Ndolo Kanyingi and Justus Makau Mulwa, named in the charge sheet as the complainants, were injured.

After investigations, the appellant was charged with 9 counts as follows: Counts 1 and 2- causing grievous harm contrary to **section 234** of the Penal Code; Count 3 -engaging in organized criminal activity contrary to **section 3(a)** as read with **section 4(1)** of the Prevention of Organized Crimes Act; Counts 4, 5, 6 and 7-being in possession of a firearm without a firearm certificate contrary to **section 4(2)(a)** as read with **3(a)** of the Firearms Act; and counts 8 and 9- being in possession of ammunition without a firearm certificate contrary to **section 4(2)(a)** as read with **section 3(a)** of the Firearms Act. When he was produced before the Chief Magistrate on those charges, the appellant pleaded guilty to all the 9 counts. At that stage, the prosecutor sought for time to outline the facts of the case. After two days, on 28th October 2011 when the matter came before Ngenye Macharia, PM (as she then was) for facts, the accused reiterated his plea of guilty. The prosecution then applied that the court proceedings be moved to Nairobi Area Police Headquarters *"to view the exhibits which are not safe in court"* and for

him to summarize the facts. The record shows that the application was granted and the trial moved to the Nairobi Area Police Headquarters.

Outlining the facts upon which the charges were premised, the prosecutor told the court that in the year 2005 the appellant converted to Islam from Christianity. He subsequently left Kenya for Somalia with the intention of joining the Al-Shabaab group. His first attempt to cross to Somalia failed and he was returned at the border. He eventually succeeded to cross through Liboi, Kenya border with Somalia on a second attempt.

Once in Somalia, the appellant underwent training involving use of firearms and ammunition with Al Shabaab group. When he was qualified, he was deployed in Somalia to gain practical experience. Eventually, in August 2011 he left Mogadishu to return to Kenya with a mission to carry out terrorist attacks. In Nairobi, he settled down in Kayole from where he recruited other members to his side.

On 24th October, 2011, in the company of another and armed with a grenade, it was alleged that the appellant supervised and directed an attack at the bus stage by detonating the grenade, injuring many people, including Patrick Ndolo Kanyingi and Justus Makau Mulwa; that through investigations and a search in the appellant's house, an AK 47 rifle, a sub machine gun, 2 revolver pistols, 2 automatic pistols, 717 rounds of different calibres of ammunition, 1 SNG machine gun magazine and 13 hand grenades, were retrieved. All these were confirmed to be firearms and ammunition as defined, respectively under the Firearms Act.

Regarding the two complainants, the prosecutor informed the court that the investigating officer was unable to obtain P3 Forms to confirm the extent of their injuries. But the officer, upon visiting them at Kenyatta National Hospital where they were still undergoing treatment, observed that the first complainant had suffered fractures of the knee cap, rib, raptured pelvis, and soft tissue injury to the head; that the second complainant suffered abdomen injury and broken arm.

On the basis of the appellant's response to these facts confirming their correctness, the trial magistrate entered, one more time an own plea of guilty in all the counts instead of convicting him on the own plea. The appellant did not wish to mitigate whereupon the learned magistrate sentenced him to life imprisonment in counts I and II, 15 years in count III, and 7 years in counts IV to IX. The sentences were to run consecutively.

Both the conviction and sentence aggrieved the appellant who moved to the High Court to challenge them, in the main, that his plea of guilty was not unequivocal and that the sentences were excessive. With regard to the first complaint, he argued that the trial magistrate failed to explain to him the essential ingredients of the offences with which he had been charged for him to appreciate their seriousness and the sentences they would attract. He also stated that the facts were ambiguous and not within his knowledge and understanding. He finally pointed out that without the P3 forms, the alleged injuries to the complainants were not proved.

The learned Judge, (Msagha, J) in rejecting the appeal found that the procedure for plea taking enunciated in **Adan V R** (supra) was followed by the trial court; that the charges were read over to the appellant and the substance explained in English which the appellant confirmed he understood and admitted all the counts; that subsequently the appellant similarly admitted the facts. In concurring with the trial court on the manner the plea was taken, the learned Judge came to the conclusion that the plea was unequivocal. However, on the sentence, the learned Judge, guided by the decisions in **Nelson V R** (1970) E.A. 599, and **Ogallo Son of Owuora V R** (1954) 21 EACA 270 found error in the order of consecutive running of the sentences in the nine counts. He set aside the order and substituted it with one for the sentences to run concurrently since the offences were committed in the same transaction. Save for that correction, he dismissed the appeal.

Once more, the appellant was dissatisfied with this decision and proffered this appeal on 3 grounds; that the learned Judge erred in law by, upholding the conviction and affirming the sentence on a plea of guilty that was not unequivocal; failing to find that the charge of grievous harm was not proved; and upholding the sentence solely on the deterrent principle and neglecting the principle of rehabilitation.

Prof. Nandwa representing the appellant argued the 3 grounds and submitted that the plea was not unequivocal because, in the first place, the language in which the plea was taken was not indicated; that there were discrepancies on the record that made it difficult to tell whether the appellant or someone else was before the trial magistrate. While there was no doubt that the appellant was male yet the record makes reference to him as **"he/she"**. In addition, although the appellant faced nine counts the record is uncertain as to this fact as it indicated **"… charge(s)…"** raising doubt whether the trial magistrate copied the proceedings from somewhere else. He further referred the Court to counts 1 and 2 on the charge sheet which both indicate **"…, jointly with others not before court…"** and pointed out that the proceedings of the trial court show that the appellant was charged jointly with only one other person.

As a result of these discrepancies, learned counsel urged us to find that the plea of guilty was based on faulty proceedings.

Counsel further submitted that due to threats or torture, the appellant was not in his stable mind at the time he pleaded to the charges; that the appellant's failure to mitigate in view of the serious charges he faced was proof that his state of mind was not stable; and that the trial magistrate ought to have observed this and referred him for mental examination. Counsel submitted that in view of the fact that the appellant was a first offender and a stranger to the court process he was confused; and that the trial magistrate erred by failing to inform him of his right to legal representation.

Regarding the proceedings that were conducted at the Nairobi Area Police Headquarters, learned counsel argued that since the venue was not declared to be a court for the purposes of conducting proceedings, the proceedings and the orders made there were unlawful and a nullity, because a public trial envisaged under **Article 50(1), 50(2)(d)** of the Constitution and **section 77** of the Criminal Procedure Code could not be had at the police headquarters which is a restricted area where the public, the appellant's relatives and advocates could not access, not to mention its intimidating atmosphere.

He further contended that without treatment notes or P3 forms in support of the allegations contained in counts 1 and 2 regarding the injuries suffered by Patrick Ndolo Kanyingi and Justus Makau Mulwa as a result of the blast, the learned Judge erred in failing to find that the two counts were not proved; that by **section 107(1)** of the Evidence Act and on the authorities of **Haron Naibei V R**, Criminal Appeal Case No.

116 of 2013 and **Francis Kimani Karanja V R**, Criminal Appeal No. 163 of 2011, an allegation must be proved by evidence, otherwise it would be inadmissible. Therefore, the degree of injury of the complainants could only be classified by a medical practitioner after physically examining the victims, the Court retaining the discretion to form its own independent opinion; and that a police officer cannot purport to assess the extent of injury.

On the last ground, counsel submitted that in basing its sentence on deterrence principle, leading to imposition of a harsh penalties, the trial court failed to exercise its discretion as expected under **section 26(2)** of the Penal Code; and that even after the appellant was declared a first offender, the court did not consider a lesser sentence to life imprisonment in terms of **section 26(2)** of the Penal Code and ignored the principles enunciated in the Sentencing Policy Guidelines; and that the court overlooked the fact that the appellant was a young man, 28 years old, who was in conflict with the law for the first time, by which reason the learned Judge ought to have considered a corrective and rehabilitative measure. Counsel concluded that had the learned Judge applied the principles of law set out in the case of **Janet Muthoni Thiaka V R,** Criminal Appeal No. 63 of 2014, he would have correctly exercised his discretion in passing appropriate sentence.

Ms Maina, Senior Public Prosecution Counsel, opposed the appeal insisting that, gauging from his answers to all the counts, the appellant understood the language in which the proceedings were conducted; that by the appellant's own confirmation of the facts of the case against him, the learned Judge properly accepted it as it was unequivocal and was satisfied that the magistrate followed the procedure in **Adan** (supra); and that following the appellant's admission, the learned Judge correctly found no fault with the trial magistrate's exercise of discretion in imposing appropriate sentences on each count, save for the sequence of service of the sentences, which was corrected by the High Court.

Counsel submitted that lack of legal representation did not prejudice the appellant as he was determined to maintain a plea of guilty. But should we be persuaded that the plea was equivocal, counsel urged us to order that a fresh plea be taken. She confirmed that should the appellant plead not guilty the prosecution would avail the witnesses and the exhibits.

This is a second appeal and the jurisdiction of this Court is defined by **section 361** of the Criminal Procedure Code and supported by numerous cases to the effect that in such second appeals, the Court will only be concerned with points of law and for that reason it will be bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence or misapprehension of the evidence or on wrong principles. See **M'Riungu V. R** (1983) KLR 455.

Irrespective of the nature of the charge, there is no law in Kenya that prohibits the courts from accepting plea of guilty so long as, first, the person pleading guilty fully understands the offence with which he is charged; second, the trial court has, in its record shown that the substance of the charge and every element or ingredient constituting the offence have been explained to the accused person in a language that he understands; and finally, that the accused person out of his own free-will, admits the charge. See **Paul Mutungi V R** (2006) eKLR. See also **section 207** of the Criminal Procedure Code. An accused person is, in the circumstances entitled to plead guilty to an offence with which he is charged and, if he does so, the plea will constitute an admission of all the essential elements of the offence, provided that the admission is unequivocal.

The third principle is that, although **section 348** of the Criminal Procedure Code provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, that provision is not an absolute bar to challenging a conviction founded on a guilty plea on any other ground. The case of **David Mbewa Ndede V. R** (1991) KLR 567, confirmed that the court is not bound to accept the accused person's plea of guilty;

> **"…where….. 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."**

The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed. See also **Wandete David Munyoki V R**, Criminal Appeal No. 56 of 2013.

Bearing in mind the foregoing three principles and the conditions enunciated in **Adan** (supra), we are only concerned in this appeal with the questions whether the plea was unequivocal, whether there was evidence to support the charges of grievous harm, and whether the sentence was harsh and excessive.

The appellant was not represented by counsel when he pleaded to the charges before the trial court and there is no doubt too that the appellant faced serious charges with grave consequences upon conviction. Both courts below were convinced that he intended to accept the nine charges; and that his answers to each charge and facts were unequivocal. A plea is unequivocal when the response by the accused person is unambiguous, clear and pointing to an absolute and unqualified admission only.

According to the record, the proceedings on the 26th of October 2011, the day the plea was taken was in the English language. Indeed, the appellant's response to each of the nine counts was in English, **"it is true".** Though not apparent from the record the proceedings of 28th October, 2011, whether the charges and facts were read over again, it is however clear from the record that the appellant reiterated his earlier plea, saying **"I want to maintain a plea of guilty".** In the case of **Joseph Marangu Njau V R**, Criminal Appeal No. 123 of 2004, this Court emphasized the need to read over the charges afresh if a matter is mentioned after an adjournment. It is in this context that perhaps the second plea should be seen.

When the court moved to the police headquarters, the facts were read out to the appellant. He once more admitted the facts, stating **"The facts are correct."** It was argued for the appellant that the holding of proceedings at the police headquarters did not present him a free atmosphere; that the police headquarters was not a designated court; and that, in those circumstances the appellant's admission of the facts could not have been given unequivocally.

Section 13 of the Magistrates Court Act provides as follows:

> **"13. (1) Sittings of a magistrate's court may be held at any place within the local limits of its jurisdiction, but it shall, so far as is practicable, be held at the place designated in the Gazette.**
>
> **(2)Without prejudice the generality of subsection (1), a sitting of a magistrate's court may be held at such other place as may be necessary for the purpose of -**
>
> **(a) Taking evidence in circumstances not conducive to proceedings at the place referred to in subsection (1);**
>
> **(b) Taking evidence on commission in accordance with the Evidence Act (Cap. 80); or**
>
> **(c)Taking evidence for any other reason that the magistrate's court may deem necessary."** (Our emphasis).

From the foregoing, it is permissible for a trial to be held anywhere else apart from the gazetted place. In the instant case, we find nothing objectionable to the holding of proceedings at the police headquarters. The prosecutor satisfied the trial magistrate as to the reason for seeking to move the trial to the police headquarters; that the nature of the exhibits required a place with sufficient security and where safety would be guaranteed. The exhibits in question included 12 grenades of F1 type and 1 of M.K. 2 type, patently an assortment of offensive arsenal.

We are unable to find anything of unusual character to make us agree with learned counsel for the appellant that the plea was procured by fear of the environment at the police headquarters. At no stage did the appellant complain of torture or any other form of mistreatment by the police. Neither did he exhibit any signs of confusion. His choice not to mitigate cannot be attributed to confusion as defended by his counsel in this appeal. On three different occasions, the appellant pleaded guilty. When charges were read out on 26th October, 2011, when the case was mentioned on 28th October, 2011 and when facts were led by the prosecutor. As the case of **Adan** (supra) emphasized;

> **"…The statement of facts serves two purposes; it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty; it is for this reason that it is essential for the statement of facts to precede the conviction..."**

We are ourselves satisfied that the appellant knew what he was doing. There is no suggestion that he was suffering from any disease of the mind. There was no justification for the trial Magistrate to order mental examination or to inquire into his state of the mind. The appellant's determination to maintain his plea was obvious and unequivocal. In the circumstances, we are persuaded that the facts, as outlined by the prosecutor and reproduced at the beginning of this judgment constituted the offences of; engaging in organized criminal activity contrary to **section 3(a)** as read with **section 4(1)** of the Prevention of Organized Crimes Act constituting the charge in count 3; being in possession of a firearm without a firearm certificate contrary to **section 4(2)(a)** as read with **3(a)** of the Firearms Act in counts 4, 5, 6 and 7; and being in possession of ammunition without a firearm certificate contrary to **section 4(2)(a)** as read with **section 3(a)** of the Firearms Act (counts 8 and 9). We are equally satisfied that the appellant pleaded guilty unequivocally because he accepted the facts as true.

However, on counts 1 and 2 where the appellant was charged with the offence of causing grievous harm contrary to **section 234** of the Penal Code, the facts upon which the charges were premised did not disclose an offence. In leading the facts in respect of counts 1 and 2, the prosecutor outlined the injuries suffered by the complainants but qualified the source of information as follows;

> **"We could not obtain the P3 forms as yet as both complainants are likely to be in hospital and undergo treatment for sometime from today. The investigating officer however visited them in hospital and confirmed the injuries. The fractures would in the circumstances be considered as grievous harm."**

The evidence of the degree or classification of injuries sustained by the two complainants was supplied by the investigating officer and verbally communicated to the court through the prosecutor. Yet, a court will be assisted by medical evidence in coming into conclusion on the nature and classification of the injury. See **John Oketch Abongo V. R,** Criminal Appeal No. 4 of 2000.

It is a basic rule of evidence in criminal law that an accused person must not be convicted of a criminal offence unless the court is satisfied that his guilt has been proved beyond reasonable doubt. Where an accused person pleads guilty, the evidence presented through the account given by the prosecutor to prove the charge, must establish beyond reasonable doubt, the existence of the allegations against the accused person, because the burden of proof as to the existence of the facts relied on rests on the person who asserts that those facts exist. See **section 107** of the Evidence Act. There was no proof of the existence, or the nature of the injuries sustained by the complainants in counts 1and 2.

For those reasons, we allow this ground and conclude that counts 1 and 2 were not proved hence the learned Judge erred in failing to so find. The conviction based on those two grounds are quashed and sentences imposed set aside.

On whether the appellant was entitled to legal representation, the obvious and ready answer is provided by the recent decision of the Supreme Court in the case of **R V Karisa Chengo & 2 Others**, Petition No. 5 of 2015, where it expressed itself as thus:

> **"… it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will be accorded in criminal proceedings.**

Consequently, in view of the principles already expounded above, it is clear with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:

(i) The seriousness of the offence;

(ii) The severity of the sentence;

(iii) The ability of the accused person to pay for his own legal representation;

(iv) The literacy of the accused;

(v) The complexity of the charge against the accused;"

The offences committed by the appellant were not capital in nature, though serious as we have noted. He was not, on account of that entitled to an automatic right to legal representation.

From the record, there was no prejudice occasioned to the appellant by not having legal representation as he understood the charges as read to him and responded and was given an opportunity to mitigate but declined to seize it.

For these reasons, we dismiss the appeal, save for those grounds relating to counts 1 and 2 which we have allowed for the reasons given earlier.

Dated and delivered at Nairobi this 9th day of February, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

…….…….....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR