



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJA.)

CRIMINAL APPEAL NO. 99 OF 2014 (R)

BETWEEN

NELSON PESA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kakamega (Thuranira, J.) dated 18th December, 2012

in

HCCRA. NO. 180 OF 2011)

JUDGMENT OF THE COURT

1. This appeal is premised on two grounds only, namely, that the appellant's plea was equivocal and that the appellant was not supplied with copies of witness statements, charge sheet, investigation diary, P3 form, treatment chits and other relevant documents to enable him prepare a proper defence.

On those grounds, the appellant's counsel urged the court to quash the conviction and set aside the death sentence that was passed against the appellant and instead order a retrial.

2. The appellant had been convicted by the Senior Resident Magistrates' Court in Vihiga on a charge of robbery with violence contrary to **Section 296 (2)** of the *Penal Code* and sentenced to death as by law prescribed.

3. The appellant's first appeal to the High Court at Kakamega was unsuccessful, hence this second and final appeal. On such an appeal, this Court's jurisdiction is limited to a consideration of matters of law only, see **section 361 (1)** of the **Criminal Procedure Code**.

4. The evidence tendered by the prosecution, briefly stated, was that on 5th December, 2009 at about 7.30 p.m., the complainant, **Idris Ikiru**, was on his way home when he was attacked by three young men and robbed of some personal items as well as K.shs.1,850/=.

5. The complainant screamed for help but also managed to get hold of one of his assailants. The

appellant's wife, **PW 2**, as well as three other neighbours, having heard the screams, rushed to the scene and found the complainant holding the appellant, being one of the people who had attacked and robbed the complainant. They arrested and escorted him to the Area Assistant Chief and thereafter to a Police Station.

6. When the appellant was arraigned before the trial court, the record shows that a plea of “*Not guilty*” was entered against him although there is no indication of the exact words that were used by the appellant. The trial magistrate directed that the case be mentioned on 23rd December, 2009 to fix a hearing date. On that day the court directed that the case be heard on 11th January, 2010 and ordered that the appellant be provided with copies of witness statements as per his request.

7. On 11th January, 2010, the case could not be reached and it was adjourned to 18th January, 2010 when the complainant testified as to how he was attacked and robbed by the appellant and his accomplices on the material day. The case came up for mention on 20th April, 2010 and the appellant informed the trial court that he was yet to be supplied with copies of witness statements. The court ordered the prosecutor to provide the appellant with copies of witness statements before the trial date, which was 23rd April, 2010. Come that date, the hearing proceeded as scheduled. Three prosecution witnesses testified and were cross-examined by the appellant. The appellant did not tell the court that he had not been served with witness statements.

8. Grace Wanjiru Ndirangu, PW 2, the complainant's wife, told the court that on the material day at around 7.30p.m. she was with her children at their home when they heard her husband, PW 1, screaming for help, saying that he had apprehended a person who had attacked him. When they rushed to the place where the screams were coming from, they found PW 1 holding the appellant. That evidence was corroborated by the testimony of PW 3 and PW4, some of the people who responded to the complainant's distress call on the material day.

9. The appellant was handed over to the Area assistant Chief, **Kennedy Onyango, PW 5**, who escorted him to Mbale Police Station.

10. In his defence, the appellant testified that on the material day at about 7.00p.m., he was walking home when he was attacked and robbed by a group of people. Thereafter he went to a nearby home to seek help but the area residents did not believe him, instead they assaulted him and took him to the Area Assistant Chief.

11. Turning to the first ground of appeal, **Mr. Nyawiri**, learned counsel for the appellant, submitted that the plea that the appellant gave was equivocal. He added that the language that was used by the trial court in explaining the charge was not stated in the proceedings and therefore there is no proof that the appellant understood the charges brought against him.

12. **Mr. Ketoo**, learned counsel for the respondent, strenuously opposed the appeal. In his view, the plea was unequivocal and there is nothing on record to show that the appellant did not understand the language of the court.

13. The record of appeal shows that the charge and all its elements were read out to the appellant and he replied in Kiswahili language that he understood the same and proceeded to deny the charge. The learned trial magistrate then recorded: “*Not guilty.*”

14. What is an equivocal plea? This is a plea that is contradictory, like where an accused person pleads guilty but adds comments that indicate a defence or an explanation that tends to explain why he has chosen to so plead.

15. The legal principles to be applied in taking a plea were well enunciated in the well known decision of **ADAN V REPUBLIC [1973] EA 445** where the court stated; *inter alia*:

“(i). The charge and all the essential ingredients of the offence should be explained

to the accused in his language or in a language that he understands.

0. *The accused own words should be recorded and if they are an admission, a plea of guilty should be recorded.*

See also **Section 207** of the **Criminal Procedure Code**.

16. Whether a plea is equivocal or not requires proper consideration, and is where the accused is recorded as having admitted the truth of the charge and the facts thereof and is subsequently convicted on that plea. In this appeal, the appellant denied the charge and a full trial ensued. The language of the court was recorded as Kiswahili and there is no indication that he did not understand the same. Whereas the trial court did not record the appellant's own words in denying the charge, we do not agree that the plea was equivocal. In any event, the appellant's conviction had nothing to do with the plea.

The first ground of appeal is without merit and consequently fails.

17. Turning to the second ground of appeal, that the appellant was not supplied with copies of witness statements and other documents as stated therein, the record shows that it is only the complainant's evidence in chief that was taken before the witness statements had been given to him. But even then, after PW 2, PW 3 and PW 4 testified, the complainant was recalled for further cross-examination. Although the record of appeal does not show why such further cross-examination was necessary, we believe it was done because the complainant had testified in chief and cross-examined before witness statements had been supplied to the appellant as ordered by the court.

18. We do not find that the appellant was in any way denied a reasonable opportunity to rebut the prosecution evidence as was alleged by his learned counsel. We must therefore dismiss the second ground of appeal.

19. The appellant did not otherwise challenge the evidence that led to his conviction. That notwithstanding, we have ourselves reviewed the same and are satisfied that the evidence adduced in proof of the charge was overwhelming. In the circumstances, we find no merit in this appeal and we accordingly dismiss it in its entirety.

DATED & Delivered at Kisumu this 23rd day of October, 2015

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR