IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, PCA, NAMBUYE & MWERA, JJ.A.)

CRIMINAL APPEAL NO. 208 OF 2007

BETWEEN

PETER NG'ANG'A NDUTA…..……. APPELLANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from the sentence of the High Court of Kenya at Nairobi (Lesiit &Makhandia, JJ.) dated 7th December, 2006) in H.C.CR.A. NO. 1351 OF 2002)

****

JUDGMENT OF THE COURT

1. This is an appeal by **Peter Ng'ang'a Nduta** from the judgment of the High Court upholding and affirming the convictions and sentences respectively by the trial magistrates' court in respect of criminal charges of robbery with violence contrary to section 296(2) of the Penal Code, rape, contrary to section 140 of the Penal Code, and assault causing actual bodily harm contrary to section 251 of the Penal Code.
2. The particulars of the offence are that on the 15th day of December, 2002 at a place commonly known as Thika flyover in Thika district, jointly with others not before court, the appellant, while armed with pangas and a toy pistol, robbed **James Mugo Mukobo** of one disco wrist watch, a wallet, a jacket, a pair of leather shoes, a pair of socks, a belt, 7 kg of miraa, a National Identification Card and a voter's card all valued at Kshs 2,640/= and at or immediately after the time of such a (sic) robbery, used personal violence to the said **James Mugo Mukobo**.

   The particulars of the other offences charged were that on 15th day of December 2002 at Thika Flyover in Thika District within the Central Province, jointly with others not before court, while armed with pangas and a toy pistol, robbed L N M of cash Kshs.450/-, a skirt a T-shirt, a handbag, underwear, a petticoat, a handkerchief and a coat all valued at kshs.2,250/- and at or immediately before or immediately after the time of such robbery, used personal violence to the said L N M; that on the 15th day of December 2002 at ***[particulars withheld]*** village, Thika District within the Central Province, jointly had unlawful carnal knowledge of L N M in turns without her consent; and that on the 15th day of December, 2002 at Thika Flyover in Thika District within the Central Province, jointly with others not before court, unlawfully assaulted Brian Guchu Kariuki thereby occasioning him actual bodily harm.

3. The Appellant was arraigned before the Chief Magistrate's Court at Thika where he pleaded guilty on all the charges and accordingly, he was convicted on his own plea of guilty. The Appellant was subsequently sentenced to death on the two capital charges of robbery with violence, fourteen years with 20 strokes of the cane plus hard labour in respect of the charge of rape, and three years' imprisonment in respect to the charge of assault.
4. Notwithstanding his plea of guilty, the Appellant was aggrieved by the conviction and sentence hence lodged an appeal at the High Court, which was heard by **Lesiit & Makhandia JJ**. At the High Court, he challenged the manner in which his plea was taken. He contended that although the trial magistrate cautioned him of the consequences of pleading guilty, he was not given time to ponder over the issue. He argued that the trial magistrate should have ordered a psychiatric examination before his plea was entertained. He also argued that the learned magistrate should have considered the circumstances under which he was compelled to plead guilty as he could have been a victim of police manipulation.
5. Being guided by legal principles on how a plea of guilty and conviction of an accused person should be recorded by the trial court as set out in the celebrated case of **Adan vs. Republic (1973) EA 445**, the learned Judges found that the trial magistrate had met the requirements as the record showed that the Appellant was warned of the consequences of pleading guilty to a capital charge and was clearly informed that he faced a death penalty. In dismissing his appeal, the learned Judges held that the said warning was sufficient hence the Appellant was properly convicted and sentenced as his plea of guilt was unequivocal. However, the Learned Judges set aside the sentences of imprisonment in the other counts and ordered that the Appellant suffer the death penalty only in respect of the first count of robbery with violence.
6. It is that dismissal that has triggered the present appeal. The Appellant initially filed 5 grounds of appeal, which may be summarized as follows:

a. ***The learned Judges failed to consider the language used by the trial court at the time the charges were read out to the Appellant and that there was no indication as to whether there was an interpreter.***

b. ***That the learned Judges erred in law in holding that it was not necessary for the Appellant to be referred to a psychiatrist for mental examination.***

c. ***That the learned Judges erred in not considering that his mitigation pointed to the fact that he did not understand the substance and consequences of the charges against him.***

7. The Appellant later filed supplementary grounds of appeal dated **10th May, 2012** which may be summarized as follows

a. ***That the learned Judges failed to consider that the plea did not amount to a plea of guilt under section 207 of the CPC.***

b. ***That the learned Judges failed to observe that the provisions of section 169/2 CPC were not duly complied with.***

c. ***That the learned Judges upheld the conviction and affirmed the sentence without ascertaining the Appellant's mental status.***

8. The Appellant further filed a supplementary memorandum of appeal dated **3rd May, 2013** through his Advocate where he has advanced only one ground: that the charge upon which the plea was entered was defective.
9. This appeal came up for hearing before us on **22ndJuly, 2013.** At the hearing, the Appellant was represented by **Mr. Oyalo,** whereas the State was represented by **Mrs. Murungi, Senior Assistant Director of Public Prosecutions.** At the hearing, learned counsel for the Appellant confined himself to only 2 issues arising from the supplementary memoranda thus:

a. **That the charge sheet was incurably defective as it omitted to describe the weapon used**

during the robbery as being "dangerous" or "offensive" and;

b. **That the Appellant ought to have been referred for mental examination before his plea was taken.**

10. Counsel for the Appellant submitted that the charge sheet was incurably defective as it omitted to state that the Appellant was "armed with dangerous or offensive weapons". He contended that these being essential ingredients to a charge of robbery under section 296(2) of the Penal Code, the charge sheet was rendered incurably defective. To this end, he relied on the case of ***Ngome Patrick vs Republic (Criminal Appeal No. 139 of 2005)*** where this Court allowed an appeal based on the grounds that the conviction was based on a defective charge. Citing the case of **Juma vs. Republic [2003] 2 EA*471,*** learned counsel submitted that where the prosecution sought reliance on the element or ingredient of being armed, it must be stated in the particulars of the charge that the weapon or instrument was a "dangerous" or "offensive" one.
11. Finally, learned counsel submitted that the superior court should have found that there was need to refer the Appellant for psychiatric evaluation.
12. In opposing the appeal, **Mrs. Murungi, Senior Assistant Director of Public Prosecution** argued that there was nothing to suggest that the Appellant needed to undergo psychiatric examination. On the issue of the defective charge, she submitted that failure to state that the weapon used was "dangerous" or "offensive" is not fatal as the other ingredients necessary to convict under **section 296(2) of the Penal Code** had been met. To support her case, she relied on this court's case of ***Eustace Ndirangu Kibaba & another vs. Republic (Criminal Appeal No. 245 of 2003)*** arguing that this Court has clarified that the element of "dangerous" or "offensive" weapons was only important in cases where the distinction between **sections 296(2) and 296(1) of the Penal Code** was at issue. She submitted that where there were other elements such as injury, the charge would still stand even if the weapon was not described as either "dangerous" or "offensive".
13. This Court has considered the record, the grounds of appeal, the able submissions by counsel and the law. This being a second appeal, we will address only points of law by dint of **section 361 (1) of the Criminal Procedure Code.**
14. It is not disputed that the charge sheet omitted the words "dangerous" or "offensive" in describing the weapons with which the Appellant and his accomplices were allegedly armed with. We note that this issue was neither raised before the trial court nor the superior court. In this Court's decision in ***Shadrack Karanja Nyambura vs. Republic [2006] eKLR,*** where the same issue was also raised at the Court of Appeal level, the learned Judges clarified that where the prosecution relied on the ingredient of armory on the part of the accused, it must be stated in the particulars of the charge that the weapon or instrument with which the Appellant was armed was "dangerous" or "offensive". The Court stated further thus:

> ***"As already stated there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under section 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or more other person or persons that would constitute the offence too. And lastly if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence. "***

15. In the present appeal, the charge sheet contained two ingredients necessary to sustain a charge under **section 296(2) of the Penal Code;** it states that the Appellant was in the company of more than one person during the crime; that at or immediately before or immediately after the robbery, used personal violence on one **James Mugo Mukobo**.
16. We further note the above case of ***Eustace Ndirangu Kibaba & Another vs. Republic***, which the State relied on for the proposition that it is only mandatory to describe the weapon as "dangerous" or "offensive" in the charge sheet where the prosecution is solely relying on the ingredient of the use of such weapon to sustain a charge of robbery with violence. Where the prosecution is relying on one of the other ingredients or elements to prove its case, then the omission of the words

"dangerous" or "offensive" is not fatal to a charge of robbery with violence under **section 296(2) of the Penal Code.** We fully agree with this decision.

17. In view of the above, we find no merit in the Appellant's claims that the plea was based on a defective charge sheet.
18. On the issue of the Appellant's mental capacity to plead guilty, we have revisited the trial court's record, portions of which are as follows:

"Interpretation- English/Kiswahili

> ***2nd Accused: guilty on 1st, 2nd, 3rd and 4th counts of offence. I was one of the robbers but the 1st and 2nd accused were not. I was with others not before court.***
>
> ***Court: court explains to 2nd accused the penal sanctions of death under 296(2) of the Penal Code as regards 1st and 2nd counts and reads charges afresh to 2nd accused who pleads guilty to all of them and adds that 1st and 3rd accused were not there. He was with other people.***

2nd accused: Guilty on 1st count

Guilty on 2nd count

Guilty on 3rd count

Guilty on 4th count."

19. The prosecutor then proceeded to read out the facts to the Appellant who confirmed the same as true upon which the trial court proceeded to convict him. He was also given an opportunity to mitigate before the sentencing.
20. In the case of ***Adan vs. Republic*** *(supra)* cited above, the Court outlined the guidelines on how a plea of guilty and conviction of an accused person should be recorded by the trial court. The Court emphasized that after the plea of guilty has been entered, the trial court should explain the facts of the alleged charge to the accused who should then be asked whether or not he admits them. If he does not deny them, a conviction may be entered against him.
21. Further to the guidelines set out in the ***Adan case***, this Court in the case ***of Boit vs. Republic (2002) KLR Volume 1 page 815***, has set forth several safeguards in instances where a plea of guilt carries a death sentence. It was held thus:

> ***"There is no statutory provision to the effect that a person charged with an offence the penalty for which is death cannot plead guilty to such a charge. But as the court remarked in Kisang's case, such cases are rare. They are indeed the exception rather than the rule. That being so, the courts have always been concerned that before a plea of guilty to such a charge is accepted and acted upon by any court, certain vital safeguards must be strictly complied with – and it must appear on the record of the court taking the plea that those safe-guards have been strictly complied with – and those safe-guards are that:***

i. ***The person pleading guilty fully understands the offence with which he is charged. The court before whom he is taken to be pleading guilty must in its record show that the substance of the charge and every element or ingredient constituting the offence has been explained to him in a language that he understands and that with that understanding and out of his own free-will the pleader admits the charge. This requirement applies not only to offences punishable by death but to all types of offences…….***

ii. ***Where the offence is one punishable by death, the court recording the plea of guilty must show in its record that the person pleading guilty understands the consequences of his plea. This***

requirement, as we have seen, was set out way back in 1946, in Kisang's case, ante. We think this is an elementary requirement of common sense and fairness. We must not forget that under section 77(2) of the Constitution a person charged with an offence –

> ***Shall be presumed to be innocent until he is proved or has pleaded guilty" to such a charge. Where the offence charged carries with it a mandatory sentence of death, then it is only fair that before an accused pleads guilty to the charge and thus puts his life on the line, he is informed about this and then left to make an informed choice on whether he voluntarily wishes to put his life on the line or whether he wishes to have those who make the allegation against him prove that allegation. If he is fully informed on all these matters and the record of the trial court shows that he has been informed but has nevertheless chosen to plead guilty then there cannot be any genuine complaint thereafter. Even the constitution itself does not debar anyone from pleading guilty to any offence whether punishable by death or otherwise."***

22. In the case the subject of this appeal, the trial court record shows that after the plea of guilty was recorded, the facts of the offence were narrated to the Appellant by the prosecutor and recorded by the court to which he answered: ***"facts are true as read by the prosecutor on all counts."*** In addition, the record is clear that the trial court explained to the Appellant the penal sanctions of pleading guilty to a capital offence before proceeding to read the charges afresh to him. It is also apparent from the record that the appellant was well in advance notified of the consequences of his plea. Needless to say, the Appellant's plea was unequivocal.
23. It was the Appellant's contention that the magistrate should have sought a psychiatrist's opinion on his mental status before his plea of guilt was entered. On this question, the learned Judges in the High Court held that:

> ***"In the instant case, the record does not show that when arraigned in Court the Appellant exhibited any psychiatric disorder as to merit a visit to a psychiatrist. It is inconceivable that the Appellant having exhibited a mental problem, the Magistrate would have proceeded the way she did."***

24. From the record, there is no patent indication that the need arose for the Appellant to be subjected to mental examination. But we must hasten to add that patent exhibitions alone are not the ground for a trial court to order a mental examination. For example, where it is brought to the court's attention that there is a history of mental illness on the part of the accused, mental examination may be warranted. All things considered, in the present appeal, we are constrained to agree with the learned Judges of the first appellate court that indeed there was no reason to refer the Appellant for psychiatric examination.
25. We also agree with the conviction and findings of both the subordinate and the superior court on the sentence, and have no reason to review the same.
26. For the reasons stated above, the appellant's appeal is dismissed. We reaffirm the conviction and sentence. It is so ordered.

Dated and delivered at Nairobi this 17th day of January, 2014.

P. KIHARA KARIUKI

……..…….

PRESIDENT, COURT OF APPEAL

R. N. NAMBUYE

……..

JUDGE OF APPEAL

J. W. MWERA

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR