IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 63 OF 2013

BETWEEN

BERNARD MUCHOMBA..APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court at Meru (Lesit and Kasango, JJ.)

dated 31st March, 2011

in

H.C.CR A. No. 238 of 2009)

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JUDGMENT OF THE COURT

1. The appellant faced the charge of robbery with violence contrary to ***Section 296(2)*** of the ***Penal Code***. The trial magistrate convicted and sentenced him to death. His appeal to the High Court was dismissed ***(Lessit & Kasango JJ).*** He has now lodged a second appeal before this Court.
2. There are two succinct grounds of appeal stateda in his memorandum of appeal dated 23rd December, 2013. These are:

i. ***That the High Court erred in law in dismissing the appeal before it without satisfying itself that the plea was properly taken in accordance with the law.***

ii. ***That the trial was flawed in law from the very onset as the particulars of the charge and every ingredient thereof were not read and explained to the appellant.***

3. At the hearing of the appeal, learned counsel Mr. Muia Mwanzia appeared for the appellant while the State was represented by the Assistant Director of Public Prosecution Mr. Job Kaigai.
4. Counsel for the appellant reiterated the grounds of appeal and emphasized that taking a plea in a criminal trial is a substantive requirement of law and an integral part of fair trial. The appellant cited the case of ***Adan – v- Republic, (1973) EA 445*** where it was stated:

"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".

5. Counsel submitted that in the instant case, at the time when the plea was taken before the trial magistrate, the appellant was not asked which language he understood. It was submitted that the Record of Appeal does not indicate if the essential ingredients and substance of the charge were read, explained, and understood by the appellant. That the record of appeal does not show the language which the appellant understood; that the issue is not whether the appellant knew the language but whether he understood the charge. Counsel submitted that when the appellant urged his appeal before the High Court, he stated that he did not fully understand the charge. Counsel emphasized that from the trial court to the High Court, the appellant was not represented by counsel. Counsel cited the cases of ***BGM HC Revision Application No. 744 of 2013; Abraham Wafula – v- Republic, Meru HCCRA No. 164 of 2010; Slias Ithalie Muroki – v- Republic*** where it was stated:

"The start line is when the court enquires as to the language the accused understands and which he wishes to be used in the proceedings. That fact must be specifically recorded by the court and the answer given thereto..."

6. Counsel for the appellant urged this Court to find that the plea not having been taken in a manner in conformity with the law, the appeal should be allowed.
7. The State opposed the appeal and supported the conviction and sentence meted out to the appellant. It was submitted that the plea was correctly taken and the record showed that the charge was read over and explained to the appellant. That there was an interpreter in court during plea taking and the entire hearing of the case. The State submitted that before the hearing commenced, the appellant stated that he understood Kiswahili and Kimeru languages. That the record of appeal shows that hearing was conducted in Kiswahili and translated into English. It was emphasized that a plea of not guilty was entered by the trial magistrate and no prejudice was occasioned to the appellant at the stage of plea taking. The State submitted that the appellant was accorded a fair trial, he fully participated in the trial and conducted cross-examination of witnesses, he gave his defence and called a witness and he handed written submissions before the High Court. The State submitted that the appeal has no merit and should be dismissed.
8. We have examined the record of appeal and the judgment of the High Court and the grounds of appeal. This is a second appeal which must be confined to points of law. As was stated in ***Kavingo – v – R, (1982) KLR 214,*** a second appellate court will not generally interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in ***Chemagong vs. Republic, (1984) KLR 213*** at page 219 where this Court held:

"A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)".

9. The main ground of appeal relates to the taking of plea. The record shows that the appellant appeared before the trial magistrate for taking of the plea on 30th June 2009. Interpretation from English to Kimeru was done. The record has the following sentence "the substance of charge read over and explained to the accused person who states in reply – Not true". A plea of not guilty is entered.
10. The issue for our consideration is whether the two grounds of appeal have merit in the face of the record. The record clearly shows that the substance of the charge was explained to the appellant. It is our considered view that an explanation of the substance of the charge of necessity includes the essential ingredients of the charge as contained in the charge sheet. The record of proceedings of 7th October, 2009, clearly shows that the appellant stated he understood Swahili and Kimeru

languages.

11. The appellant contend that he did not have a fair trial as the charges were neither read nor explained to him. In the case of ***Degow Dagane Nunow - v- R.,*** ***Cr. Appeal No. 233 of 2005 (unreported)***, this Court said in part that:

"Of course, there is a right from the beginning of the trial that an interpreter be present in court; that is clearly shown in the record of the magistrate. What is not shown throughout the record is the language which the appellant or the witnesses addressed the magistrate. Section 198 (1) of the Criminal Procedure Code states that whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands".

12. The case of ***Francis Kimani Muthoko & Another - v- R***, ***Crim. Appeal No. 331 of 2006 (unreported)*** is pertinent. In the case of Francis, the language chosen by the accused was recorded at the beginning of the trial when the plea was taken and interpreters were availed but the complaint raised was that the language was not shown in subsequent hearing sessions. This court stated:

"We are not persuaded that the complaint about language and interpretation has any merits. At the commencement of the entire proceedings when the plea was taken, it was clearly recorded that interpretation was English/Kiswahili. There was no suggestion at that time that the two appellants could not communicate in Kiswahili; they conducted their defence in person and throughout the record in the subordinate court, there was no suggestion that interpretation from English to Kiswahili and vice versa was a problem. Even before the superior court, that complaint was never raised."

13. Guided by the dicta in the above case and the record of appeal, we agree with the submission by the State that the plea was taken and trial conducted in a language understood by the appellant. We are satisfied that the particulars of the charge and every essential ingredient thereof were explained to the appellant in a language that he understood. Both grounds of appeal have no merit and this appeal is dismissed.

Dated and delivered at Nyeri this 5th day of February, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR