



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: NAMBUYE, AZANGALALA & KANTAI, JJ.A)**

**CRIMINAL APPEAL NO. 131 OF 2012**

**BETWEEN**

**JASON AKHONYA MAKOKHA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a conviction and or Judgment of the High Court of Kenya at Kakamega (Lenaola Onyancha, JJ) Dated 23<sup>rd</sup> February, 2012*

*in*

*H.C.C.RA. No. 1 of 2007)*

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**JUDGMENT OF THE COURT**

1. The appellant **herein Jason Akhonya Makokha** was charged alongside six other persons in the Chief Magistrates Court at Kakamega vide Criminal Case No. 3770 of 2006 with two counts of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Chapter 63 Laws of Kenya.

The particulars in count 1 read as follows:-

***"On the 12th day of December, 2006 at Mundoli Jaggery Shamberere sub-location South Kabras-Location in Kakamega District within Western Province, jointly with others not before Court, while armed with dangerous weapons namely iron bars, rungus and pangas robbed one Reuben Ingulushi Muheli of his torch valued at Kshs. 100.00 and at or immediately after the time of such robbery used actual violence to the said Reuben Ingulushi Muheli".***

Those in count 2 were as follows:-

***"On the 12th day of December, 2006 at Mundoli Jaggery, Shambarere Sub-location, South Kabras location in Kakamega District within Western Province jointly with others not before Court while***

***armed with dangerous weapons namely iron bars, rungun, and pangas robbed one Patel Naran Laiji of his mobile phone Nokia 1110 valued at Kshs. 4,500.00, two torches valued at Kshs. 240.00, office records and Cash Kshs. 60,000.00 all to the total tune of Kshs. 65,000.00 and at or immediately before or immediately after the time of such robbery used actual violence to the said Patel Naran Laiji"***

2. The appellant and his co accused appeared before Mr. **Obaga SRM** on the 22<sup>nd</sup> December, 2006 for purposes of plea taking. The charges were read to the appellant and his co-accused. The appellant replied that "**it is true**" and a plea of guilty was accordingly entered against him. The same routine was repeated for the second charge and the appellant replied in a like manner.

3. The learned trial Magistrate cautioned the appellant of the serious implications of him pleading guilty to the charge as follows:-

***"Court to first accused. Are you aware that the charge to which you have pleaded carried a mandatory sentence of death?"***

***"Accused. I am aware that the charge carried a death sentence. I was involved in the robbery. I am ready to suffer death"***

4. On account of the above sequence of events, the learned trial Magistrate entered a plea of guilty as against the appellant. The facts of the offence were outlined to the appellant. The appellant was asked if the facts were correct. He is indicated to have replied thus:-

***"Facts are correct. I was arrested after we robbed the complainant."***

The Court after reading out and explaining the facts to the appellant asked the appellant for the second time if he was ready to plead guilty to the charge and he is indicated to have replied thus:-

***"Accused. I admit the charges. The accused person with whom I have been charged were not with me."***

5. On all the above instances when the Court engaged the appellant in a conversation, the language of the conversation was not indicated. This notwithstanding, the learned trial Magistrate proceeded to convict the appellant on his own plea of guilty and then sentenced him to hang in accordance with the law.

6. The appellant was aggrieved by that decision. He appealed to the High Court of Kenya at Kakamega vide Criminal Appeal No. 1 of 2007 raising three grounds of appeal summarized as; the appellant pleaded guilty to the charges in a state of confusion as he was just recovering from the grievous harm he had sustained from a mob; that the learned trial magistrate did not warn him (appellant) of the consequences of pleading guilty to a capital charge; that the learned Magistrate did not give the appellant ample time to gather himself up before taking the plea; that the learned trial Magistrate also erred in failing to warn himself of the dangers of convicting the appellant without informing him of the consequences of pleading guilty to the charges.

7. The appellant was heard on the merits of his appeal. In his submissions to the High Court, the appellant reiterated the grounds of appeal set out above. The submission of the State in response to the appellant's submission is missing from the record. The learned judges of the first Appellate Court, the Hon. Mr. Justices **D.A. Onyancha and I. Lenaola** upon setting out the prerequisites on plea taking as set out in the reknown decision of this Court in the case of **Adan versus Republic [1973] EA445**, delivered themselves inter alia thus:-

***"In this case, the trial magistrate repeatedly warned the appellant of the consequences of his plea but he stood his ground and even attempted to exonerate his co accuseds. Can his explanation on appeal that he was beaten to confusion hold water? This is a court of record***

***and without any evidence that he was so injured as to fail to understand his surroundings, we have no reason to accept that explanation.***

***9. In any event the appellant was arrested at the scene soon after the robbery and his own words were "I was arrested after we robbed the complainant"***

***10. There is no reason in fact and in law to temper with the conviction as the plea was clearly unequivocal."***

8. The appellant is once more aggrieved by the High Courts' dismissal of his appeal. He has appealed to this Court firstly in a home made petition of appeal lodged in the registry of this Court on 29<sup>th</sup> day of May, 2012. It set out eight (8) grounds of appeal. These were however supplemented with two grounds of appeal contained in a supplementary memorandum of appeal filed on 9<sup>th</sup> June, 2014 by learned counsel on record. They read thus:-

***(1) That the learned judges of the Superior Court erred in law and in fact in failing to note and consider that the plea was not properly taken and it was not done in the language (the accused) the appellant understood.***

***(2) The Judges of the Superior Court erred in law and in fact in failing to re-evaluate the evidence and to arrive at its own independent conclusion and judgment"***

9. On the hearing date C.Omollo-Oron (Ms) appearing for the appellant urged us to allow the appeal on the grounds that plea was not taken in the language the appellant understood; that the plea was thus taken contrary to the prerequisites in Sections 77 (2) (b) of the retired Constitution; that the record is clear that the language used to read the charges to the appellant was not indicated; that though the record appears to indicate that the appellant replied to the charge in Kiswahili language, it is learned counsels' stand that the appellant did not understand the swahili language.

10. Turning to the findings of the first appellate Court, M/s Omolo Oron, maintained that the learned Judges failed to note that, the learned trial Magistrate had not followed the prerequisite steps in plea taking set out in the said Adan's case (supra) hence the appellant's trial was vitiated.

11. Learned counsel urged us to find that since the appellants' trial was vitiated he should be released forthwith. It was Oron's contention that a retrial would not serve the ends of justice herein for the reason that the appellant has been incarcerated for long since 2006, and subjecting him to a further indefinite period of incarceration to await a retrial would be extremely harsh; that there are no peculiar circumstances herein which can warrant a retrial; that due to the length of time that has elapsed since the commission of the alleged offence, obtaining witnesses to testify against the appellant might prove a challenge to the prosecution.

12. In response, Mr. C.N Abele, Assistant Director of Public Prosecutions conceded the appeal on the grounds that since the appellant was unrepresented the trial Court should have exercised caution during plea taking, that nowhere in the entire proceedings is the language of the Court indicated as it is required by law; that the appellants plea was not un unequivocal; that the trial Court should have satisfied itself that the appellant had understood the charge properly before moving to enter a plea of guilty.

13. On a retrial, ***Mr. Abele***, agreed that ordering a retrial would not serve any interest of justice as a successful trial would not be achieved; that the offences occurred in 2006, a period of eight years ago and getting witnesses might prove an uphill task for the prosecution; that potential witnesses who were the employer and employees of the factory may have moved on; that the circumstances of the robbery were not aggravated as no life was lost; and lastly this is not a case of great public importance.

14. On case law, learned counsel for the appellant relied on the case of ***Mbae Morison and another***

versus Republic Nyeri CRA 306 &305 of 2006 for the proposition that in the absence of the Court having recorded so, there is no reason for the Court to presume that an accused person(s) spoke and understood the language in which they are recorded to have answered the charge and conducted their defence. The case of Vincent Omondi Obeto and another versus Republic Nakuru CRA 250 of 2006 (UR) for the proposition that failure to record the language of the Court is a contravention of Section 77(2) (b) of the retired constitution and Section 198 of the Criminal Procedure Code. The case of Zephania Okwoyo Gesure versus Republic [2010] eKLR for the proposition that in a case where the offence charged carries a death penalty, before a plea of guilty to such a charge is accepted and acted upon, the Court before whom an accused is taken to be pleading guilty must in its record indicate that the substance of the charge and every element or ingredient constituting the offence has firstly been explained to the accused in a language that he understands and that with that understanding and out of his own free will the pleader admits the charge; secondly that, the Court recording the plea of guilty must show in its record that the person pleading guilty understands the consequences of his plea. The case of Antony Kamau Githuka versus Republic Nairobi CRA No. 330 of 2007 for the proposition that for the Court to nullify proceeding on account of lack of language used during the trial, it must be clear from the record, beyond doubt that the accused did not at all understand what went on during his trial. The case of Francis Koikai Katikenya versus Republic Nairobi CRA No. 280 of 2006 for the proposition that a failure to show demonstrably the language used in criminal proceedings, in contravention of Sections 197 and 198 of the Criminal Procedure Code will in appropriate cases vitiate the trial. The case of Joseph Kamau versus Republic [2013] eKLR for the proposition that it is a fundamental right in Kenya whatever the position is elsewhere, that an accused is entitled to the assistance of an interpreter through whom the proceedings shall be interpreted to the accused in a language which he understands. The case of Kiyato versus Republic [1982-88]1KAR 974 for the proposition that it is a fundamental right of an accused person charged with a criminal offence to have the assistance of an interpreter, a breach of which is fatal to the proceedings. The case of Abdalla versus Republic [1989] KLR 456 and Simiyu versus [2006] KLR 100 for the proposition that it is not in every case where language was not shown which would make an appellant to successfully raise the issue of language before the Court. (See also Mugo and 2 others versus Republic [2008] KLR 19)

15. This being a second appeal, our mandate is limited to interrogation of issues of law only as provided for in Section 361 of the Criminal Procedure Code. See also the case of Chemagong versus Republic [1984] KLR 611 wherein this Court reiterated that it had stated many times before that, it will not normally interfere with concurrent jurisdictional findings of facts by two Courts below unless such jurisdictional findings were based on no evidence, or a misapprehension of the evidence or the Courts below were demonstrably shown to have acted on wrong principles in making these findings. Also the case of Gacheru versus Republic [2005] KLR 688 in which this Court stated inter alia that:-

***"as a second appeal only points of law may be raised since the Court will not disturb concurrent findings of facts made by the two Courts below unless these findings are shown to be based on no evidence."***

16. From the concurrent arguments herein, the following legal issues have arisen for our determination namely:-

- (1) Whether the learned trial magistrate duly complied with the legal prerequisites on plea taking.
- (2) Whether the learned Judges of the first Appellate Court properly exercised their mandate.
- (3) Whether in the circumstances of this appeal, it is prudent to order a retrial.

17. Section 77(2) (b) of the retired constitution provided thus:

*"Every person who is charged with a crime and or offence-*

*(b) Shall be informed as soon as reasonably practicable in a language that he understands and in detail of the nature of the offence with which, he is charged.*

Whereas Section 198(1) of the Criminal Procedure Code provided thus:-

*"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it should be interpreted to him in open Court in a language which he understands."*

18. As was stated in the case of Kiyato versus Republic (supra) stating or reading a charge to an accused person in a language that he understands is a fundamental right and where an accused person does not understand the language of the Court, he must be provided with the services of an interpreter. In Abdalla versus Republic (supra) the Court moved a notch higher when it reiterated that, failure to comply with the above principle would in appropriate cases be fatal to the proceedings. However, the trend in recent decisions of this Court appear to have moderated the harshness of the consequences of non compliance with the above principle. In the case of Simiyu and another versus Republic (supra) the Court reiterated that the provisions of Section 77(2) (b) and (f) of the retired Constitution and Section 198 of the Criminal Procedure Code make it clear that in a criminal trial, the language of the trial must be understood by the accused person. In the case of Mugo and 2 others versus Republic [2008] KLR 19 on the other hand, the Court softened its stance. It stated that it is not every case where language was not shown which would make an appellant to successfully raise the issue of language before the Court. Each case has to be considered in the light of its peculiar circumstances. See also the case of Gichangi and 3 others versus Republic [2005] 2KLR 177 for the proposition that there was a grave danger in the failure by the trial Court to record the language of the proceedings and the language used by the witnesses as these are as important as the evidence itself; and secondly, that these also form part of the fair process of justice, the omission of which might affect an otherwise sound conviction.

19. The cardinal principles that we can draw from the above case law propositions are that, **one**, any Court of law taking a plea from an accused person has to ensure that the language of the Court and the language the accused person wishes to use to communicate with the Court is indicated on the record and where an accused person is not conversant with the language of the Court, he should be afforded the services of an interpreter; **two**, an unexplained violation of a constitutional right to language would normally result in an acquittal irrespective of the nature and strength of the evidence which might be adduced in support of the charge; save that each case has to be determined on its own facts and circumstances; **three**, that there was a reciprocal duty on the part of an accused person to indicate to the Court, for instance that he was not able to understand the language of the proceedings although this does not however lessen the duty of the Court of being satisfied that the accused was able to follow the proceedings; **four**, that where some doubt exist as to whether or not an accused person was accorded the services of an interpreter, the doubt must be resolved in his favour.

20. It is undisputed that the appellant herein was unrepresented at the time his plea was taken by the trial Court; that the trial Court recorded the presence of a Court Clerk named, Everlyn, that in normal practice the presence of a Court Clerk would imply use of such a Court Clerk for purposes of interpretation services in addition to any other Court duties; that interpretation services would be called into play where an accused person does not understand the language of the Court; that if such a service is invoked, then it is usually prudent on the part of the presiding officer of the Court to indicate the language of the Court and the language of the interpretation.

21. From the content of the record before us, it is evidently clear that neither the language of the Court nor of the interpretation was indicated. There is no record as to whether the Court asked the appellant the language he wished to use to communicate with the Court in. Neither do we have a record of the appellant himself asking the Court to provide him with interpretation services.

22. It is not in doubt that the appellant faced two counts of a serious offence of robbery with violence which carries a death penalty. In the case of **Boit versus Republic [2002]1KLR 815**, this Court was categorical that "**there is no law in Kenya which would prevent a person charged with an offence punishable by death from pleading guilty to such a charge.**" Save that the following safeguards have to be complied with namely that:-

(a) The Court before which such an accused person has been taken for plea has to ensure that the accused person pleading guilty fully understands the offence with which he is charged as provided for in law.

(b) The accused person(s) should be told in detail and in a language familiar to him the substance of the offence, the elements or ingredients which constitute it, the date and the approximate time on which the offence was committed and the person (s) against whom the offence was allegedly committed.

(c) Where the offence charged is one punishable by death, the Court recording the plea must show in its record that the person pleading guilty to the charge understands that as a consequence of his plea he will face an instant sentence of death.

(d) Where the record of the trial Court shows that such an accused person(s) has been so informed but has nevertheless chosen to plead guilty, then there cannot be any genuine complaint thereafter.

23. Herein the record indicates clearly that when the charges were read to the appellant by the learned trial Magistrate, he replied, "**it is true**" against each charge. In the case of **Oremo versus Republic [1990] KLR290** the Court ruled that the sentence "**It is true**" does not really amount to a plea of guilty. See also the case of **Kenes versus Republic [1994] KLR614**, also for the proposition that the words "It is true" may not amount to a plea of guilty and that where an accused person gives an explanation and qualifies the facts, it means that he was not accepting the facts and a plea of not guilty should have been entered.

24. The sequence of what transpired during the appellant's plea taking has already been set out above. To us, these demonstrates clearly that the appellant was either confused or did not understand the proceedings. This should have put the trial magistrate on guard so as to rethink the next step especially where the language of the Court, had not been indicated. The appellant's responses to the charges made it imperative on the trial magistrate to go further and inquire from the appellant whether he had really understood what had transpired in the proceedings and possibly defer the entry of the plea of guilty to another date. Such a step taken as a cautionary measure would have gone a long way to allow the confusion in the appellant if any to subside. We say confusion because we do not understand how an accused person could say "**we robbed**" and then shortly thereafter absolve the co-accused persons from blame. This is a clear indication that the appellant was in a state of mental confusion as at the time his plea was taken. We are satisfied that the State has properly conceded the appeal.

25. The question we have to ask ourselves now is whether this is a proper case for a retrial. In the case of **Mbae Morison and another versus Republic (supra)** it was held inter alia that a retrial should only be ordered where interests of justice require it. In **Kanyeki versus Republic [2004] 2KLR 164** there is the proposition that a retrial will be ordered where witnesses could be easily traced. In **Sinaraha & another versus Republic [2004] 2KLR 328**, the proposition is that a retrial will be ordered only when the original trial was illegal or defective but not for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. In the case of **Ekimat versus Republic [2005]1KLR 182** there is the proposition that a retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence, a conviction might result and should not be ordered where it is likely to cause an injustice to an accused person. In **M'Obici & another versus Republic [2006] 2KLR 166**, the Court ruled that a retrial should not be ordered unless the appellate Court was of the opinion that on a proper consideration of

the admissible or potentially admissible evidence, a conviction might result'. See also the case of *Kedisia versus Republic [2009] KLR 604* for the proposition that regarding an order for a retrial, the Court of Appeal is entitled to look at all the circumstances surrounding the case, taking into account the admissible or potentially admissible evidence available for determination as to whether a conviction was likely to be obtained or not; save that each case must depend on its own peculiar circumstances.

26. Applying the above principles, to the circumstances displayed herein, we are inclined not to order a retrial. Our reason for saying so are that the offence took place way back in 2006; the appellant who was sentenced to death has been in custody all along since conviction; the potential witnesses were a factory employer and his employees who may have moved on. The co-accuseds were acquitted of the same charges at a no case to answer stage. There is thus nothing before us to show that not only a fair trial but a conviction would be achieved. In the circumstances, we find it not prudent to order a retrial.

We therefore find that the state properly conceded the appeal. We allow the appeal in its entirety. We direct the appellant to be set at liberty forthwith unless otherwise lawfully held.

**Dated and delivered at Kisumu this 18<sup>th</sup> day of July 2014.**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**SANKALE ole KANTAI**

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**JUDGE OF APPEAL**