



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: ONYANGO OTIENO, KARANJA & KOOME, JJ.A.)**

**CRIMINAL APPEAL NO.604 OF 2010**

**PAULINA AMANA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(Appeal from the Judgment of the High Court of Kenya at Eldoret (Nambuye and Omondi Tunya, JJ.)  
dated 16th August, 2002***

**in**

**H.C.CR.A NO.60 OF 1999)**

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**JUDGMENT OF THE COURT**

This appeal raises one legal issue of whether there is a valid judgment on record against the appellant. Paulina Amana (appellant) was arraigned before the Senior Principal Magistrate at Eldoret on 4th June, 1999 and charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code.

The appellant pleaded guilty to both counts and after the particulars of each offence were narrated and she confirmed they were true, she was convicted on her own plea of guilty and sentenced to death on the two counts and both sentences were to run concurrently.

The appellant appealed before the High court. The appeal was heard by Nambuye, J. (as she then was), with Omondi Tunya, J. on 11th June, 2001 at Eldoret. However the proceedings by Omondi Tunya, J. cannot be traced in the court records. Interestingly he is the only Judge, who signed the Judgment that was delivered on the 16th August, 2002. This is the judgment that has provoked this appeal against which the appellant has raised a total of nine (9) grounds.

The grounds of appeal are challenging the validity of the judgment which was not properly signed and the

three issues of law that cut across all the nine grounds are; whether a Judgment that was not signed by one of the Judges who heard the appeal is valid. Secondly whether the learned Judges erred by failing to re-consider whether the plea of guilty as recorded against the appellant for an offence that carries a death sentence was unequivocal. Lastly whether this judgment should be set aside and the matter be referred for retrial by the High court before a different Bench.

M/s Kamau learned counsel for the appellant submitted that there was simply no judgment on record, and the appeal should be allowed as the plea as recorded was not unequivocal. On the part of the prosecution, Mr. Chirchir, learned Senior Prosecution State Counsel conceded the appeal was heard by two Judges but since the judgment was not signed by one Judge, the judgment was not valid and this Court should refer the appeal for re-hearing before the High Court.

It is not contested that the Judgment was not signed by the two Judges who heard the appeal. In another similar case of *Lockwacharia vs Republic (2005) KLR 379*, this Court held that a judgment of two Judges who heard the appeal and was not signed by the two Judges was not a valid judgment. While allowing the appeal, the Court pointed out that it was even precluded from deciding the merits or demerits of the judgment of the High court which was a nullity.

Being guided by the reasoning and approach illustrated in *Lockwacharia's* case (supra), it follows that the unsigned judgment is a nullity.

The next issue to determine is whether this matter should be referred for retrial as submitted by Mr. Chirchir. In considering this aspect, it is important to revisit the background of this matter and the circumstances of this case, especially the period served in prison by the appellant since conviction.

The appellant was convicted of a capital offence on her own plea of guilty. This plea of guilty was the crux of the appeal before the learned judges of the High Court. A perusal of the trial court's proceedings of how the plea by the appellant was recorded sharply contradicts the learned Judge's observation in the unsigned two paged judgment where they pointed:

***“We have perused the lower Court's record and found that she was duly warned of and appreciated the consequences of entering a plea of guilty.”***

In our own reading of the record of proceedings, it is not indicated that the learned trial magistrate warned the appellant of the consequences of entering a plea of guilty as it is recorded as follows: -

***“The accused is aware of the consequences of admitting the offence and replies: I admit I robbed the complainant.”***

Unless there is an error in the record, a non equivocal plea should have shown a question by the court explaining the consequences, and a reply by the appellant recorded as an answer. In our view the plea of guilty that was recorded in respect of the appellant was not unequivocal as the appellants own words were not recorded. (See the oft' cited case of *Adan vs. Republic (1973) EA page 443.*) This is an irregularity that goes to the root of the matter. Besides another important aspect that militates against an order of a retrial is the time the appellant has taken serving the death sentence that was passed on June, 1999.

In the case of *Ahmed Sumar v Republic [1964] EA 481*, at page 483, the predecessor to this Court stated as follows:

***“It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that retrial should be ordered”.***

The court continued at the same page paragraph H and stated:

*“We are also referred to the Judgment in Pascal Clement Bragan Za v R [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless Court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.”*

The appellant has served over 13 years; in the circumstances a retrial will not serve the ends of justice.

For the aforesaid reasons this appeal is meritorious. We hereby allow it, the conviction is quashed and the death sentence is set aside. The appellant is to be set at liberty forthwith, unless otherwise lawfully held.

**Dated at Eldoret this 30th day of January, 2013.**

**J. W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**