IN THE COURT OF APPEAL
AT NAKURU

CORAM: BOSIRE, ONYANGO OTIENO & NYAMU, JJ.A.

CRIMINAL APPEAL NO. 314 OF 2006

BETWEEN
JOHN KIMANI GITAU……..APPELLANT

AND
REPUBLIC……RESPONDENT

(Appeal from a conviction and sentence of the High Court of Kenya at Nakuru (Kimaru, J) dated 24th November, 2006

in

H.C.CR.C. NO. 15 OF 2003)

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JUDGMENT OF THE COURT

This is a first appeal. The appellant ***JOHN KIMANI GITAU***, was purportedly charged in an information dated 25th November, 2003, with the offence of murder contrary to ***Section 203*** as read with *Section 204* of the Penal Code. The particulars in that information were that:-

"On the 20th day of October, 2000 at Wanyororo "A" Farm, Bahati in Nakuru District of Rift Valley Province, murdered Samuel Mwangi Karuru."

He appeared in court on 25th November, 2003, but that was before the Deputy Registrar, *C.A. Ndeda*, who could not take plea and rightly ordered him to appear before the Honourable Judge on 1st December, 2003, "for plea". He was thereafter remanded in custody. On 1st December, 2003, he appeared before *Muga Apondi J.* The record shows that although he was to appear for plea, all that the learned Judge did was to order that the hearing was to be on 4th May, 2004. No plea was taken on that day. On 4th May, 2004, the appellant appeared before *Musinga J. Mr. Koech*, the State Counsel applied for adjournment as he was not in a position to proceed as both witnesses and investigation officer were absent. That application was opposed but the learned Judge adjourned the hearing to 6th May, 2004. On 6th May, 2004, the prosecution again applied for adjournment as witnesses were absent. That application was not opposed but the court refused it and set the hearing at 11.30 a.m. That was later adjourned to 2.00 p.m. for mention. At 2.30 p.m. the hearing was adjourned to 14th December, 2004. On that date, the hearing was again adjourned on grounds that the appellant's counsel had been appointed a magistrate and a new counsel for the appellant needed time to study the case. The case was then fixed for hearing on 12th May,

2005. The hearing did not proceed on that day as it was adjourned from time to time till 24th May, 2006 when the hearing commenced. All this time, no plea was taken and the hearing proceeded without the information being read to the appellant and his plea taken.

We need to mention that except on 25th November, 2003, when appellant first appeared before the Deputy Registrar, the appellant was represented by advocate. After hearing eight (8) witnesses, the appellant was put to his defence and he gave unsworn statement in his defence. The learned Judge thereafter summed up the entire case to the two assessors who, in their separate opinions, found the appellant guilty. The learned Judge in his judgment, also found the appellant guilty, convicted him and sentenced him to death.

The appellant felt dissatisfied with the conviction and sentence. Hence this appeal premised on several grounds contained in the original memorandum of appeal and supplementary grounds of appeal both filed by the appellant in person but which, at the hearing of the appeal, were adopted by *Mr. Kurgat*, the learned counsel for the appellant. For reasons that will be clear in this judgment, we prefer to deal with one ground which is set out as second ground in the supplementary grounds of appeal filed on 17th February, 2011. That ground states:-

"2. That the learned trial Judge erred in law and fact in failing to observe that a plea of *NOT GUILTY* ***was not entered and as such*** *Section 207* ***and*** *274* ***of the CPC were floated (sic).*** *Section 50(2)* ***of the constitution was not adhered to*** *Section 232(4)(4)(6)* ***and*** *(7)* ***of the CPC was not complied with."***

Before us, *Mr. Kurgat* addressed us on that ground first and took us through the record in his effort to demonstrate that the case was heard without the plea having been taken. He submitted that this was unconstitutional and referred us to ***Section 77*** of the retired constitution. He also referred us to this Court's judgment in the case of ***PATRICK KUBALE WESONGA VS. REPUBLIC (2007)*** **eKLR** where this Court, differently constituted dealt with a similar situation, and pleaded with us to accept that the proceedings before the High Court were vitiated by that omission to cause the appellant to plead to the charge that he faced before the hearing could proceed. *Mr. Nyakundi*, the learned State Counsel, conceded that no plea was taken, but was of the view that as the appellant had an advocate, and as the matter proceeded to full hearing and the witnesses gave evidence in the presence of the appellant and as that evidence was interpreted to the appellant, the appellant suffered no prejudice and the omission was cured under ***Section 382*** of the Criminal Procedure Code. As to the decision of this Court in the ***Wesonga's*** case (supra), *Mr. Nyakundi* was of the view that we had the jurisdiction to come to a different decision in this matter.

It is not in dispute that no plea was taken by the trial court. We have set out the salient aspects as relate to the progress of the case from the date the appellant was taken to court, which was the same date of the information, to the date the hearing started up to its conclusion. Both *Mr. Kurgat* and *Mr. Nyakundi* readily accept that no plea was taken in the case. *Mr. Nyakundi* however submits that as the appellant had an advocate representing him in the matter, that omission could not have prejudiced him. We do not, with respect agree. This was a constitutional matter and not an irregularity that could be wished away pursuant to the provisions of *Section 382* of the Criminal Procedure Code.

The case was heard as we have stated, between 25th November, 2003 and 24th November, 2006. The retired Constitution was still in operation***. Section 77 (2)(b)*** of that constitution stated as follows:

"2. Every person who is charged with a criminal offence
(a) ……..
(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."

We reiterate what this Court said in the ***Wesonga's*** case (supra) as regards the importance of that provision. It said:-

"That provision is one of the constitutional provisions meant to protect fundamental rights and

freedoms of the individual. It is a fundamental right of an individual that when he is charged with any criminal offence which might mean his being deprived of his other liberties such as that of freedom to move about as he likes, and in this case his very life, he be informed of the nature of the offence with which he is charged."

We endorse these sentiments and add that the provisions, which has now been included in the new constitution under ***Article 50 (2) (b)*** were clearly meant to enable the accused not only to understand fully the charge he is facing, but also to be able to prepare his defence to meet the charge. He can only do so if he knows well in advance not only the charge, but also the ingredients of the charge and that is the reason why both the old constitution under which the appellant was taken to court and the current constitution both make it clear that the accused be informed of the offence "in details".

Further, in trials before the High Court, upon an information ***Section 274*** of the Criminal Procedure Code states:-

"The accused person to be tried before the High Court upon an information shall be placed at the bar unfettered, unless the court sees cause otherwise to order, and the information shall be read over to him by the Registrar or other officers of the court and explained if need be by that officer or interpreted by the interpreter of the court, and the accused person shall be required to plead instantly thereto, unless where the accused person is entitled to the service of a copy of the information, he objects to the want of service, and the court finds that he has not been duly served therewith."

In our view the need for the trial court to take plea before hearing a criminal case is mandatory and the above provisions clearly state so. It is not a regulation or a technicality. The failure to do so is fatal for it is the plea that the accused offers that directs the court as to what action to take next. If he pleads not guilty then the trial proceeds and if he admits the truth of the charge then his admission shall be recorded as nearly as possible in the words used by him and then a plea of guilty shall be entered, and facts read out to him and if he admits the facts then a conviction shall be entered.

Mr. Nyakundi, invited us to vary the decision in the ***Wesonga's*** case (supra), but he did not make any attempt to distinguish it from the appeal before us, neither did he submit to us any legal basis for doing so, that decision being of this Court. On our side, we see no reason to distinguish that case from the one before us and as we have indicated above, we do adopt the decision in that case as in any case it was based on sound law.

Mr. Nyakundi also submits further that, as the appellant had an advocate, and as the full hearing took place and witnesses gave evidence and were well examined, he was not prejudiced by that omission. We have perused the record and we note that when the appellant was first taken to the court on 25th November, 2003, he had no advocate and that being the case, his advocate, who came to the scene later, may not have known that plea was not taken. Secondly, and in any event, the right that was violated had a constitutional dimension as reflected in the quotation above and was meant to protect the individual, in this case the accused person and not the advocate representing him. In our view taking a plea is part of the concept of a fair trial. The court is expected to have the charge read or in this case the information read to the accused and to take his plea whether the advocate is there or not. Indeed it is after that is done that he would properly instruct his advocate on the preferred line of defence. We are of the view that whereas the presence of the advocate is an added advantage, it still does not absolve the trial court from its duty of taking a plea in a criminal matter before proceeding to hear the case.

It must be clear from the above that we are persuaded that the trial in the High Court in respect of the case was vitiated by the omission of the trial court to take plea before proceeding with the case. The conviction is quashed and the sentence set aside.

What next? Shall we order a retrial ? That is what we must now proceed to consider. In the case of ***AHMED SUMAR VS REPUBLIC (1964) EA 481*** at page 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases 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 a retrial should be ordered."

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

"We are also referred to the judgment in *PASCAL CLEMENT BRAGANZA V R (1951) EA 152.* ***In this judgment the court accepted that a retrial should not be ordered unless the court was of the opinion that on consideration of the admissible or potentiality 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 required it and should not be ordered when it is likely to cause an injustice to an accused person."***

This Court accepted that decision in several cases, one of which was the case of ***LOLIMO EKIMAT V R***. ***Criminal Appeal No. 151 of 2004*** (unreported) where this Court had the following to say:-

"There are many decisions on the question of which appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where interests of justice require it."

Mr. Nyakundi did not address us on the issue of whether or not a retrial should be ordered as in his mind, he felt the appeal was for dismissal. *Mr. Kurgat,* on his part submitted that an order for retrial would be unfair in the circumstances as the appellant has been in custody since 2003 when he was arrested. We have perused the evidence that was adduced by all the eight witnesses for the prosecution. We have also perused the defence of the appellant. Without saying any more for fear of prejudicing the future hearing of the matter; we are of the view that in consideration of the potentially admissible evidence, a conviction on retrial might, result. Further, in this case, although the appellant has been in custody for a long time, five years of that time being after conviction and sentence, we cannot wish away the fact that going by the record, a life was lost and if found guilty, the appellant could be sentenced as he was earlier on, to death. These circumstances dictate that we order a retrial and we so order.

The appellant shall be released from prison custody to police custody and will be produced in court within fourteen (14) days of this day for a retrial before any Judge other than *Kimaru J.* These shall be the orders of this Court.

DATED and DELIVERED at NAKURU this 23rd day of FEBRUARY, 2012.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

J.G. NYAMU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR