REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Criminal Appeal 36 of 2010

JOHN OTIENO OJWANGA ……..…..…..…… APPELLANT

AND

REPUBLIC…..…….……...…… RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisii (Musinga & Muchelule, JJ) dated 3rd February, 2010

in
H. C. Cr. A. No. 173 of 2008)
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JUDGMENT OF THE COURT

The appellant, ***John Otieno Ojwang'*** was charged with the offence of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code. The particulars in the charge sheet read to the appellant were that:

"On the night of 25th day of August 2008 at Kaburini area of Homa Bay Township in Homa Bay District within Nyanza Province jointly with others no *(sic)* ***before court robbed Kevin Owino Anyach of motor bike make TVS MAX 100 RED FR No. 623 FB 3671 K50348 ENG. No. 0133K71094357 worth 95,000*** *(sic)* ***and at the time of such robbery killed the said KEVIN OWINO ANYACH."***

Although the record before us indicates that he said in response to the charge *"it is not true*" and that a plea of not guilty was entered for him, the original handwritten record of the trial court shows that he actually pleaded *"it is true"* to the charge and that after the plea was taken, the court recorded:-

"Accused is warned of the implication of a plea of guilty."

However, after that warning which came after he had pleaded guilty, there is nothing in the record to show that pursuant to the warning, the charge was read to him again to show whether despite the warning, he still insisted in pleading guilty to the charge which carries the death sentence. Further after warning,

there is nothing in the record to indicate whether or not he understood the warning and thus understood that the offence was that punishable by death. *Mr. Kiprop,* the learned State Counsel who represented the state before us, conceded that after the warning recorded as having been made to the appellant of the consequences of pleading guilty to the charge he faced, the court did not read the charge again to the appellant.

The facts purportedly in support of the case were read to the appellant. These were that on 26th August, 2008, Police Inspector Kirui was in his office at Homa Bay Police Station when at about 9.00 a.m. he learnt that two members of the public who were going to work, stumbled on a dead body near the hospital cemetery. The body had a deep cut wound on the head. The report was booked in the Occurrence Book (OB) of that day. *IP Kirui, Sgt Amollo* of scenes of crime and PC Ndolo, accompanied with the two members of the public went to the scene. On arrival at the scene, at about 11.00 a.m. they found the body of an African male adult aged between 25 and 30 years lying down with two deep cut wounds. The police officers searched the immediate vicinity for any clues but the only evidence they found was that of blood stains which were about two (2) metres from the body. At that time, none knew the name of the deceased. Photographs of the body were taken and the body was taken to the mortuary but on reaching the mortuary, Boda Boda operators identified the body as that of one of their colleagues – Kalvin Otieno. On the same day, a Mr. Martin Shikuku Wanyonyi, made a report at the Police Station that his motor cycle which was being operated by one known as Kalvin Otieno had disappeared together with its rider, one Kalvin Otieno. He last saw them in Homa Bay at 5.00 p.m. on 25th August, 2008. Before all that could be investigated, officers from Migori Police Station received information on 26th August 2008, at about 10 a.m. that there was an alleged thief who was being subjected to mob justice. PC Bernard Githiga of Migori Police Station, accompanied by other officers, proceeded to the scene. They found a person being beaten by members of the public and rescued that person. It is alleged that that person was the appellant. He was being beaten on allegation that he had taken a motor bike which had blood stains to a garage. The police officers, after rescuing the appellant rushed him to Migori District Hospital where he was admitted. The officers took the motor cycle to the police station and circulated its recovery to other police stations. Homa Bay Police Station received the message and responded. *P.C Kamande* of Homa Bay Police Station, together with *Mr. Martin Shikuku*, the alleged owner of the bike went to Migori Police Station. Martin produced evidence of the ownership of the bike. According to the record, the serial No. of the bike was 3351 frame No. 623, Engine Number 0133K71094357 issued at Kisii Market. He produced other evidence of ownership and of the identity of the motor cycle. The officers from Homa Bay Police Station picked up the appellant; and rearrested him. *Dr. Ojwang* conducted postmortem examination on the deceased, and concluded that the deceased died of head injuries. Make of the motor cycle as per record read to the court was JVS 108. The appellant was then charged as stated above.

On the court asking the appellant whether or not the facts were true, he is recorded as having stated:-

"It is true. I killed the deceased. I took the motor bike from him."

He was thereafter convicted on his own plea of guilty. In mitigation, the appellant said:-

"I want to be taken to hospital for further treatment. I pray to serve sentence in another prison. There are people who are threatening to harm me at Homa Bay G. K. Prison."

He was thereafter sentenced to death. He was not satisfied with the conviction and sentence. He appealed to the High Court against both. The High Court, *(Musinga & Muchelule, JJ.)* after hearing the appeal, dismissed it stating that to them the plea was proper and that although the appellant had been severely injured through mob justice on 26th August, 2008, by 4th September, 2008 when the plea was taken, he was in a proper state of mind and appreciated what was going on in court though he still needed further treatment. The appellant is still dissatisfied with the decision of the trial court and of the first appellate court and hence this appeal premised on the four grounds in the memorandum of appeal filed on 14th September, 2011. *Mr. Kowinoh*, the learned counsel for the appellant, in arguing the appeal, abandoned the original memorandum of appeal filed by the appellant on 19th August, 2011 and also abandoned ground four (4) of the grounds of appeal in the memorandum of appeal filed on 14th September,

2011. The grounds that were before us were that:-

"1. The learned Judges erred in law in failing to properly consider the appellant's state of health at the time of taking the plea arising from the injuries sustained at the time of arrest in holding that the plea was properly taken.

2. The learned Judges of the superior court erred in law in dismissing the appeal while the charge was defective to the extent that the particulars of the victim as appeared in the charge were difference (sic) from those in the facts as read in support by the prosecution.

3. The learned trial Judges erred in law in failing to consider and find that the warning of implications of a plea of guilty was not properly administered as per the court record.

4. …… abandoned. ……..

5. The learned trial Judges (sic) erred in law in holding that the plea of guilty was unequivocal which it was not."

In his submissions, *Mr. Kowinoh* stated that from the record before the court, it was clear that the trial court in accepting a plea of guilty to an offence punishable by death, did not take vital safeguards to ensure that the appellant understood the risk he was taking in pleading guilty to the charge before he pleaded guilty to it. He said that although there was no record of warning given to the appellant, there was nothing on record to show that the appellant fully understood the warning. This was a matter of law and thus this Court has jurisdiction to deal with the appeal. Further, *Mr. Kowinoh* submitted that as the name of the victim in the charge was different from the name of the victim given in the summary of facts, the appellant's alleged acceptance of the facts could not be acted upon to convict the appellant and lastly *Mr. Kowinoh* was of the view that the mitigation given by the appellant did show that he was not in a proper frame of mind when the plea was taken as he appeared to have been under severe injuries and also still feared being in Homa Bay town.

Mr. Kiprop, the learned State Counsel, on the other hand, urged us to dismiss the appeal contending that it was a sound decision in respect of a proper plea of guilty at the trial court and so this Court has no jurisdiction to entertain the appeal. In his mind, the plea was unequivocal and although after warning by the court, the charge should have been put to the appellant again, that omission was properly cured by the admission of facts by the appellant such that the appellant has no basis complaining on the issue. As to the alleged defects in the charge, *Mr. Kiprop* submitted that there was no merit in that complaint as the person who was killed was by whatever name an employee of *Mr. Martin Shikuku Wanyonyi* and was thus an identifiable person. He asked us to dismiss the appeal.

We have anxiously considered the record before us, the submissions by the learned counsel, the decision by the trial court as well as by the first appellate court and the law. First, we have no doubt in our minds that we have jurisdiction to entertain the appeal. The issue in contention both in the first appellate court and before us is whether or not the plea that the trial court acted upon was valid in law. It was on the basis of that plea that the appellant was found guilty, convicted and sentenced to death. That in our view is a matter of law. It is certainly not a second appeal on sentence. It is an appeal on the legality of the plea which was acted upon by the trial court – see also the case of ***NDEDE vs. R (1991) KLR 566*** below.

We cannot lose sight of the fact that in this case, the appellant was facing a charge that carried with it death as a punishment if the appellant was found guilty. In general, in all criminal cases, the requirement that guides the courts when taking a plea is spelt out in the well known case of ***ADAN vs REPUBLIC (1973) EA 445***. In that case, the court stated that when taking a plea in a criminal case, the accused must be informed of the detailed ingredients of the charge which constitute the offence, in a language that he understands, the date on which the offence was committed, the approximate time when it was committed (if known) and the person or persons against whom the offence was committed. It is only after all those are spelt out to the accused that his plea is taken down in writing in words as close as possible to the words the accused used in an answer to the charge. That is done after ensuring that the

accused has fully understood the charge. Consequently the words, "it is true" are frowned at by the courts for they mean very little if anything. After the court enters a plea of guilty, the facts are given to the court by the prosecution. Again the facts are stated to the accused in a language he understands. After the facts are read, the accused is then asked if the facts as read out reflect what actually took place. If he agrees that the facts reflect the truth of what happened, then the court proceeds to see if the facts as read do establish an offence and if they do and the offence established is as in the charge, then the court proceeds to convict the accused of the offence. Needless to say, if facts do not establish an offence known to law then the court cannot convict for there would be no offence to convict the accused of. That, in our view is the procedure in general. However, oftentimes, accused persons do not plead guilty to offences carrying death sentences such as murder, treason and robbery with violence under ***section 296 (2)*** of the Penal Code. It is mainly because of the punishment that those offences carry. As a result of the consequences of conviction on such offences, the courts have taken greater precaution in accepting pleas of guilty in respect of such offences. The extra precaution that the courts have taken is to ensure that the accused fully knows that in pleading guilty to such offences, they are putting their lives on the line. In the case of ***BOIT v REPUBLIC (2002) 1 KLR 815***, this Court held:

"1. 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.

2. That being so, the Courts have always been concerned that before a plea of guilty to such a charge is accepted and acted upon, certain vital safeguards must be strictly complied with and it must appear in the record of the court taking the plea that those safeguards have been strictly complied with. The safeguards are:

(a) As with all other offences, the person pleading guilty must fully understand the offence with which he is charged as provided under section 77 (2) (b) of the Constitution. The person 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 in which the offence was committed and the person against whom the offence was committed.

(b) Where the offence is one punishable by death, the court recording the plea must show in its record that the person pleading guilty understands that as a consequence of his plea he will face a sentence of death.

(3) If an accused person is fully informed on all these matters, and the record of the trial court shows that he has been so informed but has nevertheless chosen to plead guilty then there cannot be any genuine complaint thereafter."

In this case the record shows that when the charge was read to the appellant, he pleaded "It is true" and that was recorded. Thereafter the appellant was warned of the consequences of that plea, but there is nothing to show that after that warning he was asked whether he understood the warning. Thereafter the charge was not read to him again to ensure that he understood the warning and to give him an option, having understood the warning, to proceed with his plea of guilty, or pursuant to the warning to change it to that of not guilty. Mr Kiprop concedes that was not done. In our view upto that point of the proceedings, the plea which in any case was no more than just "it is true", was not properly taken, and could not be acted upon. Thus the entry of that plea in the record as a plea of guilty was not proper. This view was also adopted in the cases of ***REX v YONASONI & OTHERS (1942) 9 EACA 65*** and in the case of ***TOMACI NUFUMA v REX (1959) EA 625*** which was a plea in a murder case. In our view, once that first part did not accord with the law, the reading of the facts to the appellant cannot be taken to have cured the irregularity in the procedure. It is a procedure which should only be embarked on once a valid plea has been taken. However, be that as it may, *Mr. Kiprop* submits that if there was any flaw in the failure to put the charge again to the appellant after warning, that flaw was cured by the appellant's admission of the facts after the same was read to him.

It is that aspect we will now discuss. We note from the record that the appellant was beaten by a mob at Migori on 26th August, 2008. The police officers at Migori rushed him to the hospital where he

was admitted for treatment. The record also shows that the police officers from Homa Bay and the owner of the subject motor cycle went to Migori after the recovery of the motor bike was published. Unfortunately the record does not state when they went to Migori, neither does it state when the police officers from Homa Bay picked up the appellant and went with him to Homa Bay nor when the appellant was discharged from the hospital at Migori. Nonetheless, the post-mortem was done on 2nd September, 2008 and the appellant was produced at Homa Bay court on 4th September, 2008, about eight (8) days after he had suffered what the first appellate court felt were serious injuries. At the time his plea was taken and after conviction, when asked to say something in mitigation, what he said first was:

"I want to be taken to hospital for treatment."

In his appeal to the High Court, the first ground of his appeal was:

"2. That the sitting Magistrate erred in law and facts by not taking into account the state of my health after being beaten by the mob. He might have given me the chance to be given medication before being arraigned in court."

Thus, that complaint about his health, was not being made before the High Court for the first time. The appellant who conducted his case in person both before the trial court and before the High Court, was consistent that when the plea was taken he was not in good health. The first appellate court considered that ground of appeal together with what the appellant said in mitigation and said:

"We raise this mitigation because the appellant, in the Grounds of Appeal complained that the trial court did not consider that he had been beaten and injured and required treatment before being arraigned. Mr. Mutai for the State responded that the issue of the appellant's health had not been raised by him and also that any such state of health did not disadvantage him. The prosecution indicated the appellant was beaten by members of the public who had found him with the motor-cycle. When police rescued him, they took him to Migori District Hospital where he was admitted. That shows he received serious injuries. He was not charged until 4th September, 2008. At mitigation he was still talking for (sic) further treatment. We have considered these facts quite carefully but are of the view that, despite the injuries, the appellant was in a state of mind where he followed the events at plea and accepted to have committed the offence charged."

It is not certain as to what evidence caused the learned judges of the High Court to form that opinion that though suffering serious injuries, the appellant was still in a state of mind where he followed the events at plea and pleaded guilty unequivocally and knowing what he was doing. That view could have not been formed if the learned trial Magistrate had followed the legal requirements and enquired as to the circumstances and conditions of the appellant before the plea was taken. This could have been done by getting a doctor to examine him and to certify that he was able to follow the events in court before a plea was taken. In the case of ***NDEDE VS REPUBLIC (1991) KLR 566***, this Court stated in a similar case but in which the appellant had been earlier on beaten by police:

"1. There is a long line of authority to the effect that the bar to an appeal against a conviction based on a guilty plea is not absolute.

2. The Court is not bound to accept the accused's admission of the truth of the charge and convict him as there may in the words of the Statute "appear sufficient cause to the contrary."

3. Where, as happened in this case, at the time of taking plea there appears to be an unusual disadvantage such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to court from the date of arrest, then an explanation of the circumstances must form an integral part of the facts to be stated by the prosecution to the court."

In our view the explanation to the court in the circumstances of the accused is required in such situations to enable the court decide whether to proceed with taking of the plea or not. The court needs to comment

on such circumstances. In this case, the police told the court that on 26th August, 2008, eight (8) days before the plea was taken, the appellant was beaten by a mob, the appellant himself in his mitigation raised the issue of his health but the learned Magistrate made no comment on it at any stage. Neither did the Magistrate think such a situation would create confusion in the mind of the appellant to the extent that he might not understand what he was facing. It is therefore not surprising that the appellant still felt even after pleading guilty to such an offence carrying death sentence, that he was going to serve imprisonment and therefore sought a prison outside Homa Bay. It was no surprise that he in fact never raised any normal mitigating factors perhaps because he did not fathom what was going on in Court. The learned Judges of the High Court, though accepting that the appellant had serious injuries, nevertheless felt the same injuries had no effect on him eight days after they were inflicted on him. It would appear, their attention was not drawn to ***Ndede's*** case*(supra)*.

In our view, both at the plea level and after the facts were read, we cannot say the appellant pleaded guilty voluntarily and certainly. We cannot say that he voluntarily elected to put his life on the line having understood the charge and the facts constituting the charge. We have doubts on these aspects which doubt must be resolved in favour of the appellant. In the result, we quash the conviction and set aside the sentence. On account of what we have stated herein above, we do not think it necessary to consider whether the charge was defective or not nor whether the different names of the complainant in the charge and as stated by prosecutor had any effect on the plea.

What next? This is a case where an innocent life was lost at the hands of somebody whether the appellant or any other person. Justice must be done to the family of the deceased and in accordance with law. The appellant has been in confinement for about three years only. We believe a successful prosecution can still be mounted. In the case of ***MUIRURI vs REPUBLIC [2003] KLR 552*** this Court held:-

"3. Generally whether a retrial should be conducted or not must depend on the circumstances of the case.

4. It will only be made where the interest of Justice requires it and if it is unlikely to cause injustice to the appellant. Other facts include illegalities, or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not."

This is a proper case for a retrial as the ends of justice demand it. We direct that the plea be taken a fresh before another Magistrate other than *C.A.S. Mutai*, SRM (as he then was). Let the appellant be placed in police custody at Homa Bay and thereafter be produced in Court within fourteen days from the date hereof for his plea to be taken.

Dated and delivered at Kisumu this 22nd day of MARCH, 2012.

S. E. O. BOSIRE
……..……
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
……...……
JUDGE OF APPEAL

J. G. NYAMU
…….……...
JUDGE OF APPEAL

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

DEPUTY REGISTRAR