REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Criminal Appeal 274 of 2008

BETWEEN

ZAPHANIA OKWOYO GESURE ..... APPELLANT

AND

REPUBLIC .....RESPONDENT

(An appeal from a sentence and conviction of the High Court of Kenya at Kisii (Gacheche, J) dated 24th May, 2007

In

H.C. Cr. C. No. 39 of 2005)
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JUDGMENT OF THE COURT

On the 25th July, 2005, Zaphania Okwoyo Gesure, the appellant herein, appeared before the late Kaburu Bauni, J charged with murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. The particulars contained in the Information were that on the 10th May, 2005 at Bosinange sub-location in Gucha District within Nyanza Province, the appellant murdered Clemensia Nyaboke.

When the charge was read to the appellant who was represented by Mr. Marube, Advocate, he pleaded not guilty and the hearing was set for 7th December, 2005 and dragged on thereafter until 24th May, 2007 when the appellant appeared before Gacheche, J. According to the Judge's notes for that day, the charge was read over and explained to the accused person in Kegusii, a language which he confirms that he understands well, to which he responded:-

"It is true"

The Judge took this to be a plea of guilty and Mr. Chirchir, the prosecuting counsel, gave the facts of the case to the court. The appellant was then represented by Mr. Mogire. The facts given to the Judge were that:-

> **"On 10th May, 2005, the accused's child was sick. He sent his wife Valentine to go and look for traditional herbs to treat the child with. While on the way Valentine met the accused grand-mother Clemensia Nyaboke, who enquired whether they had**

Kale seedling for planting. Valentine referred her to the accused who was at home and she proceeded to her destination.

The grand-mother went to the accused's home and found the accused at home . She told the accused why she had gone there; he insisted on payment. She did not have any money. The accused without uttering any word entered in his house and removed a panga, emerged there from and cut her severally on the head claiming that she had bewitched his sick child. The grand-mother died instantly at the scene. He dumped the body in a pit latrine. He spent the whole night in the sugar plantation. On 11th May, 2005, he resurfaced and surrendered himself at Ogembo Police Station and told them that he had murdered his grandmother. On 16th May, 2005, Postmortem was performed on Nyaboke's body and the doctor formed the opinion that cause of death was due to cardiopulmonary arrest following severe head injury and severe hemorrhage. I wish to produce the postmortem report as Exhibit P1.

On 21st June 2005, the accused was escorted to Ogembo District Hospital for age and mental assessment. He was found to be 21 years and mentally fit to stand trial.

"Accused: It is true.

Court: Plea of guilty confirmed and accused accordingly convicted of the charge of murder and sentenced to suffer death."

That is the whole record compiled by the learned Judge. Mr. Mogire was present as an advocate for the appellant but he played no role at all in the matter. He appears to have been relegated to the role of a spectator. In the case of **BOIT VS. REPUBLIC [2002] 1 KLR 815,** which was extensively cited by the Court in **PAUL MUTUNGU VS. REPUBLIC**, Criminal Appeal No. 127 of 2006 (unreported), the Court stated as follows:-

"There is no statutory provision to the effect that a person charged with an offence the penalty for which is death cannot plead guilty to such a charge. But as the Court remarked in KISANG'S Case, such cases are rare. They are indeed the exception rather than the rule. That being so, the courts have always been concerned that before a plea of guilty to such a charge is accepted and acted upon by any court, certain vital safe-guards must be strictly complied with – and it must appear on the record of the court taking the plea that those safeguards have been strictly complied with and those safe-guards are that:-

(i) The person pleading guilty fully understands the offence with which he is charged. The court before whom he is taken to be pleading guilty must in its record show that the substance of the charge and every element or ingredient constituting the offence has been explained to him in a language that he understands and that with that understanding and out of his own free-will the pleader admits the charge. This requirement applies not only to offences punishable by death but to all types of offences.

Section 77 (2) (b) of the Constitution puts it this way:

'77(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 understand this section to mean that the detailed nature of the information to be given to the person charged and in a language that he understands to be the substance of the offence, and the elements or ingredients which constitute the same, the date on which the offence was committed, the

approximate time when it was committed and the person or persons against whom the offence was committed. These are the requirements which the Court of Appeal for East Africa sought to codify in the case of Adan vs. Republic (1973) EA 445. As we have said this first requirement applies to any accused person taken to be pleading guilty to any crime, whether that crime be punishable by death or not.

(ii) Where the offence is one punishable by death, the court recording the plea of guilty must show in its record that the person pleading guilty understands the consequences of his plea. This requirement, as we have seen, was set out way back in 1946, in Kisang's case, ante. We think this is an elementary requirement of common sense and fairness. We must not forget that under section 77 (2) of the Constitution a person charged with an offence –

'shall be presumed to be innocent until he is proved or has pleaded guilty.'

----------. Where the offence charged carries with it a mandatory sentence of death, then it is only fair that before an accused pleads guilty to the charge and thus puts his life on the line, he is informed about this and then left to make an informed choice on whether he voluntarily wishes to put his life on the line or whether he wishes to have those who make the allegation against him prove that allegation. If he is fully informed on all these matters and the record of the trial court shows that he has been informed but has nevertheless chosen to plead guilty then there cannot be any genuine complaint thereafter. Even the Constitution itself does not debar anyone from pleading guilty to any offence whether punishable by death or otherwise."

Apart from showing that an advocate was representing the appellant before the learned Judge, her record is wholly silent on the issue of whether she warned the appellant on the consequences of a guilty plea to a charge of murder. As we have already pointed out, the appellant's advocate appears to have played no role at all in the proceedings before the Judge. The learned Judge could, for example, have shown in her record that she had asked Mr. Mogire to discuss the matter with the appellant and recorded what Mr. Mogire told her after such discussion. The responsibility to ensure compliance with the safe-guards set out in **PAUL MUTUNGU'S Case** supra, are however, primarily on the trial court. The Court of Appeal for Eastern Africa held, way back in 1942:-

"That in any case in which a conviction is likely to proceed on a plea of guilty (in other words when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every constituent and that he fully understood the charge and pleaded guilty to every element of it unequivocally."

- see **REX VS. YONASANI EGALU & OTHERS [1942] 9 EACA 65.** In 1959, the Court of Appeal for East Africa re-asserted what was said in the **YONASANI Case** in the case of **TOMASI MUFUMU VS. REX [1959] EA 625**. The Court stated:-

"It remains only to say that it is very desirable that a trial Judge, on being offered a plea which he construes as a plea of guilty in murder case, should not only satisfy himself also and record that the accused understands the elements which constitute the offence of murder and understands that the penalty is death. This should be done (and recorded) notwithstanding that the accused may be represented by an advocate, particularly where the advocate belongs to another race and may have encountered language difficulties in explaining the charge to, and taking instructions from, the accused person."

The constituents or elements or ingredients of a charge of murder are:-

"Causing the death of another person by an unlawful act and with malice aforethought,"

and ***section 206*** of the Penal Code sets out circumstances from which malice aforethought is to be gleaned. These should fully be explained to an accused person and his answer to the explanation recorded as fully as is reasonably practicable so that in the event of an appeal, the appellate tribunal can itself see from the record of the trial court that the accused person intended to and did plead guilty to the charge and that he was fully aware of the consequences of his doing so, i.e. that he was made aware that a sentence of death would be the inevitable consequence of the plea of guilty.

Looking at the record of the trial Judge in this case, we are satisfied she did not comply with the accepted safeguards we have already set out herein. The inevitable consequence of that failure must be that this appeal must be allowed.

What is to follow from that conclusion? We think that if the brief facts stated by the prosecution before the trial Judge were to be proved, the appellant might well be convicted of murder. We are aware the offence was allegedly committed in 2005, which is some five years ago but Miss Oundo, the learned Senior State Counsel, informed the Court that the prosecution can still find its witnesses. Mr. Ochieng', who represented the appellant before us and whose research into previous cases was of great help to the Court, did not really oppose an order for a retrial, but even if he had done so, we would still have rejected such opposition.

In the event, we allow the appellant's appeal to the extent that we set aside the conviction for murder and the consequent sentence of death imposed on the appellant, and order that the appellant shall be tried again at the High Court of Kenya, Kisii. Pending the new trial, the appellant shall remain in prison custody as a remand prisoner. Those shall be the orders of the Court in the appeal.

Dated and delivered at Kisumu this 19th day of March, 2010.

R.S.C. OMOLO
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JUDGE OF APPPEAL

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

J.G. NYAMU
……..
JUDGE OF APPEAL

I certify that this is atrue copy of the original.

DEPUTY REGISTRAR.