IN THE COURT OF APPEAL OF KENYA
AT NYERI
Criminal Appeal 302 of 2006

UMURO ADAN DOTI……..……...……...……APPELLANT

AND

REPUBLIC…….RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Meru (Lenaola & Sitati, JJ) dated 12th October, 2006

in

H.C.CR.A. NO. 49 OF 1999)

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JUDGMENT OF THE COURT

The appellant was charged before Senior Resident Magistrate Marsabit with the offence of robbery with violence contrary to *section 296(2)* of the Penal Code. He pleaded guilty to the charge and upon conviction he was sentenced to death.

The particulars of the charge stated in part that:-

"*…….. while armed with a dangerous weapon namely a knife robbed MEDINA RAMATA of two sheep valued Kshs.1,200/= and at or immediately before or after the time of such robbery killed the said MEDINA RAMATA".*

The record shows that the charge was read over to the appellant in Borana language by a court clerk named Ibrahim. The facts stated by the prosecutor were very brief, the essential ones being that:-

"*On 15th October, 1998 at Dambala Urgo Manyatta the deceased was grazing her father's animals. The accused approached her and stole two sheep and a leso. As the complainant was struggling she was knifed by the accused and also hit her with a stone killing her. He went away with the two sheep------."*

The appellant replied to the facts thus:

"*The facts are correct only that it is a stone that I used to kill her".*

Upon conviction the appellant said in mitigation.

"*I ask for leniency throughout I have not denied that I caused her death."*

The appellant appealed to the superior court against conviction and sentence on 11 grounds which included the following grounds:-

"*1. The learned Magistrate failed to understand my plea that I was not intending to kill the said girl because she is also my relative i.e. my sister's daughter.*

2. ----------

3. The learned magistrate failed to recognize my plea that this incident happened immediately after the "shangilla" tribe invaded our tribe i.e. Gabra and killed many people even police officers and had also taken with them all our belongings and livestock. So everybody was confused and there was a lot of misunderstanding amongst us.

4. The learned magistrate did not comply with my argument that I did not use any kind of weapon except the stone I threw to the deceased and by bad lack (sic) landed on his forehead thereby killing her.

5. ----------

6. The learned magistrate failed to realize that I faithfully, after the incident went and report (sic) the matter to the police personally because, I had no malice aforethought.

7. The learned magistrate failed to realize that after the incident I accepted my evil doing before the police and also before the deceased relatives and did not turn the table at the court I also pleaded guilty.

8. ----------

9. ----------

10. ----------

11. The learned magistrate failed to realize whether the goat which I was taking from the flock was mine or belonged to the deceased parents because this was the cause of the fracas".

At the hearing of the appeal the appellant tendered written submissions in which he submitted on additional grounds including the ground that he did not understand the language spoken by Ibrahim, the court clerk. The appellant did not, however, file a supplementary petition of appeal.

The superior court made a finding that the plea of guilty was unequivocal saying in part:-

"*We have carefully reconsidered the proceedings and are satisfied that the appellant's complaints that he did not follow the proceedings because the interpreter was not a Boran is hollow and has no support from the written record. The written record clearly shows that the charge was read over and explained to the appellant in the Borana language and that he responded to the same in Borana language and told the court that the charge as read and explained to him was correct. After the facts were given, the appellant again told the court that the facts given were true, and added that he had used a stone to kill the deceased."*

There are three substantive grounds of appeal in the supplementary Memorandum of Appeal, namely, that, the trial court and superior court erred in law by not affording the appellant adequate interpretation, that the trial court and the superior court erred in law by not appreciating that the appellant's plea was equivocal, and, thirdly, that the trial court erred in law in not giving the appellant a warning of the consequences of the charge upon conviction.

The appellant did not in the petition of the appeal filed in the superior court raise the ground of lack of adequate interpretation of the charge and the proceedings. That ground was raised for the first time in the

appellant's written submissions. However, as we have observed above, the appellant did not file a supplementary petition of appeal in the superior court. The result is that the additional grounds of appeal on which the appellant submitted in the written submissions did not form part of his grounds of appeal. Nevertheless, the superior court, quite properly in our view, considered the additional grounds. The appellant submitted that the interpreter, Ibrahim spoke in BURUJI language which the appellant as a GABRA did not understand. The appellant however submitted that although BORAN, GABRA and BURUJI are not one and the same language some dialects sounds similar to a person from the region who speaks a different language.

The proceedings in the subordinate court clearly show that there was a Borana interpreter in court who interpreted the charge and proceedings to the appellant. Similarly, there was a Borana interpreter in the proceedings in the superior court. The superior court considered the question of language and made a finding that the appellant understood the Borana language. The appellant did not complain either to the subordinate court or to the superior court that he did not understand Borana language. On our own evaluation of the proceedings before the superior court, we are satisfied that the appellant understood the Borana language. The proceeding in the subordinate court show that the appellant indeed pleaded guilty to the charge. There is no doubt that the appellant intended to plead guilty to the offence of robbery. Indeed he has stated clearly in his petition of appeal filed in the superior court that he hit Medina Ramata with stone killing her and he not only confessed the commission of the offence to the police and to the deceased's relatives but also pleaded guilty to the charge.

Nonetheless, the question whether the appellant unequivocally pleaded guilty to the charge of robbery with violence has caused us much concern.

The offence of robbery with violence under *section 296(2)* of the Penal Code is constituted if in the course of stealing, the accused is:

(a) Armed with any dangerous or offensive weapon or instrument, or

(b) Is in company with one or more other person or persons or

(c) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

The particulars of the charge against the appellant contained elements (a) and (c) above. The particulars stated that the appellant was armed with dangerous weapons - a knife and that immediately before or immediately after the robbery he killed Medina Kamata. The prosecution did not have to establish both elements. It is sufficient if the prosecution established only one of the two elements.

The prosecutor stated in court that the appellant "knifed" the deceased and also hit her with a stone killing her. The appellant in reply admitted the facts but denied that he "knifed" her saying that he used a stone to kill her. The appellant thus denied the first element of the offence - that he was armed with a dangerous and offence weapon namely a knife.

The appellant did not specifically answer element of stealing two goats. The appellant however cast doubt on the charge of stealing the goats in ground 11 of the petition of appeal filed in the superior court where he tacitly stated that the goat he took from the flock was his. He also stated in ground 3 that the Shangilla tribe had stolen livestock and properties of Gabra tribe. It is doubtful in the circumstances that the appellant intended to admit that he stole two goats. It seems that his mind was focused on the aspect of killing Medina Kamata and that he intended to plead guilty to killing her.

Without the fact of theft of the two goats, the charge of robbery with violence is not constituted.

It follows from the foregoing that the plea to the charge of robbery was equivocal. Nevertheless the appellant clearly pleaded guilty to unlawfully killing the deceased. We cannot understand why the prosecution did not prefer a charge of murder or manslaughter whichever was appropriate which would

have been more straightforward than a charge of robbery with violence.

By *section 361(4)* of the Criminal Procedure Code (Code).

"*Where a party to an appeal has been convicted of an offence and the subordinate or the first appellate court could lawfully have found him guilty of some other offence and on the finding of a subordinate court or of the first appellate court it appears to the Court of Appeal that the court must have been satisfied of the facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction entered by the subordinate court or by the first appellate court a conviction of guilty of that other offence, and pass such sentence in substitution for the offence passed by the subordinate court or by the first appellate court as may be warranted in law for that other offence."*

The question arises whether the subordinate court or the superior court could have convicted the appellant of some other offence on the facts presented to court by the prosecutor. The answer lies in section 179 of the Code which provides:-

"*179(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved he may be convicted of the minor offence although he was not charged with it.*

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it".

Sections 180 to 190 of the Code specifies some offences which an accused person could be convicted of although not charged with the particular offences. However, as *section 191* of the Code provides, those provisions are to be construed as being without prejudice to the generality of the provisions of *Section 179.*

Thus by *section 179* of the Code the subordinate court or the superior court could have convicted the appellant of any minor and cognate offence to the offence of aggravated robbery established by the facts established in court (see *MUGAMBI V THE REPUBLIC [1980] KLR 73.*

In this case the assault of the deceased with a stone resulting in her death was one of the constituents of the charge of robbery with violence as framed. We have considered the definition of "grievous harm" in *section 4* of the Penal Code and we are satisfied that the offence of causing grievous harm contrary to *Section 234* of the Penal Code which carries a maximum sentence of life imprisonment is a minor and cognate offence to the offence of robbery with violence contrary to *section 296(2)* of the Penal Code. We are further satisfied that the facts stated by the prosecutor and admitted by the appellant proved the offence of causing grievous harm to Medina Kamata. The subordinate court and the superior court could have convicted the appellant of that minor offence. It is just in this case that the conviction for causing grievous harm should be substituted for the conviction for robbery with violence.

In the result, the appeal is allowed to the extent that the conviction for offence of robbery with violence is quashed and the sentence of death set aside and in lieu therefor we substitute a conviction for causing grievous harm to Medina Ramata contrary to *Section 234* of the Penal Code and sentence the appellant to 15 years imprisonment to take effect from 15th February, 1999 when the appellant was convicted and sentenced by the magistrate.

DATED and DELIVERED at NYERI this 16TH day of MAY, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR