



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CRIMINAL APPEAL 241 OF 2006

PAUL NAKUA EYAN APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the High Court of Kenya at Kitale (Wanjiru Karanja & G. Dulu, JJ) dated 20th February, 2006

in

H.C.CR.A. NO. 46 OF 2005)

JUDGMENT OF THE COURT

The appellant *Paul Nakua Eyan*, a Turkana, was convicted by the Senior Resident Magistrate Lodwar on his own plea of guilty for robbery with violence contrary to *section 296(2)* of the Penal Code and sentenced to death. The particulars of the charge were that on 19th March, 2005 the appellant jointly with others not before the court being armed with dangerous weapons, namely, a rifle and a Somali sword robbed *EMMANUEL WANJOHI NGURE* of Kshs. 100,000/= and at or immediately before or immediately after the time of such robbery fatally wounded Joseph Wambugu, co-worker to the said Emmanuel Wanjohi Ngure.

The appellant was taken to court for a plea on 4th April, 2005. The record shows that on that day one John Lotiir – a Court Clerk was present and although the court recorded the interpretation as “*English/Kiswahili/Turkana*” the record nevertheless shows that the charge was explained to the appellant in Kiswahili language and that the appellant pleaded not guilty in Kiswahili. The record reads:-

“COURT: *The substance of the charge(s) and every element thereof has been stated by the court to the accused person in Kiswahili language that he understands, who being asked whether he admits or denies the truth of the charge(s) and he replies in Kiswahili language as:.....*

ACCUSED: _____ *False*”.

The charge was subsequently amended and plea on the amended charge taken on 4th May, 2005. On that day the same Court Clerk Lotiir was present and the interpretation was recorded as

“*ENGLISH/KISWAHILI*”. The appellant pleaded not guilty to the charge. The court record for that day reads thus:-

“COURT: Amended charge admitted. The substance of the charge as amended read over to accused in Kiswahili language and he replies thereto in Kiswahili language as:

ACCUSED False.”

The case was fixed for hearing for 18th May 2005. On the hearing date the same Court Clerk Lotiir was present and the interpretation was recorded as:-

“*ENGLISH/KISWAHILI*”.

The record shows that upon being reminded of the charge the appellant admitted the offence and upon being cautioned three times on the consequences of pleading guilty to the charge the appellant nevertheless pleaded guilty to the charge. We quote below what transpired on 18th May, 2005:

“COURT: Accused reminded of the substance of the charge and every element of it in Kiswahili language and upon asked to either admit or deny it, he replies thereto in Kiswahili language that he understands as:-

ACCUSED: True. I stole Kshs. 100,000/= from Ngure and fatally wounded his brother Joseph.

G.M.A. ONG’ONDO,

SRM.

COURT: Accused warned of the consequences of pleading guilty to the charge as the consequence is death penalty. The warning is given three (3) times to him.

G. M. A. ONG’ONDO,

SRM.

ACCUSED: I still maintain what I have told the court that I stole Kshs. 100,000/= from Ngure and fatally wounded his brother, Joseph.

G.M.A. ONG’ONDO,

SRM.

COURT: Plea of guilty entered for accused upon cautioning him three (3) times of the effects of pleading to the charge, whose penalty on conviction is death sentence.

G.M.A. ONG’ONDO,

SRM.”

Thereafter the prosecution stated how the robbery was committed and that the appellant upon interrogation admitted committing the robbery. Before the appellant was called upon to reply to the facts the trial Magistrate cautioned him again and noted the caution thus:-

“COURT: Accused cautioned against admitting the facts as the offence attracts death penalty on conviction and he is cautioned accordingly three (3) times”.

In spite of the caution the appellant accepted the facts stated by the prosecutor as true whereupon the trial

Magistrate convicted the appellant and sentenced him to death.

The appellant appealed to the superior court the main ground of appeal being that:-

“I pleaded guilty at the trial since the charge and the essential ingredients of the offence were not explained in a language I understand. The language used is Kiswahili which I am not familiar with.”

The appellant further complained that he was not given an opportunity to dispute the facts and that the trial Magistrate failed to give him adequate warning or caution when recording the plea of guilty.

The superior court considered the grounds of appeal. On the question of language the superior court concluded:-

“Having perused the proceedings and the responses of the appellant we are convinced that the appellant did understand the language of the court. The language used was Kiswahili. The appellant was probably a Turkana.

On the 4th April, 2005 the interpretation is described as English/Kiswahili/Turkana. However, the record shows that the language used throughout the proceedings was Kiswahili. There is nothing on record to suggest that the appellant complained at any time that he did not understand Kiswahili language”.

On the question whether the plea was irregularly taken the superior court concluded:-

“.....we are of the humble view that the learned trial Magistrate fully complied with steps required for taking pleas of guilty as set down in the case of Kariuki vs Republic [1984] KLR 809. He went further and cautioned the appellant three times before entering a plea of guilty and three times before convicting him. We find no errors in the way the plea of guilty and conviction were entered”.

There is only one ground of appeal, namely, that the superior court erred in law in affirming the conviction whereas the trial in the subordinate court was conducted in a language that the appellant did not understand.

Mr. Okara, learned counsel for the appellant, contended that the trial in the lower court was conducted in a language that the appellant did not fully understand and that in failing to interpret the proceedings in Turkana language, the trial court breached the appellant’s constitutional rights under **section 72(2)(b)** of the Constitution.

On his part Mr. Omutelema, learned Senior Principal State Counsel, submitted that the trial Magistrate established that the appellant understood Kiswahili language which is the language used throughout the proceedings.

It is true that **section 72(2)(b)** of the Constitution requires that a person charged with a criminal offence should be informed of the nature of the charge in a *language that he understands*.

In this case the charge sheet indicated that the appellant was a Turkana. However, it is apparent from the record that although the Court Clerk Lotiir was apparently a Turkana, the charge and facts constituting the offence were read to the appellant in Kiswahili language. The mere fact that the charge and facts constituting the offence were not interpreted to the appellant in his mother tongue would not itself constitute a breach of **section 72(2)(b)** of the Constitution for the constitutional guarantee is only that the accused person *understands* the language used.

In the instant case the trial Magistrate recorded at the time of taking the plea when appellant was first taken to the court that the appellant understood Kiswahili. On that occasion the appellant pleaded not

guilty to the charge. Again on 18th May, 2005 when the appellant pleaded guilty to the charge the trial Magistrate recorded that the appellant understood Kiswahili language. If indeed the appellant understood Kiswahili language, it would follow that *section 72(2)(b)* of the Constitution was complied with. Whether the appellant in this case understood Kiswahili is a question of fact to be determined from the record of the proceedings of the trial court.

The superior court meticulously considered the entire proceedings of the trial court and comprehensively considered the ground now raised in this appeal and made a definite finding that the appellant did in fact understand Kiswahili. Indeed it is clear that the trial Magistrate took the plea with circumspection and made an elaborate record of the proceedings. He was entitled in law to record a plea of guilty for the offence punishable by death and convict on such plea of guilty so long as he followed the safeguards stipulated by this Court in ***Boit v Republic [2002]1 KLR 815***. The trial Magistrate in this case faithfully applied those safeguards.

In the result, we are satisfied that the superior court reached the correct decision and that this appeal has no merit. The appeal is thus dismissed.

Dated and delivered at ELDORET this 26th day of September, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR