REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Criminal Appeal 166 of 2006

RICHARD NYARIKI TURUNGI ……. APPELLANT

AND

REPUBLIC ……...……...…..RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisii

(Bauni & Warsame, JJ) dated 24th March, 2006

in

H.C.CR.A. NO. 221 OF 2004)

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JUDGMENT OF THE COURT

On 8th September, 2004, ***Richard Nyariki Turungi***, the appellant herein, together with two other named persons appeared before a Principal Magistrate at Kisii charged with two counts of robbery with violence contrary to ***section 296(2)*** of the Penal Code. The other two people charged with the appellant were Oscar Moruri Nyamuta (Accused No.2) and Alfred Nyariki Olango (Accused No.3). The particulars contained in the two counts were different. In count one, the particulars were that:-

"On the 2nd day of September, 2004 at Ichuni Sub-location in Nyamira District within Nyanza Province, jointly robbed COSMAS MOSE of one Yashika camera and cash Shs.1,200/= and that immediately before or immediately after the time of such robbery used actual violence to the said Cosmas mose (sic)."

The particulars in the second count were that:-

"On the 2nd day of September, 2004 at Ichuni Sub-location in Nyamira District within Nyanza Province, jointly while armed with dangerous weapons namely Somali sword, robbed ELKANA NYABUSIA of cash Kshs. 3,800/=."

It is not quite clear to us why the language in the two counts was different; in count one the appellant and his colleagues were not armed with dangerous or offensive weapons but it was apparently being alleged that they were three people in number and they used actual violence on the victim of the robbery in that count, namely Cosmas Mose. In count two, it was apparently being alleged that they were armed with a dangerous weapon, namely a Somali sword, at the time they robbed Elkana Nyabusia; but they did not use any form of violence against Elkana. A capital robbery, i.e. robbery carrying with it the death penalty upon conviction is committed if and only if at the time of its commission the offender is,

EITHER

(a) armed with a dangerous or offensive weapon or instrument;

OR in company with one or other person or persons;

OR

at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to the victim of the robbery.

Any of these three alternatives or a combination of them would be sufficient for a charge under ***section 296(2***) of the Penal Code and it seems to us that in count one, the prosecution chose to go under alternative two combined with alternative three, while in count two the prosecution chose to proceed under alternative one. We think there cannot be much quarrel with that.

The record of the trial Magistrate shows that when the appellant and his colleagues first appeared in court, there was present, the Magistrate himself, a Chief Inspector of police called Akumu as the prosecutor and a court clerk called Mwebi who was translating the proceedings from the English language to "*Ekegusii"* and from "*Ekegusii"* to English. The two charges were read out to the three of them and they are recorded as answering the Magistrate as interpreted from Ekegusii as follows:-

"***Count 1: Accused 1:- It is true PGE***

Accused 2:- It is not true PNGE

Accused 3:- It is not true PNGE

Count 2: Accused 1:- It is true PGE

Accused 2:- It is not true PNGE

Accused 3:- It is not true PNGE"

We take the acronyms PGE and PNGE to mean "*Plea of Guilty Entered"* and "*Plea of Not Guilty Entered"* respectively. The trial magistrate was clearly of the view that the sentence "It is true" in respect of each count meant that the appellant, unlike his two colleagues, was pleading guilty to the two charges. The Magistrate then proceeded as follows:-

Court:- The first accused is duly warned that the charge he is facing carry (sic) a mandatory death sentence. The charge shall be read to him again. Accused be brought back tomorrow. All RIC."

Again the acronym "*RIC"* appears to be "*Remanded in Custody"*.

On the following day, the three of them appeared before the Magistrate. The Magistrate once again read the charges to the three of them and the appellant is once again recorded as telling the Magistrate on each count:-

"***It is true."***

The other two persons charged with the appellant maintained their pleas of not guilty. The Magistrate then called upon the prosecutor to state the facts on which the prosecution relied to support the two charges. The prosecutor narrated those facts as follows:-

"***On 2nd September, 2004 at Ichuni sub-location in Nyamira District, the first complainant was going house (sic) from work. He had a Yashika Camera and Kshs. 1,000/=. He met with the first accused and his colleagues who were dressed in jungle jackets. They stopped him and introduced themselves as police officers. He was slapped by the first accused who took his camera. He was searched and Kshs.1,200/= taken. He was kicked and ordered to run away. As he went away he met the second accused who said he had been robbed of Kshs.3,800/=. When the accused said [saw?] the two together they started chasing the complainants who ran away in different directions while raising an alarm. Members of the public came and managed to arrest the first accused who had a jungle attire and military boots. He was thoroughly beaten. He was then escorted to the police with a Somali sword. On interrogation the first accused mentioned the co-accused. They were arrested and a parade conducted where the two accused were identified. All the three accused persons were charged."***

The Magistrate next asked the appellant to comment on the facts stated by the prosecutor. The appellant is recorded as telling the Magistrate:-

"***Accused 1:- The facts are correct but I was not with my co-accused."***

It was after this that the Magistrate convicted the appellant and sentenced him to death. His first appeal to the High Court (Kaburu Bauni & Warsame, JJ) was dismissed on 24th March, 2006 with the learned Judges holding:-

"***The trial court had no alternative and on our part we have no option in view of the expression (sic) admission by the appellant. The trial court did not convict him the first day when he pleaded guilty. The matter was adjourned to enable him to change his position, which was detrimental to his interest and the usual warning was administered on him in a language he understands. The appellant had a satisfactory trial which we are reluctant to disturb. ----------."***

The appellant now comes before us by way of a second appeal and that being so this Court is only entitled to deal with the matter on issues of law.

Mr. Carilus O. Nyawiri urged the appellant's appeal before us. In his Memorandum of Appeal dated 2nd November, 2006 and lodged in the Court's Sub-Registry at Kisumu on 15th November, 2006, Mr. Carilus O. Nyawiri raised three complaints, namely:-

"*1. The learned Hon. Judges erred in law by failing to notice and appreciate that the appellant made equivocal plea of guilty.*

2. The learned Hon. Judges erred in law by failing to recognize and/or appreciate that the particulars of the charge do not support the charge as to require any plea by the appellant.

3. The learned Hon. Judges erred in law by failing to find, recognise and/or to notice that the judgment made and delivered by the trial (lower) court did not meet the requirements of ***section 169*** *of the Criminal Procedure Code (Cap 75) Laws of Kenya."*

These were the first three grounds of appeal. Then on 13th December, 2006 Mr. Carilus O. Nyawiri filed a "***SUPPLEMENTARY MEMORANDUM OF APPEAL"*** containing only one ground, namely

"***That the learned Hon. Judges erred in law by failing to recognize, notice and/or appreciate that the sentence against the appellant did not and/or does not disclose the count on which the appellant was convicted, and sentenced."***

When he commenced his submissions before us, Mr. Carilus O. Nyawiri told us on behalf of the appellant that he would abandon grounds one and two in the original memorandum of appeal and only argue ground two thereof together with the only ground in the supplementary memorandum of appeal. On those two grounds, Mr. Carilus O. Nyawiri told us that the Magistrate did not specify on which count he convicted the appellant and on which count he sentenced the appellant to death and it appeared to us learned counsel was contending this was a fatal omission which entitles the appellant to an acquittal by this Court. Mr. Musau, learned State Counsel, opposed this submission.

It is true the Magistrate did not specifically record that he was convicting the appellant on count one and count two. But it is clear from the Magistrate's record that he read out to the appellant each of the two counts and recorded the plea of the appellant on each count. The facts narrated by the prosecutor dealt with both counts; the first complainant met the appellant and two other people; the appellant and those two people were dressed in jungle jackets and military boots. They stopped the first complainant, told him they were police officers and the appellant slapped him and took away the camera. The pocket of the first complainant was searched and Kshs.1,200/= taken therefrom. The first complainant was then kicked and told to go away. On the way, the first complainant met the second complainant and the second complainant narrated to the first how he had also been robbed of his Kshs.3,800/=. When the two were thus talking the appellant and his group once again came upon the two complainants and they were ordered to run away. The two complainants ran away but at the same time raised an alarm and were joined by members of the public who chased the appellant, caught him, beat him thoroughly and delivered him to the police. He had a Somali sword. The appellant gave to the police the names of the other two who were subsequently arrested. The appellant, as we have seen, admitted all these facts only denying that he had been with his co-accused persons. The facts admitted by the appellant proved the two counts of robbery as charged and it cannot matter that the facts showed that the first complainant had only Kshs.1,000/= in his pocket while the particulars in the charge alleged he had been robbed of Kshs.1,200/=. One is no less guilty because one has been shown to have robbed more than could have been possible to rob, unless it be shown that there was in fact nothing which could have been taken away. If there was no money to be taken away from Cosmas Mose, the appellant took away from him his Yashika camera. Clearly the appellant pleaded guilty to both counts and the Magistrate's record:-

"*Guilty on plea and convicted"* must, in the context of the record, mean he was convicted on both counts. We agree with Mr. Carilus O. Nyawiri that the Magistrate should have specified on which count the sentence of death was being imposed, but that is a matter which we can and will in due course put right.

In the case of ***BOIT V REPUBLIC*** *[2002]1KLR 815* this Court remarked as follows at pages 816 to 817:-

"***----------As far as we are aware 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. As long ago as 1946, the then Court of Appeal for Eastern Africa had this to say on that subject:-***

'***This is one of those rare cases in which it was in no sense improper for a Judge to accept a plea of guilty to murder. The accused was represented by counsel and must have understood what he was charged with and the consequences of his plea. There is no statutory provision invalidating such a plea – see REX VS CHANGWONY ARAP KISANG' (1946) Vol. X111 153'***

We think the same position still obtains to this day. 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 safe-guards have been strictly complied with and those safe-guards are ----------."

In the present appeal, the appellant was not represented by counsel, but as we have pointed out, he was not alone. He heard the others plead not guilty to the charges and the record of the Magistrate specifically shows that he was warned about the consequences of his pleading guilty. The Magistrate even adjourned the matter to the following day so as to enable the appellant think over the matter. When he returned

the following day, he still persisted in pleading guilty to the charges. There was nothing else the Magistrate could have done in the circumstances but to accept the plea. Learned counsel for the appellant now tells us that despite the appellant's plea of guilty, despite his unqualified admission of the facts relevant to the charges, the trial magistrate nevertheless ought to have written a judgment so as to comply with the provisions of ***section 169*** of the Criminal Procedure Code which set down the requirements to be complied with in composing a judgment. With the greatest possible respect to Mr. Carilus O. Nyawiri, there was no need for a judgment to comply with ***section 169*** of the Criminal Procedure Code because the appellant admitted all the issues and none was left for the Magistrate to determine. On the contrary, the case fell for consideration under ***section 207*** of the Criminal Procedure Code. Like in the case of ***KISANG'*** in 1946 we are, like the old Court of Appeal for Eastern Africa, satisfied that this is one of those rare cases in which it was in no sense improper for the trial Magistrate to accept the appellant's plea of guilty to the two charges against him. It is not to be forgotten that the best evidence a court could ever have in proof of guilt is the free and voluntary admission of the offence by the person charged.

The Magistrate having convicted the appellant on two counts, and since the only sentence provided by law for each of the two counts was death, the Magistrate ought to have sentenced the appellant only on one count and need not have imposed another sentence of death on the second count. As we have repeatedly pointed out it is not possible to hang one man twice over. Accordingly, while we do and hereby dismiss the appeal against the conviction on each of the two counts, we set aside the second sentence of death imposed by the Magistrate on count two. The sentence of death on count one, however, remains. Those shall be our orders in this appeal.

Dated and delivered at Kisumu this 23rd day of March, 2007.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR