



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT ELDORET
CRIMINAL APPEAL 215 OF 2006

1. DAVID EYANAE
2. DAVID ELOKITA
3. MICHAEL MUSEE LOKINGI.....APPELLANTS

AND

REPUBLIC.....RESPONDENT

(Appeal from a judgment of the High Court of Kenya

at Kitale (W. Karanja, J) dated 22nd February, 2006

in

H.C.CR.A. NO. 100, 101 & 102 OF 2005)

JUDGMENT OF THE COURT

This is a second appeal. The three appellants *DAVID EYANAE*, (first appellant) *DAVID ELOKITA* (also referred to in the original charge sheet as *Peter Elokita*) (second appellant) and *MICHAEL MUSEE LOKINGI* (third appellant) were jointly charged in the Senior Resident Magistrate's court at Lodwar with one count of robbery with violence contrary to *section 296(2)* of the Penal Code, Chapter 63 Laws of Kenya, one count of being in unlawful possession of a firearm without a firearm certificate contrary to *section 4(2) (a)* as read with *section 4(3)* of the Firearms Act, Chapter 114 Laws of Kenya, and one count of being in unlawful possession of ammunitions without a firearms certificate contrary to *section 4(2)(a)* as read with *section 4(3)(a)* of the Firearms Act. The second appellant *Elokita* faced further two counts of being in unlawful possession of a firearm without a firearms certificate contrary to *section 4(2) (a)* as read with *section 4 (3) (a)* of the Firearms Act Chapter 114 Laws of Kenya and of being in unlawful possession of ammunition without a firearms certificate contrary to *section 4(2) (a)* as read with *section 4(3) (a)* of the Firearms Act. The third appellant *Michael Musee Lokinei* also faced a further charge of being in possession of bhang contrary to *section 2(1)* as read with *section 3(1)* of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.

When the charges were read and explained to the appellants in Turkana language which they understood as they were all from Turkana community, they each pleaded guilty to all the charges. After

their answers to the charges were recorded but before the pleas were entered on their first appearance in court, the record reads as follows:-

“Count I: *Each accused warned of the consequences of pleading to the charge as offence in count I attracts death penalty.*

G.M.A. ONG’ONDO

SRM

Accused 1 -

I am aware of the consequences but I did steal from Hassan while armed.

Accused 2 -

I am aware of the consequences thereof.

Accused 3 -

I am aware of the consequences thereof.

G.M.A Ong’ondo

SRM

COURT: Each accused seems to maintain plea of guilty, but owing to seriousness of the charge (count 1), plea deferred to 28/9/05 for each accused to reconsider plea of guilty. Each accused to remain in custody.”

We need to point out here that in the subordinate court, *Michael Musee Lokinei*, the third appellant, was the first accused, *David Eyenae* the first appellant, was the second accused and *David (Peter) Elokita*, the second appellant, was the third accused.

On 28th September 2005, the appellants again appeared in court before the same learned Senior Resident Magistrate and the record reads as follows:-

“Court

Each accused reminded of the substance of the charges and every element of the same in Turkana language that each accused understands and each accused replies thereto in Turkana language as:

Count I

Accused 1 - True I stole from the late Hassan while armed with a dangerous weapon AK47 rifle.

Accused 2 - True I stole from the late Hassan while armed with a dangerous weapon AK 47 rifle.

Accused 3 - True I stole from the late Hassan while armed with a dangerous weapon, AK47 rifle.

Count II

Accused 3 - True I was in possession of AK47 rifle with no Firearm Certificate.

Count III

Accused 3 - True I was found with two(2) rounds of ammunition without a Firearm Certificate.

Count IV

Accused 1 - True I was found with mark IV rifle without a Firearm Certificate.

Accused 3 - True I was in possession of mark IV Firearm without a Firearm Certificate thereof.

G.M.A. Ong'ondo

S.R.M.

Count V

Accused 1 - True I was found with a round of ammunition without Firearm certificate thereof.

Accused 2 - True I was found with a round of ammunition without a Firearm Certificate.

Accused 3 - True I was found with a round of ammunition without a Firearm Certificate thereof.

G.M.A. Ong'ondo

S.R.M.

Count VI

Accused 1 - True I was found in possession of 5 grams of Cannabis Sativa.

G.M.A Ong'ondo

Court

Each accused reminded that on 27/9/05, plea was deferred for them to reconsider their plea of guilty to count I herein and each of them is reminded and warned (cautioned) of the consequences (death penalty) of pleading guilty to it. The caution is administered twice to them in Turkana language.

G.M.A. Ong'ondo".

The record shows that after that further warning the first count of robbery with violence was again put to the appellants the third time. Their plea to that count when put to them the third time was as follows:-

"Accused 1 - True I stole from the late Hassan while armed with a dangerous weapon, AK47 rifle.

Accused 2 - True I stole from the late Hassan while armed with a dangerous weapon, AK47 rifle.

Accused 3 - I still maintain that I was armed with a dangerous weapon, AK47 rifle when I stole from the late Hassan."

The learned Senior Resident Magistrate then entered plea of guilty for all appellants and in doing so he stated as follows:-

"Court:

Plea of guilty entered for accused 1, accused 2 and accused 3 in counts I, IV and V for accused 3 in counts II and III and for accused I in count VI after having cautioned them yesterday and today twice of the death penalty of plea of guilty to count 1 herein."

Thereafter facts were read to all appellants. The nature of the appeal before us demands that we reproduce the facts as recorded by the subordinate court:-

“IP KHAEMBA:

Facts are that on 11.9.2005, at about 7.00 a.m., one Ismail Hassan (deceased) was in his shop at Kalokol area at a place known as Eliye Springs Shopping Centre in Turkana District. While in his shop, three persons namely accused 1, accused 2 and accused 3 herein, who were armed with dangerous weapons, AK47 rifles in those circumstances (sic), fatally murdered (sic) him and stole unknown amount of money from him in the process. At the time, the deceased was a Kenya Police Reservist (KPR) and was licenced to have a Firearm (Mark IV) rifle S/NO. GB21143A and accused persons took the firearm away and disappeared.

The incident was reported at Kalokol Police base and thereafter at Divisional CID Headquarters, Lodwar. Investigations commenced and IP Otieno of CID led Police Officers to scene and several suspects were arrested among them, accused 1, accused 2 and accused 3 herein. Investigations were extended to Kerio Division at a place called Nakurio and accused 3 was found with an AK rifle S/NO. 6748 and two (2) rounds of ammunition calibre 7.62 special, but he (accused 3) had no Firearm Certificate thereof.

Further investigations revealed that accused 1, accused 2 and accused 3 had a firearm (Mark IV) S/NO. GB21143A that had been issued to the deceased by the Government and had got lost during the fatal wounding of the deceased on the material evening; but accused persons had no Firearm Certificate thereof, too. Accused 1, accused 2, and accused 3 had a round of ammunition calibre .303 without a Firearm Certificate.

Accused persons were searched and accused 1 found with 5 grams of cannabis sativa (bhang) not in medical preparation.

The AK47 rifle S/NO. 6748 two(2) rounds of ammunition of calibre 7.62 mm special, a firearm (Mark IV) S/NO.GB 21143A, one (1) round of ammunition of calibre 303 and 5 grams of cannabis sativa were all recovered and kept as exh.1, exh.2, exh.3, exh.4 and exh.5 respectively. They are before Court – Exhibits 1,2,3,4 and 5 noted and admitted.

The body of the deceased was removed from the scene and postmortem done on it as per post mortem report dated 12/9/05 showing that he died due to gunshot wound on the base of the neck. Exh.6. Later accused 1, and accused 2 and accused 3 were charged of (sic) the present offence.”

The appellants were asked whether they admitted the facts or not and they each said:-

“Count 1

Accused 1 - Facts are true

Accused 2 - Facts are true

Accused 3 - Facts are true

Count II

Accused 3 - Facts are true

Count III

Accused 3 - Facts are true

Count IV

Accused 1 - Facts are true

Accused 2 - Facts are true

Accused 3 - Facts are true

Count V

Accused 1 - Facts are true

Accused 2 - Facts are true

Accused 3 - Facts are true

Count VI

Accused 1 - Facts are true”

Thereafter the appellants were each convicted on their own plea to the various charges that were preferred against each appellant as indicated hereinabove.

The prosecution asked the court to treat each appellant as a first offender though the offence in count 1 was serious. When asked for mitigation each appellant's mitigation was important and we reproduce the same below:-

ACCUSED 1 IN MITIGATION

“I am 25 years old, I am a herdsman. The Area Assistant Chief, John Epakan had sponsored us to kill the deceased, who was allegedly indebted to him. We stole Ksh.50,000/- and gave the Assistant Chief who told us to hide the weapons. I have a family to support. I am remorseful.”

G.M.A ONG'ONDO

S.R.M.

ACCUSED 2 IN MITIGATION

“I am 29 years old. I deal in handcraft (sic). I never killed any other person in my life. The area Assistant Chief John Epakan sent us to steal and fatally wound the deceased and I did so together with accused 1 and accused 3 herein. We stole Ksh.50,000/= from the deceased and gave it to the Assistant Chief, who had promised me a reward of (5) camels. I am a widower and I have a young daughter to support at home. I am remorseful.”

ACCUSED 3 IN MITIGATION

“I am 25 years old. I am a herdsman. I was hired by the area Assistant Chief Epakan to steal from the deceased. I was together with accused 1 and accused 2 and we stole Ks.50,000/= that we gave to the Assistant Chief, who told us to hide the weapon. I was promised a reward of five (5) camels. I have two (2) wives without support. I am an orphan. I regret the act. The deceased was allegedly indebted to the Assistant Chief. I am very remorseful.”

The learned Senior Resident Magistrate thereafter sentenced each appellant to death in count 1 and rightly left the sentences in the other counts in abeyance.

The appellants were each dissatisfied with the conviction and sentence. They appealed to the superior court. Their grounds of appeal were similar in substance and were, in summary, that they were confused at the time their pleas were taken in the subordinate court as they had been tortured by police and were threatened with more torture if they did not plead guilty; that the offences were not explained to them in a language they understood and that they were sick as a result of torture and therefore could not comprehend the charges they faced. The superior court (*Mohamed Ibrahim and Wanjiru Karanja JJ*) considered their appeals at length and dismissed each appellant's appeal stating, *inter alia*, as follows:

“Our conclusion therefore is that the learned trial Magistrate took the pleas in question in strict compliance with the provisions set out in section 207 of the Criminal Procedure Code and as clearly enunciated in the cases of ADAN V. R, KARIUKI VS. R and many others. We find and hold that the pleas in question were unequivocal. That although it is not mandatory for the appellants to be cautioned, they were cautioned more than three times and given adequate time to reconsider their pleas. They persisted and insisted on pleading guilty to the charges.

In our considered view, there was no error at all in the way the learned trial Magistrate took the said plea. We have no basis for interfering with the same. This appeal lacks merit. We accordingly dismiss the same and uphold the conviction on all the counts and the death sentence on count 1”.

The appellants are still dissatisfied with that decision of the superior court and hence this appeal.

Mr. Ngeno, the learned counsel for the first appellant, *M/s. Wanjala* the learned counsel for the second appellant and *Mr. Omboto* the learned counsel for the third appellant in their submissions, argued that the facts did not tally with the charges; and that the appellants did not understand the charges. We have considered their submissions, and the Memoranda of Appeal filed by the appellants in person before us together with the supplementary Memoranda of Appeal filed by *J.A. Wanjala & Company, Advocates* for the second appellant. We have also considered the record, part of which has been reproduced hereinabove extensively. This is a second appeal as we have stated above. The appeal has to be determined mainly on issues of law. *Mr. Ngeno* submits that the plea that was taken ended up in an absurdity and the law cannot seek to create absurdity. What we understood him to mean was that the facts as stated by the prosecutor showed that more than one gun was used to kill the victim of the robbery while the particulars of the charge showed that only one gun was used. *Mr. Ngeno's* contention appeared to be that if only one gun was used, then it would not be correct that each appellant would have said he stole from Hassan while armed with a gun. That appeared to us to be what *Mr. Ngeno* called “an absurdity”. For our part, we find nothing absurd in three people being armed with one gun and one of the three fires the fatal shot.

As regards the manner of taking the plea, Section 207 of the Criminal Procedure Code is the guiding law in plea taking in criminal cases and in as far as the trial court strictly complied with the same, that court cannot be faulted merely because the nature or the punishment resulting from such a plea is serious. In the case of BOIT VS. REPUBLIC [2002] 1 KLR, this Court stated as follows at pages 817 and 818:

“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 safeguards 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 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”.

to such a charge. 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”.

The above sets out the principles applicable when taking plea in all criminal cases and additional requirements when taking plea in offences punishable by death. In the case of RICHARD NYARIKI TURUNGI VS. REPUBLIC, Criminal Appeal No. 166 of 2006, this Court dealt with a similar situation as obtains here. It had this to say:

“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 persisted in pleading guilty to the charges. There was nothing else the Magistrate could have done in the circumstances but to accept the plea. 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 appellants’ 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”.

In the matter before us, the parts of the record we have reproduced above show that the first count was robbery with violence under section 296 (2) of the Penal Code and the punishment for the same is death. However, the learned Senior Resident Magistrate was fully alive to that aspect of the case before him and he went to great lengths to have the charge explained to the appellants in their own language - i.e. Turkana language which they each understood. When each appellant pleaded guilty, the learned Magistrate warned them of the consequences and enquired from each of them whether they understood the warning. Their response was that they understood the warning but still wanted to plead guilty to the

charges. They never said they had been tortured and apparently there was no evidence of those allegations. The learned Senior Resident Magistrate, adjourned the plea and again warned them to think of the consequences as they ponder over the plea till the next day. When the hearing resumed, they were again warned before the plea was taken afresh. They still persisted on pleading guilty to the charges. Thereafter, the charge of robbery with violence contrary to *section 296 (2)* was put to them. They still pleaded guilty to it. After their plea was taken, the facts were read over to them and each accepted the facts. Indeed, the mitigation by each of them clearly demonstrated beyond reasonable doubts that they knew what the charges were and the gravity of the charges they were pleading guilty to. In those circumstances, we, like the superior court, see no way in which the learned Magistrate could have avoided accepting their pleas. We too are of the view that the learned Magistrate did all he could to ensure that the appellants not only understood the charges but also understood the consequences of pleading guilty to count 1 of robbery with violence. We have considered all aspects of this appeal and, with respect, we are unable to see in what way the facts as read to the appellants were at variance with the charges they faced.

This appeal lacks merit. It is dismissed.

DATED and DELIVERED at ELDORET this 21st day of September, 2007.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR