REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Criminal Appeal 127 of 2006

PAUL MUTUNGU ……..……. APPELLANT

AND

REPUBLIC ……..……RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Ochieng & Makhandia, JJ) dated 22nd July, 2004

in

H.C. Cr. Appeal No. 511 of 2001)

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JUDGMENT OF THE COURT

This is a second appeal, the first appeal having been dismissed by the superior court. The appellant, Paul Mutungu, was charged before the Chief Magistrate at Nairobi with the offence of attempted robbery with violence contrary to **section 297(2)** of the Penal Code. The particulars were as follows:

"**Paul Mutungu**

On the 13th day of April, 2001, at New Mathare Estate, Nairobi within Nairobi area, jointly with others not before court while armed with offensive weapons namely metal bars, and a knife, attempted to rob James Taemu money and at or immediately before or immediately after such attempted robbery threatened to use actual violence to James Taemu."

The appellant was not represented in the subordinate court. He was recorded as having pleaded guilty; was convicted on the same plea and was sentenced to death.

The relevant part of the entire record of proceedings before the subordinate court was short and we reproduce it herebelow for ease of reference:

"**20.4.01.**

B. Olao (Mr.) C.M.

IP Odoyo

C.C Mohammed

Interpretation – English/Kiswahili

The substance and every element thereof has been stated by the court to the accused who being asked whether he admits or denies the truth of the charge replies;

That is true.

Court: Accused warned of consequences of conviction.

Accused: That is true.

Court: Plea of Guilty insisted upon.

Prosecution: On 13:4.01 at 6.45 a.m. the

complainant, James Taemu, was asleep in his house at Mathare when he heard a knock at the door. Before he could open it, the door was broken and the accused was seen standing at the door armed with a metal bar and knife. The accused demanded money from the complainant threatening to hit him with a bar. Others armed with pistols came. The complainant screamed and members of the public came to his rescue. The accused and his accomplices tried to run away but he was apprehended, taken to Muthaiga Police Station and charged with this offence.

Accused: The facts are correct.

Court: Guilty of plea and conviction.

Prosecution: No record

Court: Are you well (sic)

Accused in Mitigation

I am well. I have never committed any offence like this before.

Court: Only once (sic) mandatory sentence is

provided for and it is death.

SENTENCE

The accused sentence (sic) to hang.

Right of appeal explained.

B. OLAO (MR)

C.M.

20.4.01."

As we have stated herein above and as appears in the proceedings we have reproduced above, the appellant was convicted and sentenced to death by the Chief Magistrate upon his alleged plea of guilty to the charge of attempted robbery with violence under **section 297(2)**. He appealed to the superior court in Criminal Appeal No. 511 of 2001. That Court (Ochieng and Makhandia, JJ) dismissed his appeal stating

inter alia as follows:

"**All in all we are satisfied that the appellant's plea of guilty was voluntary and properly entered by the learned trial Magistrate. We are in no doubt at all that the learned trial Magistrate in the instant case was so to speak, a trustee to the accused person who insisted to admit his guilt, having satisfied himself on the issue, and thus relieved the prosecution of what may sometimes be the enormous task of proving all that they alleged, beyond reasonable doubt. This appeal is clearly without merit and is consequently dismissed."**

The appellant was not satisfied and has come to this Court, as we have stated, on a second appeal. Ten grounds of appeal have been preferred and this time he is represented by an advocate. The grounds however can be reduced to no more than three in total and these are on the main that the plea was not properly taken; that the learned trial Magistrate erred in law in failing to find out the language that the appellant understood best and to take the plea in that language and that the learned trial Magistrate erred in law in that he failed to take such precautions and administer such warning so as to ensure that the appellant understood the nature and the consequences of the charge he was pleading guilty to before he entered a plea of guilty and thereafter sentenced the appellant.

Mrs. Odembo, learned counsel for the appellant, urged us to accept that the appellant did not understand what he was pleading guilty to as he neither understands English nor Swahili which were the languages of the court; whereas the appellant speaks and understands only Kibutsotso, a dialect of Kiluhya language and that the charge and the warning administered could not therefore have been understood by him. She submitted, that when the learned trial Magistrate noted that the appellant was perhaps through ignorance pleading guilty to such a serious charge, the court should have given the appellant time to hire an advocate or the appellant should have been taken for a medical examination to ascertain whether he was fit to plead before the plea could be taken and acted upon. Mrs. Murungi, Principal State Counsel, while supporting the conviction and sentence contended that the language used in court was understood by the appellant and that the Magistrate took all the necessary precaution to ascertain that the appellant understood the charge and that the appellant was well before his plea was taken. She however conceded that as the Magistrate appeared to be in doubt as to the health (apparently mental health) of the appellant; he should have subjected the appellant to medical examination to ascertain that aspect.

The legal principles to be applied in taking plea in all criminal cases were well spelt out in the well known case of **Adan vs. Republic (1973) EA 445** part of which were well set out by the superior court in its judgment, the subject of this appeal. The part that we feel needs to be emphasized for purposes of this appeal is the part that gave rise to the part setting out the procedure for taking plea quoted by the superior court from the same authority. We will not refer to the procedure set out in that case because, much as it is the proper procedure for taking pleas in criminal cases, in capital offences, this Court has consistently insisted that special caution be taken in addition to strict compliance with the procedures set out in **Adan's** case. In any case, when we reproduce the principles that deal specifically with requirement for taking pleas in capital offences, we will refer also to the general principles. The part of **Adan's** case we reproduce herebelow echoes the general concern of the courts on convicting an accused person without ascertaining that he understands the charge. It is at page 446 of the report and it states:

"**The Courts have always been concerned that an accused person should not be convicted on his own plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education and does not speak the language of the court."**

There is no law in Kenya to stop the courts from accepting plea of guilty to capital offences. The courts can accept such a plea. However, the law which has developed through the doctrine of precedents requires the courts to strictly bear in mind the need to ensure that such a plea, like any other, is taken in the language that the accused understands freely, preferably the language of the accused and that the words of the accused are recorded as close as possible to what the accused actually stated. It is also necessary that whatever the accused says in his plea and in mitigation is fully recorded in the

proceedings. In offences carrying the death sentence, it is essential for the court to warn the accused of the consequences of his pleading guilty namely that he may be sentenced to death if he pleads guilty. In the case of **Boit vs. Republic (2002) KLR Volume 1 page 815**, this Court faced a similar situation as is now before us. It stated:

"**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."

We make no apologies for this lengthy quotation of the case above as we find it necessary to set out the

principle applicable in all other criminal cases and additional requirement in cases involving offences punishable by death so as to ensure that the slight but important difference in the two sets of principles is not missed out.

In the case before us, the appellant says he did not understand Kiswahili language and therefore missed out in everything that went on in the court. He was not represented and he says he did not understand what he pleaded guilty to. The superior court found that from their reading of the record, there was nothing to show that the appellant had difficulties in understanding Kiswahili, he being recorded as being a Kenyan. The superior court thereafter analyzed the record of the subordinate court including the warning given to the appellant of the consequences of the plea of guilty to the charge that he faced and the response the appellant gave when asked whether he was well and concluded that the plea was properly taken.

The record of the subordinate court which we have reproduced hereinabove shows that the way the substance of the charge and every element thereof was stated by the court to the appellant was the normal standard way. That cannot be faulted as the court in putting the charge to the appellant at first was not aware that the appellant would plead guilty to the charge as that course was rare as observed by this Court in the case of **Boit vs. Republic** (**supra**). What we find difficult to appreciate however, is that after the appellant had stated in response to the charge that "*That is true*", what followed was that he was warned of the consequences without specifically stating in what way he was warned and what constituted the warning and making it clear in the record that that warning made it clear to the appellant that he faced death as the mandatory sentence for the offence he was pleading guilty to. Further, there is nothing to show that after the warning was administered, the appellant was asked whether he understood the warning so that when he is recorded to have stated after the warning that "*That is true*", one is not certain whether those words were in response to the warning given or whether he was still insisting on his plea of guilty to the charge as the court recorded. In our view, after the warning, the court should have enquired whether the appellant understood the warning and if he said he understood the warning, then the charge should have been put to him afresh and all that should have been recorded. Further, the law requires the trial court to enter a plea of guilty after recording what the accused had said "*as nearly as possible in his own words*", but in this case, all that the court entered was "*Plea of guilty insisted upon*", which in our view, is different from simply entering "*Plea of Guilty*". After the facts were read to the appellant, he answered that the facts were correct and the court recorded "*Guilty of Plea and conviction*." This is not clear as at this stage all that the court needed to record was a conviction. Be that as it may, what causes us more concern is that after the prosecution had been given an opportunity to avail any past records of the appellant, the Magistrate then apparently felt the appellant was not acting voluntarily and it would appear he felt the appellant was not well for the record shows that he asked the appellant "*are you well?*", to which the appellant in mitigation responded that he was well. We cannot fathom what necessitated that question, but apparently, the Magistrate was not comfortable with the answers the appellant gave or was purely mystified as to what could have caused the appellant to behave the way he did. In our view, once the Magistrate entertained any doubt as to the health of the appellant (mental or otherwise), his duty was to stop taking the plea, adjourn the matter and subject the appellant to medical examination before continuing with the taking of the plea. In that way, the plea would have been unequivocal and free from any possibilities of having been taken while the appellant was not in the best of health either physically or mentally. We do not read much in the appellant's answer given to the court that he was well. A person suffering mental disorder would hardly know that he is unwell. In our view, the fact that the appellant is a Kenyan does not of its own mean he is conversant with Swahili language and many Kenyans do not understand the language. The appellant's contention that he did not understand Swahili since his language is Kibutsotso may very well be true.

We think we have said enough to show that the plea taking was not satisfactory in a case of this nature where the appellant was facing a charge that carried the death sentence. The matters we have alluded to were not considered by the superior court. They were matters of law. We cannot say what conclusion the superior court would have come to had it considered them. As we have found that the plea was not satisfactorily taken, we do quash the conviction that was entered by the subordinate court and set aside the sentence of death.

We were not addressed by the counsel on whether a retrial should be ordered in this case or not. The appellant was arrested on 13th April, 2001 and has been in prison for a period of 5 years. We believe witnesses can still be available to mount a successful trial. Every case must depend on its own facts but in this case, what commends itself to us is a retrial. We therefore order that the appellant be tried *de novo* on the charge of attempted robbery contrary to **section 297(2)** of the Penal Code. The retrial should be held by a different Magistrate at Nairobi and the appellant shall remain in prison custody pending the trial. Those shall be our orders in the appeal.

Dated and delivered at Nairobi this 13th day of October, 2006.

S.E.O BOSIRE

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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