IN THECOURT OF APPEAL

AT NAKURU

(CORAM: OMOLO, LAKHA & O'KUBASU JJ A)

CRIMINAL APPEAL NO 96 OF 2002

BETWEEN

KENNEDY NDIWA BOIT.....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Appeal from a judgment of the High Court at Kitale, Etyang & Omondi-Tunya JJ, dated March 13, 2002

in

H.C.Cr.C No 125 of 2000)

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JUDGMENT OF THE COURT

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." (underlining ours) - see *Rex vs Changuony Arap Kisang* (1946) VOL XIII, 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 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 v 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) (a) 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 so 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.

Why do we make these observations in this appeal?

On 30th September, 2000, Kennedy Ndiwa Boit, the appellant hereinafter, appeared before a Senior Principal Magistrate (Mrs. Sewe) at Kitale Court charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. That offence is mandatorily punishable by death. The particulars of the offence were that on 17th August, 2000 at Kitalale Farm in Trans Nzoia District of the Rift Valley Province, the appellant, jointly with others not before the court, and while armed with a dangerous weapon, to wit an AK 47 rifle, robbed one Bashir Towett Chemaswet of two long trousers, two bed-sheets, two dresses, two shirts, two towels and cash K.Shs.3,700/=, all valued at K.Shs.5,400/= and that at, or immediately before or immediately after the time of such robbery, the appellant and his confederates threatened to use actual violence on the said Bashir Towett Chemaswet. W

hen the appellant appeared before the Magistrate on 30th August, 2000, he was not represented by counsel. The record of the Magistrate shows that the appellant understood Swahili language and that when the substance of the charge and every element thereof was read and explained to him by the Magistrate, the appellant in answer to the charge, told her in Swahili:-

> "It is true that on 17.8.00 at Kitale I and others while armed with a gun robbed Bashir Yowet (sic) Chemaswet. The others escaped with the gun."

The Magistrate rightly thought that the appellant was pleading guilt to the charge. Her record, however, is wholly silent as to whether she warned or informed the appellant of the consequences of his pleading guilty. The Magistrate then proceeded to record the facts on which the Republic was relying in support of its charge against the appellant. Those facts were that on 17th August, 2000, while Bashir Towett Chemaswet was sleeping in his house at Kitalale Farm, he was attacked by a group of six persons at about 3 am. Those six persons included the appellant and they were armed with an AK47 rifle. They wounded Bashir and robbed him of the items listed in the charge. After the robbery the attackers fled and Bashir reported the matter to the CID, Kitale. Later, the appellant was arrested but no recovery was made. The appellant confessed to having committed the offence and he was then charged.

After the narration of those facts the Magistrate asked the appellant for his comments on them and he is recorded as telling her:-

> *"I admit all those facts. They are true."*

What follows that admission is this and we reproduce it:

> "**Court:** G.O.P & C" which we understand to be
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> "Guilty on plea and convicted."
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> "**Prosecutor:** He be treated as a first offender."
>
> "**AIM:** I am a student in Form 1. I am 17 years old. I am asking for pardon."
>
> "**Order:** Accused age be assessed for a report on 1.9.00 RIC"

Stopping there for the moment, it is abundantly clear to us that at no stage did the Magistrate warn the appellant of the consequences of his pleading guilty to the charge. Indeed the appellant's plea in mitigation that "**I am asking for pardon**" clearly shows that the appellant was wholly unaware that he ran the risk of being sentenced to death.

Luckily for the appellant, he turned out to be under-age and so could not be sentenced to death but that is not the point in issue. The point is that the Magistrate who could not have known the age of the appellant did not warn him of the consequences of his pleading guilty to the charge facing him. Had the appellant been over eighteen years old, he could have been sentenced to death without one single word of caution. Mr. Mbeche who argued the appellant's appeal before us told us that the appellant's plea was unequivocal. If that was all the complaint we had to deal with, we doubt, on the face of the record, whether it would have succeeded. The High Court rejected that complaint on first appeal to that court (Etyang & Omondi-Tunya, JJ) but in rejecting the appeal, the learned Judges of the High Court said absolutely nothing about the failure by the trial Magistrate to warn the appellant of the consequences of his pleading guilty. The High Court's failure to address that issue is a question of law which entitles us to interfere with their finding and that of the Magistrate.

What should we do in the circumstances? The appellant's trial was clearly unsatisfactory. The offence is alleged to have been committed in 2000 and we believe witnesses for the Republic can still be traced. In the circumstances, we allow the appeal, quash the conviction recorded by the Magistrate and confirmed by the High Court, set aside the Magistrate's order that the appellant be detained at the pleasure of His Excellency the President and order that the appellant shall be tried *de novo* on the charge of robbery with violence contrary to section 296 (2) of the Penal Code. The retrial shall be held by a different Magistrate at Kitale and the appellant shall remain in prison custody pending the trial. Those shall be our orders in the appeal.

Dated and delivered at Nakuru this 18th day of October, 2002

R.S.C OMOLO

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JUDGE OF APPEAL

A.A LAKHA

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JUDGE OF APPEAL

E.O O'KUBASU

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JUDGE OF APPEAL