



**IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, LAKHA & O'KUBASU, JJ.A.
CRIMINAL APPEAL NO. 40 OF 1994**

BETWEEN

JOHN MAINA WACHIRAAPPELLANT

AND

THE REPUBLIC.....RESPONDENT

**(Appeal from a Judgment of the High Court of Kenya at
Nairobi (Porter & Mbaluto, JJ.) dated 17th November,
1989**

in

H.C.CR.A. NO. 325 OF 1989)

JUDGMENT OF THE COURT

John Maina Wachira (the appellant) and three others were arraigned before the Principal Magistrate at Nyeri on a charge of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the charge stated that on 2nd December, 1987 at Mathaithi in Karatina area within Nyeri District in Central Province, jointly armed with iron bars robbed Wilson Gachogu Gacheru of Shs 1,000/-, a leather jacket and a bunch of keys and in the process of committing the offence used personal violence against the said Wilson Gachogu Gacheru .

When all the four accused persons appeared before the Principal Magistrate on 29th December, 1987 for plea, the record shows that the substance of the charge and every element of it was read and explained to all the defendants. When asked whether they admitted or denied the charge, the other three defendants denied the charge and a plea of NOT GUILTY was entered in respect of each one of them. When the appellant was asked how he pleaded to the charge he responded:-

"I admit that I used violence and robbed the complainant."

and the Magistrate then entered a plea of guilty. As the prosecutor did not have the appellant's record, the matter was adjourned to 30th December, 1987. On that date the prosecutor informed the court that the appellant had admitted the charge and he was ready to state the facts. The appellant himself confirmed to the court that that was the correct position.

The prosecutor then stated the facts which were that on 2nd December, 1987 at 8.00 p.m, the deceased

accompanied by two ladies and another man left his home at Karatina in a matatu he had hired for the journey, to visit a patient at Tumutumu Hospital. On their way back at Mathaithi area, they found a trailer which had broken down and blocked the road. They took a detour but after a short distance the matatu got stuck in mud and the passengers got out and started pushing it. At that point, the appellant and the other three appeared posing as good Samaritans and offered to help push the vehicle. No sooner had they joined, they suddenly produced iron bars and rungs and hit the deceased on the head causing him severe personal injuries. They robbed him of Shs 1,000/- in cash, a leather jacket and a bunch of keys. The persons who accompanied the deceased ran away screaming which attracted villagers to the scene. The appellant and his gang disappeared into the bush. The deceased was taken to Karatina Hospital and later transferred to Nyeri Provincial Hospital where he succumbed to his injuries and passed away on 10th December, 1987.

The post mortem examination showed that the cause of death was due to a depressed skull due to haematoma on his head. Investigations revealed that the appellant was a member of the gang that attacked the deceased, and when he was arrested he was found in possession of the bunch of keys belonging to the deceased. The other persons were also arrested and charged jointly with the appellant. The appellant admitted the charge. When the prosecutor had stated the facts, the Magistrate asked the appellant whether he admitted the facts and he replied:-

"I admit all the facts as related to be true."

The magistrate then recorded-

"On the facts as stated I find that the accused No.2 fully admits the charge and I find him guilty and convict him under section 296(2) of the Penal Code."

After a short plea in mitigation the Magistrate sentenced the appellant to death.

Since the appellant was convicted on his own plea of guilty in normal circumstances he had no right of appeal to the superior court against conviction but he could appeal against sentence for what it was worth. But the appellant did appeal against his conviction and sentence on the ground that his plea was not unequivocal. He told the Judges that although the charge was read and explained to him and the facts related by the prosecutor were true, the magistrate did not explain to him the consequences of his plea and more specifically that it was not explained to him that the offence on conviction carried a mandatory death sentence.

The learned Judges felt uncomfortable that the trial magistrate had not explained to the appellant the consequences of his plea. They said:-

"We feel concerned and a bit uncomfortable with the unusual situation in which the appellant pleaded guilty in the court below on a capital charge without having been cautioned by the court as to the consequences of his being convicted on such a charge - especially so as he was then unrepresented. It is our view that when it appears to the court at the time of taking plea on a capital charge that the accused intends to plead guilty, it is desirable at that stage to caution him and make him fully aware of the consequences including the possible penalty he is likely to receive if he was so convicted of the offence. However, this does not mean that any conviction so entered in the absence of such caution is invalid, provided that the appeal court is satisfied that the accused fully understood the charge and wished to plead guilty to it unequivocally."

We fully endorse this statement of the law by the learned Judges. In this particular case, although the magistrate did not disclose to the appellant the nature of sentence to be imposed, the learned Judges found and held that the failure did not occasion a miscarriage of justice and dismissed his appeal against both conviction and sentence. The matter did not end with the appellant's conviction and sentence. At the trial of the other three accused before a different magistrate the appellant was called as a prosecution witness (P.W.1) and he said in part:-

"When we were brought to the court I pleaded guilty to the offence of robbery because I had committed that offence alone. I do not know the accused persons. I committed the offence for which I pleaded guilty when I was with two others not before this court, and they are not the accused persons in the dock. I did not commit this offence together with the three people in the dock."

This part of the appellant's evidence at the trial of his co-accused reinforced his earlier plea of guilty before the Principal Magistrate. He stood by his earlier plea and appeared to take full responsibility for the robbery. In these circumstances how does he expect anyone to believe him when he changes tack and claims that he did not appreciate the consequences of his plea of guilty. On this the learned Judges remarked:-

"We are satisfied on the material before us that he voluntarily pleaded guilty unequivocally to the charge against him. Even after he had been convicted and sentenced to death accused was recalled by the prosecution as a witness against his co-accused persons, he repeated as we have shown above that he had pleaded guilty to the offence "because I have committed that offence alone." He reiterated this in his petition of appeal. It follows therefore that even if the learned magistrate had not cautioned him or warned him of the consequence of pleading guilty to a capital charge such failure did not occasion any miscarriage of justice and is curable under section 382 of the Criminal Procedure Code."

Like the learned Judges of the superior court, we do not see what difference it would have made, if the trial magistrate had indicated to the appellant that the offence to which he was pleading guilty carried a mandatory death sentence. We must accordingly reject the submission by Mrs Field-Marsham, for the appellant, that the failure by the trial magistrate to inform the appellant about the sentence rendered his plea invalid. The appellant clearly understood what was on offer and took his chance. He did not repudiate the plea at the trial of the other robbers. We are satisfied that the failure to inform the appellant about sentence in this particular case did not occasion any miscarriage of justice.

Accordingly, this appeal fails and it is dismissed.

Dated and delivered at Nairobi this 16th day of February, 2001.

R. O. KWACH

.....

JUDGE OF APPEAL

A.A. LAKHA

.....

JUDGE OF APPEAL

E. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR