IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, LAKHA & OWUOR, JJ.A)
CRIMINAL APPEAL NO. 87 OF 2000

BETWEEEN

ELIJAH AYWA ZEDEKIAH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a conviction and sentence of the High court of Kenya at Nairobi (Hon. Mr. Justice Mbogholi, Ang'awa) dated 4th December, 1998
in
H.C.CR.A. NO. 173 OF 1998)
****

JUDGMENT OF THE COURT

On 2nd day of December, 1997 the appellant herein, Elijah Aywa Zedekiah and another were arraigned before the Senior Resident Magistrate's Court at Maseno and charged with three counts of robbery with violence c/s 296(2) of the Penal Code .

The allegations against the appellant were that he was a member of a gang that terrorised, beat up and robbed three different traders at Chulaimbo Trading Centre, East Karateng' Sub-Location in Kisumu District on the night of 1st and 2nd December 1997. The three traders were complainants in the three counts preferred against the appellant and his coaccusTehde. police were called, laid ambush and arrested the appellant after shooting at him. He was hurled to the police station that same night and from there straight to court the following morning, nursing a hand that had been shattered with a bullet. The record indicates that upon the charge being put to the appellant, he replied to each of the counts consistently like a robot with the words,

"It is true that I robbed the complainant as alleged and assaulted him."

The matter was adjourned to the following day the 4th of December, 1997 to enable the Prosecutor to present the facts to the court. It would appear that the other accused person was injured as well so an order was made, for him to be taken for treatment. No such order was made in respect of the appeal. Following day the appellant appeared again and he was reminded of the charges against him. The record of the trial court reads as follows:-

"Accused is reminded of the charges in Luhya language and warned that the penalty is death, being asked whether he admits or denies the charges replies as follows:-

Accused

I still maintain my plea of guilty to the three charges."

The facts were then narrated elaborately and he answered "I admit all the facts to be true."

He was then convicted on his own plea of guilty on all the three counts and sentenced to death.

Mr. Mogikoyo has argued this appeal on two main grounds namely:-

> "(1) That the learned judges of the High Court misdirected themselves in finding that the appellant understood Luhya language.
>
> (2) That the learned Judge erred in law in failing to observe that there was no precaution taken to ensure that I was not in a state of shock or labouring from shock having been maimed by a spray of bullets and not taking me before a doctor."

He contends that the plea upon which the appellant was convicted and sentenced to death was not unequivocal in that the appellant was not a party to the proceedings that went on in court. He did not understand them, because of lack of interpretation. The proceedings were not clearly interpreted to him sufficiently enough for him to be able to appreciate the nature of the charges that he faced.

Secondly, that the appellant was in great pain having been shot at by the police and his left arm shattered the night before. Therefore, the circumstances under which he allegedly pleaded guilty were not free for the possibility of the learned Magistrate having entered a plea of guilty under a mistake.

We were requested by Mr. Mogikoyo and indeed acceeded to the request and took judicial notice of the fact that there is no language called Luhya per se. The Luhya tribe consists of people speaking several dialects. Some of these dialects are completely distinct from each other. In this particular case the record indicates that the appellant was a Luhya adult from Ehisekwe Sub-Location. Counsel informed us and Mr. Bwonwonga for the State did not state otherwise, that the appellant had come from Idakho Location being tried in Maseno Court situated partly in Luoland and partly in Luhyaland and that he might not have been able to understand a Munyore interpreter. There is no indication on record the particular dialect of Luhya language the interpreter put the charge to the appellant. We have no cause to doubt his word that he did not understand the language in which the proceedings were conducted.

This Court in the case of **Hando s/o Alwnaay v Republic** [1951] EACA 307 stated as follows:-

> "When a person is charged with an offence, the charge and the particulars thereof should be read out to him so far as possible **in his own langauge** , but if that is not possible, a language which he can speak and understand." (The underlining being ours)
>
> Thereafter, the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit them, his answer should be recorded as nearly as possible in his own words and then a plea of guilty formally entered."

In view of what we have said above we do not accept the superior court's finding that the mere fact that the appellant stated before the learned Judges that he was a Luhya, this in itself confirmed the fact that he understood the charges against him and his answer amounted to a proper plea of guilty.

In as far as the second ground of appeal is concerned, Mr. Bwonwonga did not contradict the appellant's contention that, the fact that he had been shot the night before, shoveled to Court the following morning without any treatment and with a hand whose femour was completely shattered, he was experiencing excruciating pain. The kind of pain which a normal person would not be expected to concentrate and appreciate the nature and gravity of charges he is expected to plead to. It is clear to us that considering the circumstances the appellant was in he could have pleaded guilty for many other reasons, for instance so that he could get away quickly and be taken to the doctor. Our view of this matter is that the circumstances surrounding the entering of a plea of guilty, and thereafter the appellant being convicted

and sentenced to death, were clearly such that the learned Magistrate could have made a mistake. The circumstances demanded that the court should go the extra mile inorder to make sure that the appellant was not prejudiced as indeed was the situation in this case.

As we have already held the plea was not an unequivocal admission of guilt. The result is that the conviction of the appellant on all the counts was a nullity. Accordingly, we allow the appeal, quash the conviction, set aside the sentence and order that this be remitted to the court of first instance for a retrial of the appellant in accordance with the law.

Dated and delivered at Nairobi this 9th day of February, 2001.

J.E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR