



**IN THE COURT OF APPEAL
AT NAIROBI**

(CORAM: GICHERU, BOSIRE & KEIWUA J.J.A)

CRIMINAL APPEAL NO.53 OF 1995

BETWEEN

MOHAMED WEKESA WANYONYI APPELLANT

AND

REPUBLIC RESPONDENT

**(Appeal from a judgment) of the High Court of Kenya at
Nairobi (Mbaluto & Oguk JJ.) dated 13th October,
1992**

in

H.C.CR.C. No.739 of 1986)

JUDGMENT OF THE COURT

Mohamed Wekesa Wanyonyi, the appellant was charged before the Chief Magistrate's Court at Nairobi, jointly with another person whose appeal is not before us, with two counts of robbery with violence contrary to section 296(2) of the Penal Code, and a third count of unlawful wounding contrary to section 237(a) of the Penal Code. Both of them pleaded not guilty to all the three counts on their first appearance in court and were thereafter remanded in custody. Their case came for mention on at least four occasions before it came for hearing on 3rd April, 1986, before the late Mango, then a Senior Resident Magistrate. He received evidence from two witnesses and the case was then adjourned. At the resumed hearing on 3rd June, 1986 the appellant indicated he wished to change his plea and plead guilty to all the three counts, whereupon the court cautioned him as follows:-

"Court: Accused reminded and warned that the only sentence in this offence is death."

The appellant is recorded as having responded as follows:

"Accused: I understand that the only sentence is death and I have decided to plead guilty despite that. I committed the offence."

Thereafter the trial magistrate read and explained the respective counts to the appellant who responded in each count: "It is true".

The prosecutor then outlined the facts the prosecution was relying on in support of the three counts,

after which the appellant responded:

"Accused: I have understood the facts and they are all correct."

The trial magistrate then proceeded to convict the appellant in all the three counts, and later sentenced him to suffer death in the first two counts, and 2 years imprisonment with 10 strokes of the cane in the third count which sentence in that third count was ordered to be in abeyance.

Prima facie, the appellant's plea of guilty is unequivocal, and under section 348 of the Criminal Procedure Code, an appeal against conviction would not ordinarily lie. The appellant however, appealed to the superior court complaining, among other things, that the trial magistrate did not make any or sufficient inquiry as to whether indeed the appellant understood the charge and also, whether he actually intended to plead guilty. Besides, that the trial magistrate should have but did not ascertain the appellant's mental condition.

The superior court after considering all the facts and circumstances of the appellant's case and also various decisions, both local and English on the matter, held that the magistrate not only appreciated the law governing pleas of guilty but also appropriately warned the appellant of the consequences of a plea of guilty to a capital charge, before he accepted the appellant's plea of guilty. In that court's view the appellant's plea of guilty to the aforesaid three counts was unequivocal and that in those circumstances no appeal lay in view of the provisions of section 348 aforesaid. It then dismissed the appellant's appeal and hence the appeal before us.

In his memorandum of appeal the appellant in effect challenges all the findings of the first appellate court. Mr Oyalo for the appellant submitted before us, on the main, that a careful reading of the record of appeal clearly shows that the appellant did not fully appreciate what he was pleading guilty to and the consequences thereof. He particularly took issue with the superior court's remark in its judgment that the appellant "appeared to be normal as anyone can be." Besides he complained that the superior court should have but did not fault the trial magistrate for accepting a plea of guilty to a capital charge.

We wish to observe that in law there is nothing against a court accepting a plea of guilty to a capital charge if that court is satisfied that the accused understands the charge and has unequivocally pleaded guilty to it. Indeed on several instances this court has in the past upheld convictions on capital charges on pleas of guilty. For instance in David Mundia Onkoba Criminal Appeal No.41 of 1990, (unreported) and in the recent case of John Maina Wachira Criminal Appeal No.40 of 1994 (unreported) each of the appellant's conviction based on a plea of guilty to the charge of robbery with violence contrary to section 296(2) of the Penal Code, was upheld. And whether or not an accused understands the charge is a matter of fact. It is, however, a matter of law whether or not his plea of guilty is unequivocal.

As we stated earlier, the appellant did not plead guilty to the aforesaid three counts on his first appearance in court. He made several appearances in court for the mention of his case. Two witnesses testified and he was given an opportunity to cross examine them. The record of the subordinate court shows that the appellant indeed crossexamined those witnesses. He asked each of the witnesses whether he knew him; and when the witnesses respectively denied they knew the appellant the latter did not ask any further questions. That clearly shows that the appellant was intelligent enough as to know the type of questions to ask, contrary to submissions by his counsel that he lacked understanding because of his limited education.

It was not the appellant's case that proceedings at his trial were conducted in a language he did not understand. Nor was it his case that the trial magistrate did not sufficiently warn him of the consequences of pleading guilty to a capital charge. Rather his case was basically that the trial magistrate did not make sufficient inquiry as to whether he understood the consequences of a plea of guilty to a capital charge.

The procedure for taking a plea of guilty is designed to obviate the danger of a court accepting a plea of guilty when in fact an accused has not sufficiently understood the effect of such a plea. The appellant was duly warned of the consequences of pleading guilty to a capital charge, indicating clearly that the trial

magistrate showed some reluctance in accepting the appellant's plea of guilty. It was not until the appellant confirmed to him that he, the appellant, fully understood the consequences of pleading guilty to a capital charge that the trial magistrate invited the appellant to plead to the three counts he faced and thereafter invited the Court Prosecutor to outline the facts in support of the three counts, which he admitted before a conviction was entered against him in all the three counts. The facts the appellant admitted, are, in summary, as follows:-

On 18th December, 1985, at 7.30 p.m. a gang of at least six people armed with guns, simis and rungas, raided the residence of Sabina Rato at Pangani Nairobi, and after gaining entry into the house, they demanded money from Rato. When he hesitated, he was shot at and he died instantly from bullet wounds. Part of the gang held the watchmen who were on guard at the gate while others forcibly gained entry into Rato's house, and also, another house belonging to one Sminder Singh. The robbers made away with several valuable items from both houses and in the course of their escape they shot and wounded one David Mwangi Wambugu.

The appellant and his co-accused were arrested on 31st December, 1985, at Ruiru. The police had trailed them from Gatundu on being tipped that the appellant and his co-accused had been seen there armed with a gun and simis. At Ruiru the police confronted the appellant and his companion. Thereafter the appellant and his co-accused were placed in police cells. The gun was later examined by a ballistic examiner who found that it was the gun which had fired the bullet that killed Rato. Spent cartridges recovered from Rato's house were also examined and were found to have been fired from that gun. Further police investigations revealed that the appellant was the leader of the gang that raided both Rato's house and that of Sminder Singh.

As we stated earlier, the foregoing facts were put to the appellant. He confirmed he understood them fully and confirmed that they were correct.

The facts no doubt clearly support the three counts and the trial magistrate was perfectly entitled to enter a plea of guilty against the appellant. The first appellate court was also quite perfectly entitled to come to the conclusion it did that the appellant's plea of guilty to the three counts was unequivocal.

Mr Oyalo complained further, that a careful reading of the proceedings of the subordinate court reveals that the appellant may not have been mentally sound at the time of the plea. The appellant at no time complained of any unsoundness of mind or mental impairment of any kind on his part. That issue, we think, was raised as an afterthought and we have no hesitation in rejecting it.

For the foregoing reasons we come to the conclusion that the appellant's appeal lacks merit. It is therefore dismissed in its entirety.

Dated and delivered at Nairobi this 29th day of June, 2001

J.E. GICHERU

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

M. OLE KEIWUA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR