



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL APPEAL NO. 108 OF 2014**

**(FORMERLY KISII HCCRA NO. 1 OF 2012)**

**BETWEEN**

**KENNEDY OTIENO ABBOT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 62 of 2012 at Senior Principal Magistrates Court at Oyugis, Hon.R.C.B. Ngetich, SPM dated on 3<sup>rd</sup> February 2011)***

**JUDGMENT**

1. The appellant, **KENNEDY OTIENO ABBOT**, was charged with the offence of robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the charge were that on 16<sup>th</sup> January 2012 at Karabondi in Rachuonyo North within Homa Bay County, jointly with others not before the court, while armed with offensive weapons namely rungus and pangas robbed Florence Adhiambo Onyango of her cell phone make Kabambe IMEI No. 35670731299951 valued at Kshs. 3,500.00 and at or immediately before or after the time of such robbery killed Florence Adhiambo Onyango.
2. The appellant was convicted on his own plea of guilty and sentenced to death. He now appeals to this court against the conviction on the grounds set out in the petition of appeal filed on 14<sup>th</sup> February 2012 which may be summarized as follows: that he pleaded guilty amid frustration and physical torture by the CID who misinformed him and persuaded him to plead guilty, that the court did not explain to him the nature and consequences of pleading guilty and that the court ought to have given him some days to recover due to the stress of his unexpected arrest. The appellant reiterated these grounds in his hand written submissions.
3. In opposing the appeal and supporting the conviction, Mr Oluoch, learned counsel for the State, submitted that the charge and elements thereof were read to the appellant in *Dholuo* which is a language he understood. That the court read and explained to the appellant the nature and consequences of the guilty plea. He further submitted that the facts read to the appellant

disclosed the offence of robbery with violence and that on the whole the conviction as the plea was unequivocal.

4. The requirements of recording a guilty plea provided for under **section 207** of the ***Criminal Procedure Code (Chapter 75 Laws of Kenya)*** were elucidated in ***Adan v Republic [1973] E.A. 445*** as follows:-
  - i. The charge and all the essential ingredients of the offence should be read to the accused in his language or in a language he understands
  - ii. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.
  - iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute or explain the fact or add any relevant facts.
  - iv. If the accused does not agree with the facts or raises any question as to his guilt, his reply must be recorded and a change of plea entered.
  - v. If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.
5. The proceedings show that the charge was read to the appellant in ***Dholuo*** which is the language he understood and in response, he stated as follows;

*It is true.*

Thereafter the court noted as follows;

***Court:*** *The seriousness of the offence and the sentence it attracts explained to the accused and charge and its particulars read and explained to him in Dholuo language. Accused replies as hereunder;*

***Accused*** – *It is true.*

6. The appellant also confirmed the facts were true when they were read to him by the prosecutor. The facts were that on 16<sup>th</sup> January 2012 at around 9.00am, a neighbor of Florence Anyango Odhiambo (“the deceased”) heard her screaming and shouting that she was being robbed of her property and being killed. When the neighbor arrived at the house, the door was ajar and the deceased was lying dead with her clothes torn and a head injury. The report of her death was relayed to the police who came and collected the body. A post mortem was done which established that she died from blunt trauma on the head and neck. The police began investigation and arrested the appellant who had in his possession the kabambe phone belonging to the deceased.

7. After the facts were read to him, the appellant stated as follows;

*Facts are correct. It is true I robbed and killed Florence Adhiambo Onyango and took her mobile.*

Upon conviction, the appellant stated in mitigation that;

*I ask for forgiveness. I did not intend to kill the deceased. I leave it to the Court to decide. I am 24 years.*

8. The record is clear that the proceedings were translated in ***Dholuo***. When he first stated that the charges read to him were true, the learned magistrate explained to him the seriousness of the

offence and the sentence its attracts and the appellant still confirmed that the charges were true. I therefore reject the appellant's contention that the learned magistrate did not explain to him the nature of the charges and penalty. There is no allegation on record that the appellant was forced to plead to the charge. The appellant did not raise the issue at all in the proceedings.

9. Even where the accused has admitted the facts as read to him, the court may yet record a plea of not guilty where the accused says something in mitigation that negates the offence. The Court of Appeal in **John Muendo Musau v Republic NRB CA No. 365 of 2011 [2013]eKLR** observed that,

*We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence.*

10. Although the accused stated that, "I did not intend to kill" I find that the mitigation did not negate the guilty plea as his intention was irrelevant to establishing the essential elements of robbery with violence and the facts which he had accepted as true.

11. A similar situation arose in **Mohamed Wekesa Wanyonyi v Republic CA NRB Civil Appeal No. 53 of 1995 (Unreported)** where the Court of Appeal observed that;

*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 conviction was entered against him on all the three counts.*

12. I am satisfied the appellant's plea of guilty was unequivocal. I affirm the conviction and sentence. The appeal is dismissed.

**DATED and DELIVERED at HOMA BAY this 11<sup>th</sup> day of March 2016.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecution instructed by the Office of the Director of Public Prosecutions for the respondent.



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