Case Number:	Criminal Appeal 164 & 165 of 2010
Date Delivered:	20 Dec 2010
Case Class:	Criminal
Court:	High Court at Nakuru
Case Action:	Judgment
Judge:	Mathew John Anyara Emukule, William Ouko
Citation:	JOHN NDUATI WANJIRU & another v REPUBLIC [2010] eKLR
Advocates:	-
Case Summary:	..
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO.164 OF 2010

CONSOLIDATED WITH CR. APPEAL NO. 165 OF 2010

JOHN NDUATI WANJIRU…….....1ST APPEALLANT

PATRICK WANJOHI KAMUNYA…….2ND APPELLANT

VERSUS

REPUBLIC……RESPONDENT

[Appeals from original conviction and sentence in Nakuru

C.M.CR.C.NO.2510/2010 by Hon W. Juma, Chief Magistrate, dated 10th May, 2010]

JUDGMENT

The two appeals consolidated into one arises from a conviction and sentence arising from a plea of guilty for the offence of **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. **Section 348** of the **Criminal Procedure Code** provides that:

" 348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence"

The section suggests that appeal arising from a plea of guilty can only be brought in respect of the severity and/or legality of the sentence.

It has however, been held that the section is not a complete bar to an appeal on any other ground. See **Eliranus Mwasia Mutua & Others** Vs. **Republic**, Criminal Appeal No.120 of 2004.

Having pleaded guilty and upon conviction on that plea and having been sentenced to death, the appellants now challenge the conviction and sentence on the grounds that the plea was no unequivocal; that the charge sheet was defective that the appellants had raised the issue of violation of their constitutional rights; that the facts did not support the charge and; that the appellants' mitigations were not considered.

Before us, learned counsel for the appellant's did not argue all these grounds concentrating his efforts only on the single ground that the plea of guilty was not unequivocal. In support of his submissions, counsel cited the case of **Wanjiru** Vs. **Republic** (1975) EA 5.

Learned counsel for the respondent conceded the appeal for the reasons that the plea was not unequivocal and further that the appellants were misled in believing that by pleading guilty they would be

pardoned by the complainant.

We have considered these arguments and hold the following view. The appellants, as we have said earlier, were charged with **robbery with violence** contrary to **section 296(2)** of the **Penal Code**. Their plea was recorded on 10th May, 2010 when the charge was read out to them, they are recorded to have answered as follows:

Accused 1 –“ Kweli”

Accused 2 – “Kweli”

After the facts were led by the prosecutor the appellants responded thus:

“Accused 1

I admit facts as true, I attacked and robbed complainant”

“Accused 2:

I admit facts as true, I robbed the complainant as stated.”

In mitigation, they told the court that:

“Accused 1 – the complainant said he was coming to pardon us.

Accused 2 – The complainant is related to me, I married a girl from his home. He has come and has decided to pardon us. We have talked as a family.”

The learned trial magistrate dismissed the statement and proceeded to pronounce death sentence on the appellants.

We observe that the learned magistrate appropriately warned the appellants of the consequences of pleading guilty to the offence of robbery with violence contrary to **section 296(2)** of the Penal Code.

In a recent decision, **Zaphania Okwayo Gesure** Vs. **Republic**, Court of Appeal Cr. Appeal No.274 of 2008, the Court of Appeal has restated the law relating to the taking of a plea where the accused person pleads guilty to the charge. After considering the previous decisions on the subject, including **Adan** Vs. **Republic** (1973 EA 445, the court cited in extenso from **Paul Mutungu** Vs. **Republic,** Cr. Appeal No.127 of 2006 in which **Boit** Vs. **Republic** (2002) l KLR 815 was also extensively cited as follows:

"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 safeguards must be strictly complied with – and it must appear on the record of the court taking the plea that those safeguards 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 vs. 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) of the Constitution a person charged with an offence –

"shall be presumed to be innocent until he is proved or has pleaded guilty."

----------. 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 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."

Also quoting from the Court of Appeal for Eastern Africa in the Case of **Paul Mutungu** Vs. **Republic** the judges said:

“That in any case in which a conviction is likely to proceed on a plea of guilty (in other words when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every constituent and that he fully understood the charge and pleaded guilty to every element of it unequivocally.”

Finally, the Court of Appeal for East Africa also expressed similar sentiments in the case of **Republic** Vs. **Yonasani Egalu & others** [1942] 9EACA 65 as follows:

“It remains only to say that it is very desirable that a trial Judge, on being offered a plea which he construes as a plea of guilty in murder case, should not only satisfy himself also and record that the accused understands the elements which constitute the offence of murder and understands that the penalty is death. This should be done (and recorded) notwithstanding that the accused may be represented by an advocate, particularly where the advocate belongs to another race and may have encountered language difficulties in explaining the charge to, and taking instructions from, the accused person.”

Applying the foregoing principles, it is clear to us that the plea was not unequivocal. The appellants, it seems went to court under the mistaken belief that by pleading guilty, they would be pardoned. The learned trial magistrate ought to have noticed that the plea of guilty was not out of their own free will. They could not have agreed to face death and then be pardoned.

For these reasons, we allow the appeal, quash the conviction and set aside the sentence. Learned counsel for the respondent has assured us and we are satisfied that witnesses are available, the incident having taken place in May, 2010 and in view of the above assurance, we order that a fresh trial be conducted.

In the spirit of the Constitution, it is ordered that the appellants' be produced before the Chief Magistrate's Court for a fresh plea on 21st November, 2010.

To facilitate this, the appellants will be remanded at Bondeni Police Station forthwith.

Dated, Signed and Delivered at Nakuru this 20th day of December, 2010.

M. J. ANYARA EMUKULE

JUDGE

W. OUKO

JUDGE