



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. E018 OF 2021

CHEKWUBE JUBILEE EZEObI

***alias* JUBILEE YARO OKEYO.....APPELLANT**

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal against the Judgment and decision of the Chief Magistrate's Court at Kisumu

_(Hon. P. N. Gesora (CM) dated the 15th December 2020 in Kisumu CMCCR No. E269 of 2020]

JUDGMENT

The Appellant, **CHEKWUBE JUBILEE EZEObI** *Alias* **JUBILEE YARO OKEYO**, was convicted on the following 3 counts;

(i) Being in possession of Kenyan identity

card for the purpose of remaining in

Kenya contrary to Section 54 (1) (L)

as read with Section 54 (2) of the

Kenyan Citizenship and Immigration

Act 2011;

(ii) Making false declaration which you

knew it was false or misleading for

purpose of obtaining a Passport

contrary to Section 54 (1) as read

with Section 54 (2) of the Kenyan

Citizenship and Immigration Act 2011;

(iii) Being unlawfully present in the country

contrary to Section 53 (1) (j) as read

with Section 53 (2) of the Kenya

Citizenship and Immigration Act 2011.

1. The conviction arose from the Appellant's plea of guilty.
2. Following the conviction, the trial court handed down sentences as follows;

(a) Count 1 – A fine of Kshs 1,000,000/=

or in default 12 Months imprisonment.

(b) Count 2 – A fine of Kshs 1,000,000/=

or in default 12 Months imprisonment.

(c) Count 3 – A fine of Kshs 100,000/=

or in default 6 Months imprisonment.

3. Being dissatisfied with both the convictions and the sentences, the Appellant lodged an appeal to challenge the same.
4. In the first instance, he contended that the conviction was based upon a plea which was not unequivocal.
5. Secondly, the Appellant asserted that the trial court failed to accord him an opportunity for appropriate mitigation.
6. Finally, the Appellant asserted that the sentences were harsh and excessive in the circumstances of the case.
7. Pursuant to **Section 348** of the **Criminal Procedure Code**;

“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 of legality of the sentence.”

8. In principle, therefore, the Appellant was barred from challenging his conviction.
9. However, he has submitted that the plea in this case was not unequivocal. His said submission is based upon the contention that the trial court failed to meet the threshold stipulated in **Section 207** of the **Criminal Procedure Code**.
10. The said statutory provision sets out the procedure for the taking of a plea.
11. In the case of ADAN Vs REPUBLIC [1973] E.A 445, the Court of Appeal held as follows;

“When a person is charged, the charge

and the particulars should be read out

to him, so far as possible in his own

language, but if that is not possible,

then in a language which he can speak

and understand”

12. In this case, the record of the proceedings does not indicate the language in which the charge and the particulars thereof were read out to the Appellant.
13. The Appellant's contention was that the charges were not read out and explained to him in a language he understands.
14. He further stated that because he is a foreigner, the trial court ought to have asked him to notify the court about the particular language which he understood.

15. In my considered opinion, the need for an accused person to be able to understand the language in which the plea was being taken, is not limited to foreigners. If any accused person is unable to understand the language in which proceedings are being conducted, his rights to a fair trial would have been undermined.

16. In this case, the Appellant submitted that he was a foreigner, and that therefore, he was entitled to the services of an interpreter.

17. Pursuant to the provisions of **Article 7** of the **Constitution of Kenya**, the official Languages are Kiswahili and English. And this Court takes judicial notice of the fact that almost all proceedings in Kenya are conducted in English.

18. Therefore, when the Appellant submits that the plea was taken in a language which he did not understand, he ought to have indicated to this Court whether or not the proceedings were conducted in English.

19. I appreciate the pronouncement by the Court of Appeal in **ELIJAH NJIHIA WAKIANDA Vs REPUBLIC, CRIMINAL APPEAL NO. 437 OF 2010** that;

“We think that it is a good practice

for the specific language used to

state the elements of the charge be

specifically stated.”

20. However, it is sometimes possible, to ascertain from the record of proceedings, whether or not the accused understood the language used in the course of the proceedings.

21. The manner in which an accused cross-examines witnesses, or even the way that the accused communicates with the court, could sometimes enable the court to appreciate that the accused was or was not understanding the proceedings.

22. In my considered opinion, whereas it is definitely a good practice for the trial court to specify the language in which the plea is taken, it is not necessarily a fatal error if the court did not do so. The justice of each case would be determinable from the totality of the proceedings.

23. In this case, as the Appellant was convicted on his own plea of guilty, this Court did not have the benefit of a substantial record of proceedings, from which the Court could ascertain whether or not the accused did understand the proceedings.

24. The Respondent conceded the appeal against conviction; and I find that the said concession was properly founded upon the law.

25. The Respondent has asked this Court to order for a re-trial.

26. Ordinarily, when the appeal is allowed on the basis of a defect in the trial; and if the said defect was wholly attributable to the trial court, it may be possible to consider ordering for a re-trial.

27. In this case it is clear that the prosecution had no role in the defective manner in which the plea was taken. The deficiency in the procedure was wholly attributable to the learned trial magistrate.

28. Secondly, if the Appellant were to admit the facts which constitute the particulars of the offence, I hold the view that he could be convicted, if there was an order for his retrial.

29. However, I note that the Appellant was convicted and sentenced on 15th December 2020. Therefore, he has already served more than 10 months imprisonment. Accordingly, I hold the considered view that the Appellant would be prejudiced if he were to go through a fresh trial.

30. Of course, I am alive to the provisions of **Section 333** of the **Criminal Procedure Code**, pursuant to which the trial court would be obliged to give credit for the period which an accused person had spent in custody whilst awaiting trial.

31. However, the Appellant herein has not been in custody whilst awaiting trial. He was in custody following conviction. Therefore, it might be arguable that the period he spent in custody cannot be taken into account when sentencing him, if he were to undergo a retrial.

32. Also, the prosecution did not provide this Court with the requisite information, which would have enabled me to determine whether or not the witnesses required, would still be available, in the event of a re-trial.

33. I therefore decline to order for the re-trial of the Appellant.

34. Meanwhile, as regards the sentences handed down by the trial court, the Appellant failed to demonstrate the specific circumstances of his case. which could have resulted in lesser sentences.

35. According to the Appellant, he was deprived of an opportunity for mitigation.

36. However, the record of the proceedings shows that the learned trial magistrate did give to the Appellant an opportunity for mitigation.
37. But it is clear from the proceedings that the Appellant did not utilize the said opportunity in such a manner as could have influenced the sentence which the Court was to pass.
38. From the manner in which the Appellant utilized the opportunity, it does appear that he probably did not appreciate what was expected from him. I therefore find that the Appellant's conduct, at that stage of the proceedings, is an indication that he probably did not understand the proceedings, either partially or completely.
39. Nonetheless, the Appellant has failed to demonstrate that the trial court failed to take into account the fact that he was a first offender, who was 30 years old.
40. If anything, the court expressly took into consideration the fact that the Appellant was a first offender.
41. Meanwhile, the fact that the Appellant was 30 years old was not, of itself, a mitigating factor.
42. I bear in mind the fact that the offences under **Count 1** and **2** attract sentences of a fine not exceeding Kshs 5,000,000/=; whilst the offence under **Count 3** attracts the sentence of a fine not exceeding Kshs 1,000,000/= or in default 12 Months imprisonment.
43. By sentencing the Appellant to fines of Kshs 1,000,000/=, or in default 12 Months imprisonment (on **Counts 1** and **2**), the trial court cannot be said to have handed down harsh or excessive sentences.
44. Similarly, the sentence of a fine of Kshs 100,000/= or in default 6 Months imprisonment (on **Count 3**) cannot be deemed harsh or excessive.
45. Therefore, if the conviction were upheld by this Court, I would definitely have dismissed the appeal against the sentences.
46. The Appellant has stated, repeatedly, in his submissions, that he was ready and willing to travel back to his country of origin. However, his actions display the very opposite intention. He not only devised and executed a scheme to get a Kenyan Identity Card, but also went further to obtain a Kenyan Passport.
47. This Court finds that it is necessary to give effect to the order for the repatriation of the Appellant to Nigeria.
48. Accordingly, I direct that the Appellant be repatriated to Nigeria, forthwith.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF SEPTEMBER 2021

FRED A. OCHIENG

JUDGE