



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL REVISION NO. 71 OF 2019

EVELYN MUTIO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. The appellant was charged at the Senior Principle Magistrate's court at Ngong (**Hon. Kasavuli, PM**) in Criminal case PRC No. 693 of 2019, with 3 counts under the Pharmacy and Poisons Act, Cap 244 of the Laws of Kenya. In Count 1, she was charged with being in possession of part (1) Poisons Contrary to section 26(1) (b) as read with Section 26(2) of the Act. Particulars were that on the 3rd December, 2019 at **Jeva Pharmacy** in Kiserian Township within Kajiado County, she was found in possession of Part (1) Poisons as per inventory SF 3257, while not being an authorized seller of Poisons.

2. She was also charged in Count 2 with carrying on the business of a Pharmacy while not registered as a pharmacist by the pharmacy and Poisons Board, contrary to section 19(1) (a) as read with Section 19(2) of the Act. Particulars were that on the same day, 3rd December, 2019 at **Jeva Pharmacy** in Kiserian Township, within Kajiado County, she was found carrying on the business of a pharmacist while not being a registered Pharmacist by the Pharmacy and Poisons Board contrary to the Provisions of the Act.

3. And in Count 3, she was charged with carrying on the business of a Pharmacy in premises not registered by the Pharmacy and Poisons Board. Particulars being that on 3rd December, 2019 at **Jeva Pharmacy** in Kiserian Town Kajiado County, she was found carrying on business of a Pharmacist in premises which were not registered by the Pharmacy and Poisons Board contrary to the provisions of the Act.

4. When the applicant was produced in court on 4th December, 2019, she pleaded guilty to the 3 counts, she was then convicted on all three counts and fined as follows: count 1, Kshs. 50,000, or nine months in default; count 2, Kshs. 30,000 or 6 months in default and in count 3, Kshs. 300,000 or one year in default. The sentences were to run consecutively. The exhibits, drugs were released to the Pharmacy and Poisons Board.

5. The applicant has now invoked the jurisdiction of this court under sections 354, 355 and 366 (should be sections 362, 264 and 365) of Criminal Procedure Code and Article 50 of the Constitution for revision. She has stated that when she was presented to court, she was intimidated by officers from the Pharmacy and Poisons Board and forced to plead guilty to the offences; that there after facts constituting the offence were not read to her and she was not given an opportunity for the facts to be explained to her. He contended that her rights were violated as a result.

6. She urged the court to call for the trial courts file and satisfy itself on the legality of the proceedings of 4th December 2019.

7. I have considered the application for revision. I have also perused the trial court's record. What is clear from the record, is that when the applicant appeared in court on 4th December, 2019, the charges were read to the applicant who is recorded to have admitted them and was recorded to have pleaded guilty. The court entered a plea of guilty on all the three counts.

8. The prosecution was then recorded to state that facts were as per the charge sheet. The applicant was convicted and sentenced as already stated above prompting this application for revision.

9. I have to state that the trial court did not comply with the requirements of the law on plea taking. First and foremost, the record of the trial court does not show the language in which the charges were read and explained to the applicant to enable this court determine whether or not the applicant understood the charge she faced before pleading to it. Language is an integral aspect of fair trial in terms of Article 50 (2), (b) of the Constitution. the Article confers on every accused person the right to be informed of the charge, with sufficient detail to answer it. Clause (m) further entitles an accused person to have the assistance of an interpreter without payment if he cannot understand the language

used at the trial.

10. Without the trial court indicating the language in which the charge was read and explained to the applicant, it would be difficult for this court to assume that the applicant understood the charges she faced and unequivocally pleaded guilty to them. The applicant had a constitutional right to a fair trial, a right that is non derogable under Article 25 (c) of the Constitution. Failure by the trial court to ensure that the applicant was accorded this right, by indicating in its record the language used in stating and explaining the charges to the applicant, vitiated her right to a fair trial before that court.

11. Second; the facts constituting the charge were not read to the applicant. After pleading guilty, the applicant was entitled to have the facts read to her again in a language she understood and either admits those facts as stated by the prosecution or dispute them. If she disputed the facts, the court would then have to enter a plea of not guilty and proceed to conduct a trial. The trial court could only convict the applicant on her own plea of guilty, if satisfied that she understood the facts as stated by the prosecution and unequivocally admitted them.

12. A trial court should always bear in mind the provisions of section 207 of the Criminal Procedure Code which state how a plea should be recorded. The section provides;

“(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.

(5) If the accused pleads—

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President’s pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.”

13. In ***Adan v Republic*** [1973] EA 445, the Court of Appeal for Eastern Africa laid down the law on plea taking at page 446, thus;

“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. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, off course, be recorded.”

14. It is clear to this court that the trial court did not comply with both the Constitution, section 207 of the Code and the guidelines in the ***Aden case*** when reading the charges; explaining them to the applicant and recording her plea to those charges.

15. From all this, I am unable to conclude that the plea was unequivocal to form the basis of the applicant’s convictions and eventual sentences.

16. Having come to that conclusion, the question that follows is whether this court should order a retrial. A retrial will be ordered where justice of the case demands. In ***Ahmed Sumar v R*** [1964] EA 483 the court stated:

“...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficient of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered”

17. Further n ***Pius Olima & another v Republic*** [1993] eKLR, the Court of Appeal stated that a retrial may be ordered where the original trial, is defective, if the interest to justice so require and if no prejudice is caused to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case.

18. I have considered this and the charges the applicant faced. I have also perused the trial court's record and noted that exhibits were released to the Pharmacy and Poisons Board. In the circumstances, a retrial will not result in justice given that the prosecution will not be in a position to successfully prosecute its case without exhibits which will be crucial in that trial.

19. In the end, the application for revision dated is allowed. Convictions are hereby quashed and sentences set aside. the applicant shall be set at liberty forthwith unless otherwise lawfully held

Dated, signed and delivered at Kajiado this 18th day of September 2020.

E.C. MWITA

JUDGE