REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL REVISION NO. 4 OF 2020

ELIZABETH NTHOKI JOHN .....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. This is an application filed under sections 354, 355 and 356 of the Criminal Procedure Code, the Constitution of Kenya 2010 and Law Reform Act Cap 26 Laws of Kenya. It seeks the following orders:

a) **That,** the Honourable court be pleased to revise/set aside the conviction and sentence imposed against the Applicant by the lower court in Kilungu Principal Magistrates Court Criminal Case No. 997 of 2019.

b) **That,** costs of this application.

2. The application is supported by the grounds on the face of the application and the affidavit of the Applicant. The main ground is that the plea was not unequivocal. She avers that the plea, facts were not read to her as per the provisions of the Criminal Procedure Code. They were also not read to her in a language she understands.

3. She therefore urges the court to recall the lower court record and satisfy itself of the legality or otherwise of the proceedings, conviction and sentence and revise the same and, or set it aside for purposes of a re-trial.

4. The Respondent filed a replying affidavit by learned counsel Mrs. Ann Penny Gakumu. She avers that the charge sheet disclosed the offence which was read to the Applicant who admitted every element of the particulars read to her by the trial court. She however admits that the prosecutor handling the case failed to give a summary of the facts. On the other hand, she avers that after adopting the facts he/she proceeded to produce the medical documents which were not objected to by the Applicant.

5. She depones that there was no error occasioned by the trial Magistrate to warrant any interference by this court. That the sentence imposed was too lenient and has been served.

6. The application was to be disposed of by written submissions. Mr. Nzioki for the Applicant relied on the case of **Adan –vs- Republic (1973) E.A 445** which set out the steps to be taken in taking plea to be as follows.

i. The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language which 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 then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

iv. If the accused does not agree to the facts or raises any question of his guilt, his reply must be recorded and change of plea entered; and

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.

7. The Respondent did not file any written submissions despite the ample time given to them.

Analysis and determination

8. The Applicant cited the wrong provisions of the Criminal Procedure Code in her application. The Powers of the High court to call for records from the lower court is anchored in section 362 Criminal Procedure Code which provides:-

> Section 362:
>
> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court"***

9. Further the power of the High Court to revise is in section 364(1) Criminal Procedure Code which provides:

> **Section 364(1)** In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –
>
> *a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;*
>
> *b) In the case of any other order other than an order of acquittal, alter or reverse the order.*
>
> *(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:*
>
> *(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High court shall not inflict a greater punishment for the offence which in the opinion of the High court the accused has committed than might have been inflicted by the court which imposed the same.*
>
> *(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entered at the insistence of the party who have appealed.*

10. The lower court record is before this court and I have carefully read through it. This application relates to the proceedings of 2nd December 2019 before Hon. E. Muiru – Senior Resident Magistrate. The Applicant was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. The sentence provided for this offence is five (5) years imprisonment.

11. It is not disputed that the charge was read to the Applicant and she responded. The original record does not indicate the language she responded in. The typed proceedings show that she responded in Kiswahili. The procedure for taking plea was clearly set out by the Court of Appeal in the case of **Adan –vs- Republic** (*supra*). This has never changed. Courts have now and again been called upon to be guided by this as strictly as possible. I am very certain that when the charge was read to the Applicant, the particulars in the charge sheet were read to her and she admitted the same.

12. The next step was for the facts to be stated by the prosecutor. The record shows that no facts were given and even the Respondent confirms that through the replying affidavit.

13. A statement of facts enables the Magistrate or Judge to satisfy himself or herself that the plea of guilty was really unequivocal and that the accused has no defence. It also gives the Magistrate or Judge the basic material on which to assess the sentence to mete out. This is what was noted by the court in the **Adan case** (*supra*).

14. It was also noted by the court in the **Adan case** (*supra*) that it is not unusual that an accused person, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he or she did not really understand the position when he pleaded guilty. It is for this reason that it is essential that a statement of facts precedes the conviction.

15. The following is what is recorded as having transpired:

> **02/12/2019**
>
> Magistrate – Hon. E. Muiru – Senior Resident Magistrate
>
> State Counsel – Wangia
>
> Court clerk – Gladys
>
> English/Kiswahili
>
> The substance of the charge and every element thereof has been stated by the court to the accused person in the language that she understands, who being asked whether she admits or denies the truth of every element of the charge replies in Kiswahili:

Accused: It is true.

Court: A plea of guilty entered.

Prosecutor:

Facts as per charge sheet.

P3 form Pexh No. 1

OP card Pexhb No. 2

Accused: Facts are correct.

Court: Accused convicted on her own plea of guilty.

16. The Court of Appeal dealt with a similar issue in the case of **Elijah Njihia Wakianda –vs- Republic Criminal Appeal No. 73 of 2016 (NKR)**. It had this to say:

> *"With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of "charge(s) when there was a single charge and the rather odd, "in a language he understands" when it is more normal and logical to simply state the language used. This smacks of a mere going through motions, a recital of ritual, while that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards it assumes a critical dimension when the plea is one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language".*

17. From the above decisions it is clear that failure to give the statement of facts prejudiced the Applicant, because she was denied an opportunity to specifically respond or question anything. I therefore find that the plea was equivocal. The conviction is quashed and sentence set aside.

18. This having been a case of assault, I find that for the ends of justice to be met a fresh plea should be taken before a court with competent jurisdiction at Kilungu.

Orders:

i. File to be returned to Senior Principal Magistrate's Court Kilungu for hearing before any Magistrate other than Hon. E. Muiru – Senior Resident Magistrate.

ii. The fine of Kshs.10,000/= paid by the Applicant to be refunded to her forthwith.

iii. Mention before the Senior Principal Magistrate Kilungu on …….. 2020.

Delivered, signed & dated this 12th day of November 2020, in open court at Makueni.

…….

H. I. Ong'udi

Judge