REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL APPEAL NO. 35 OF 2018

NICODEMUS NYAKENYWA NYAANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

{Being an appeal against the conviction and the sentence of Hon. B. M. Kimutai – SRM dated and delivered on the 24th day of July 2018 in the Original Keroka Principal Magistrate's Court Criminal Case No. 737 of 2018}

JUDGEMENT

The appellant was on 24th July 2018 sentenced to one-year imprisonment for issuing a bad cheque contrary to Section 316 (A (1) of and (4) of the Penal Code.

The particulars were that on 10th November 2017 at Borabu Sub-county in Nyamira County he issued a cheque No. 000017 drawn on Jamii Bora Bank Account No. 18******** for Kshs. 141,000/= to Highland Creameries and Foods Limited with knowledge that the said account had insufficient funds. The accused pleaded guilty to the charge whereupon the facts were put to him and when admitted the facts he was convicted and subsequently sentenced to serve one-year imprisonment.

Being aggrieved by the conviction and sentence he preferred an appeal on the following grounds: -

> **"1. The Learned Trial Magistrate erred in law in finding and holding that the ingredients necessary for establishing the offence facing the appellant (then accused person) were established by the prosecution, in respect of the matter touching the appellant herein. Consequently, the finding and holding of trial magistrate has occasion miscarriage of justice.**
>
> **2. The Learned Trial Magistrate erred in proceeding to convict the appellant on the basis of the facts read to the appellant without establishing whether he understood the nature of the offence with which the appellant was charged.**
>
> **3. The Learned Trial Magistrate erred in law and fact by violating article 48 of the constitution where the appellant was not afforded an opportunity to be informed the consequences of the charge (s) he was facing in the said court of law.**
>
> **4. The Learned Trial Magistrate erred in law and that by violating the provisions of article 49 (a) of the constitution whereby the particulars of the offences and charge(s) were not clearly read to the appellant in a language he understands well.**
>
> **5. The Learned Trial Magistrate erred in law and fact by violating the provisions of article 49 (c) of the constitution so that he could be afforded an opportunity to communicate with an advocate and other persons whose assistance is necessary.**
>
> **6. The Learned Trial Magistrate erred in law and fact by violating clear provisions of law pursuant to articles 40 (i) (g) & (h) of the constitution.**
>
> **7. The Learned Trial Magistrate erred in law and fact by going contrary to article 50 (I) (i) of the constitution.**
>
> **8. The sentence meted out by and/or at the instance of the Learned Trial Magistrate is unconstitutional and contrary to article 25 of the constitution which forbids inhuman and degrading punishment."**

By this appeal he urges the court to quash the conviction, vary and or set aside the conviction.

At the hearing of the appeal, the appellant relied on written submissions done by himself only adding that he did not understand the

proceedings and that he has a child at the university who cannot fend for himself.

Counsel for the respondent opposed the appeal and submitted that all steps for taking a plea were observed as the substance and every element of the charge as well as the facts were explained to the appellant who admitted the same without raising any objection. Counsel submitted that the appellant was properly convicted and that the sentence was within the law. He urged this court to dismiss the appeal.

I have carefully considered the appeal, the grounds thereof, the record of the lower court and submissions by both sides and it is my finding that this appeal has merit. Although **Section 348 of the Criminal Procedure Code** provides that **where an accused has pleaded guilty courts should not entertain appeals save for the legality and extent of the sentence,** the section presupposes that the guilty plea is unequivocal. The steps that a court should follow in recording a plea were settled in the case of **Adan Vs. Republic [1973] EA 445** where the court stated: -

> ***"2. The manner in which a plea of guilty should be recorded is:***
>
> ***(a) The trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands;***
>
> ***(b) He should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;***
>
> ***(c) The prosecution may 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;***
>
> ***(d) If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply."***

The offence created by **Section 316 A (1) (a)** and for which the appellant was charged is not a strict liability offence. The offence is only committed where a person draws or issues a cheque on an account if he knows that the account has insufficient funds. My reading of the Section is that it is not enough to allege that the accused issued a cheque which was dishonoured. It must be proved that he did so knowing that the account upon which he drew the cheque did not have sufficient funds. Whereas the allegation that the appellant did not understand the language used by the court is false as the proceedings were conducted in Ekegusii which he admits he understands, there is no record of the prosecution stating that he knew that the account had insufficient funds. The facts simply stated that he issued a cheque No. 18******** for Kshs. 141,000/= to Highland Creameries who deposited the cheque but the account had insufficient funds. The facts put to the appellant did not therefore contain a crucial element of the charge facing him. What if he had been asked if he knew whether the account had insufficient funds and he said no? the answer is that the plea would have been one of not guilty. The plea herein was unequivocal and the trial magistrate erred by convicting the appellant on the same. The appeal has merit and it is allowed. The conviction and sentence are set aside and the appellant shall be freed forthwith unless otherwise lawfully held.

Dated, signed and delivered at Nyamira this 24th day of January 2019.

E. N. MAINA

JUDGE