REPUBLIC OF KENYA

IN THE HIGH COURT

AT KIAMBU

CRIMINAL APPEAL NO. 127 OF 2017

JOSEPH KIMANI IHUGO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence in Thika Criminal case No. 3418 of 2015)

JUDGMENT

1. The Appellant was charged with the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code. The particulars of the offence were stated that

> **"On the 7th July 2015 at Kihunguro in Ruiru within Kiambu County jointly with others not before the court were found with a toy pistol in circumstances that indicated that you were so armed to commit robbery with violence."**

2. On the 9th July 2015 the plea was taken.

The trial magistrate indicated that the language used was "Interpretation English/Kiswahili."

The record further states that the substance of the charge was then stated to the accused person in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charges (s) replies

Accused – it is true.

The court then entered a plea of guilty.

3. On the 7th July 2015 the facts in support of the charge were read/stated to the accused person. The language used to read/state the facts is not stated. The accused however stated that the facts are correct. It is not shown once again in what language the appellant stated that the facts were correct.

The court then proceeded to convict the accused on his own plea of guilty.

4. In his mitigation it is again not stated which language he was used – English or Kiswahili

The court proceeded to sentence the accused, now appellant to seven (7) years imprisonment.

5. In his Amended petition of appeal filed on the 18th September 2018 the appellant challenges both the conviction and sentence on two grounds that:

1. the facts did not disclose an offence

2. it was not clear which language was used to read the facts.

6. The facts as stated/read to the appellant are quoted herebelow thus

"On 7th July 2015 at 8.00p.m. at Ruiru Kihunguro, Jane Wangari Stephen was in her house when someone visited her. She was watching television. She suddenly realised there was someone in the house. She declared that she identified the person as the accused who had worked for her before. Accused was arrested and taken to the AP camp. On being interviewed, he had a bonoko toy pistol which had been left in the house he was arrested in. The toy pistol was taken to the police post. He was arrested and charged. Toy Pistol Exhibit 1."

7. **Section 207** of the Criminal Procedure Code provides the manner in which an accused person should be called upon to plead to a charge/information thus

1. The substance of the charge shall be stated to the accused.

2. He is asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

3. If he admits the truth of the charge, the court records as nearly as possible in the words used by him and the court shall convict him and pass sentence. Before the sentence.

4. The facts upon which the charge is founded are stated/read to the accused person.

5. If the accused admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence unless there appears to be sufficient cause to the contrary.

8. **Two issues arise for determination**

1. Whether the charge, particulars of the offence and the facts of the offence were read in the language that the appellant understood and

2. Whether the particulars of the offence disclosed an offence under the Penal Code.

The above requirements were stated in the case **Adan -vs- Republic (1973) EA 445.**

9. I have perused and considered the trial court's record of proceedings and particularly the 9th July 2015. The trial magistrate did not expressly state what language was used during the plea taking nor when the particulars of charge and the facts were read to the appellant. It only states "English/Kiswahili."

Either of the two could be used in the trial court but no definitive language was used. It is not clear whether the appellant understood either of the two languages.

10. In **Solomon Muchui -vs- Republic (2018) e KLR,** in very similar circumstances the appellant was not asked which language he understood whether English or Kiswahili and no records indicating verification of the language that the appellant understood either the court held that provisions of **Section 207 CPC** were not followed and therefore the plea was entered irregularly. See also **Sangei NKuruna & 2 Others –vs- R (2015) e KLR.**

An irregular plea is therefore not an unequivocal plea of guilt.

11. The court in **Solomon Muchui -vs- Republic (Supra)** further stated that facts giving rise to the charge are required to be read immediately after the admission of a charge, to ensure that the accused person fully understands the facts and that he or she is pleading to, that constitute the offence he or she is accused of.

It is upon such charge and facts of the offence that the court is able to determine whether the facts as read relate to the offence charged, and if they disclose the alleged offence before proceeding to convict the accused person.

If the court determines that the facts relate to the offence and the charge, only then should it proceed to convict.

12. In the appeal before me, it does not seem like the trial magistrate pondered over the charge, the offence it disclosed and whether or not the facts supported the charge as stated, and the law.

The offence stated under **Section 308(1) of the Penal Code** is defined as "**Preparation to commit a felony**." The ingredients of the said offence are

1. The person must be found armed with dangerous or offensive weapon, in

2. Circumstances that indicate that he was so armed with intent to commit a felony.

13. The facts of the offence are stated that the appellant visited the complainant who was her former-employer. He therefore did not break in.

Then the complainant noticed that there was someone in the house. The accused was arrested and taken to the AP camp. It was not stated why he was arrested, nor whether he was the "someone" noticed to have been in the house. It was not stated that he had a toy pistol when he visited. It is not clear who had left a *bonoko* toy pistol in the complainant's house. A toy pistol is not a dangerous weapon.

14. Further, the facts did not indicate what preparation to commit a crime the appellant was doing nor any overt act in the alleged preparation to commit a felony was demonstrated.

15. It is also not stated who left the toy pistol in the complainant's house nor was it established that the appellant was one who was in possession of the alleged toy pistol, nor that he left it in the complainant's house.

16. Under **Section 362 of the CPC** the High Court may examine the record of any criminal proceedings before a subordinate court to satisfy itself of the correctness, legality and propriety of any finding, sentence or order record as to the regularity of the proceedings.

17. In the case **Nyadenga –vs- Republic (1989) KLR 514**, the Court of Appeal rendered that

> (i) An accused person commits the offence of preparation to commit a felony under Section 308(1) of the Penal Code if he is found first to be armed with dangerous offensive weapon and secondly in circumstances indicating that he was so armed with the intention of committing a felony.
>
> (ii) These ingredients of the offence under Section 308(1) PC must be specific. Any omission of any one of these ingredients will render the charge for such offence detective to the extent that it discloses no offence.
>
> (iv) The words ***"dangerous or offensive weapon"*** *contemplates the weapon being used to cause peril or intended for or used in attack.*

18. The court proceeded to render that failure to indicate the ingredients of the offence in the charge renders the charge fatally defective.

In the circumstances the consequential conviction and sentence can therefore not be regularised. **Section 380 and 382 CPC** cannot save the situation by correcting the errors therein save to revise the same to the benefit of the appellant. – **Criminal Revision No.46 of 2016 - Republic -vs- Peter Njenga (2017) e KLR.**

19. Considering the charge sheet, the particulars of the offence as stated together with the facts of the offence, no nexus and or clear relationship can be inferred between the appellant and the alleged crime. They are completely at variance. The three do not complement each other. The facts do not support the charge nor the particulars, and the facts.

20. Coupled with the alleged unclear language used to read the charge, the particulars of the offence, as well as the facts being not the language that the appellant understood, it is evident that the conviction was irregular.

These cannot be the basis of a fair trial under **Article 50 of the Constitution and the Criminal Procedure Code.**

As a result, the appellant was gravely prejudiced with the result that he was wrongly and irregularly convicted and sentenced.

21. This court therefore finds that there was a violation of the appellant's right to a fair trial. The plea was not unequivocal and the elements of the offence could not support the charge.

In the result I find the appeal to be meritorious.

It is therefore allowed with the result that the conviction is quashed and the sentence set aside.

Unless otherwise lawfully held, the appellant is set free.

Dated and signed at Nakuru this 27th Day of March 2019.

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J.N.MULWA

JUDGE

Dated, signed and delivered at Kiambu this 10th Day of April 2019.

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C. MEOLI

JUDGE