REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL REVISION NO. 15 OF 2019

ROSE WAYUMBU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant has filed an application dated 1st July, 2019 seeking for review of her conviction in Hamisi principal Magistrate's Court Criminal Case No. 354 of 2019 on grounds:-

(1) That she was not informed of the charge in advance before the plea was read to her which was a violation of Article 50 (2) (b), (c) and (j) of the Constitution of Kenya.

(2) That the trial court failed to inform her of the probable consequences of pleading guilty to the charge which is an important precursor to pre-trial preparation.

2. The applicant seeks that the decision of the trial magistrate be quashed and the sentence of 6 months imposed on her set aside as it was a product of a flawed legal process. That the proceedings of the trial court be deemed null and void since they don't meet legal threshold required to secure a safe conviction.

3. The application is supported by the affidavit of the applicant in which she states that she was arraigned in court over an offence of dealing with alcoholic drinks without licence contrary to Section 7 (1) (b) as read with Section 62 of the Alcoholic Drinks Control act No. 4 of 2010. That she came to know of the charges against her on 6th June, 2019 when the charges were read to her in court. That she prematurely admitted to the charges without her being informed of her rights upon which she was sentenced to serve six months imprisonment. That failure to be informed of the charge before the time she took plea was a violation of plea taking procedure. That the trial court did not inform her of the consequences of pleading guilty to the offence levelled against her which was a violation of plea taking procedure.

4. The application is made pursuant to Section 362 of the Criminal Procedure Code (CPC) and Article 165 (6) and (7) of the Constitution of Kenya, 2010.

5. Section 362 of the Criminal Procedure Code gives powers to the High Court to 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.

6. Article 167 (6) and (7) of the Constitution grants the High Court supervisory jurisdiction over subordinate courts and for that purpose may call for the record of any proceedings from a subordinate court so as to satisfy itself of the things stated in Section 362 of the CPC.

7. When exercising its powers of revision provided by Section 362 of the CPC the court has to always bear in mind that such powers should not be exercised so as to turn a revision into an appeal. The revision should only be limited to rectifying a manifest error in the proceedings. In **George Aladwa Omwera –Vs- Republic, High Court Milimani Criminal Revision No. 277 of 2015 (2016) eKLR,** Wakiaga J. held that:-

> ***"In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.***

In **Veerappa Pillai –Vs- Remaan Ltd** the Supreme Court of India has this to say:-

"The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made….."

8. Article 50 of the Constitution of Kenya, 2010 provides for the rights of an accused person when the accused makes an appearance in court. Article 50 (2) (b) provides for the right to be informed of the charge with sufficient detail to answer to it. Article 50 (2) (c) provides for the right of an accused to have adequate time and facilities to prepare a defence. Article 50 (2) (j) provides for the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

9. The applicant relies on the decision of Nyakundi J. in the case of **Joshua Njiri –Vs- Republic, High Court Kajiado Criminal Revision No. 11 of 2017 (2017) eKLR** where the learned judge held that where an accused person is convicted on the basis of a charge sheet read in court for the first time whose information and sufficient details in form of a charge sheet and witness statements have not been supplied to him in advance amounts to a violation of Article 50 (2) (b) of the Constitution. In the case the learned judge held that such information has to be supplied before the trial court took any step in the case.

10. The appellant says that she was not served with such information before the charge was read to her in court. She therefore contends that there was a violation of her rights under Article 50 (2) (b) of the Constitution.

11. The applicant relies on the same decision of Nyakundi J. where he also held that it is a violation of an accused's rights under Article 50 (2) of the Constitution for the accused not to be informed the penalty prescribed for the offence in case he pleaded guilty.

12. The steps that ought to be followed in plea taking were laid down by the Court of Appeal for Eastern Africa in **Adan –Vs- Republic (1973), EA 446** as follows:-

(i) The charge and all essential ingredients of the offence should be explained to the accused in his language or in a language 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 a 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.

13. The importance of giving the facts of the case is that it gives an opportunity to the accused to dispute the facts and if he disputes the facts the court is required to change plea to that of not guilty.

14. In the case against the applicant the court prosecutor did not set out the facts of the case. The prosecutor only stated:-

"Facts as per the charge sheet."

The prosecutor then proceeded to produce 15 litres of chang'aa as exhibit. The trial court thereupon convicted the applicant of the offence.

15. In the premises, it is clear that there were no facts as to how the applicant was arrested and how she was found with the exhibit. The applicant was not given an opportunity to find out whether the facts were as she knew them. It is apparent that the trial court took a short cut in taking the plea. There should be no such short cuts in a criminal trial whether the offence is a petty one or a serious one. There was thereby no compliance with the procedure of taking pleas as laid down in **Adan –Vs- Republic** (Supra). In **Republic –Vs- Simon Wambugu Kimani & 20 Others, High Court Garissa Criminal Revision No. 1 of 2015 (2015) eKLR,** Dulu J. stated that the practice of prosecutors saying that the facts are as per charge sheet should be discouraged, a view I am in agreement with. This is because as stated in **Adan –Vs- Republic** (Supra), the facts enables the accused to clarify some salient facts of the case. When the facts are not given the accused is denied that opportunity. In **Obed Kilonzo Kevevo –Vs- Republic (2015) eKLR** the Court of Appeal held that:-

"The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused person understood the facts to which he was pleading guilty and has no defence."

It is not lost to this court that at times an accused person proceeds to deny the charge when the facts are given. It was therefore a defect in procedure for the court to fail to take the facts of the case. The plea was thereby not unequivocal. There was a manifest error in plea taking that falls within the jurisdiction of this court to correct by way of revision.

16. The applicant alleges that she was not warned of the consequences of pleading guilty to the charge. There is no legal requirement for the court to warn the accused person of the consequences of pleading guilty to the charge. However it is the practice of our courts for an accused

person facing a serious offence to be warned of the resultant sentence in case he pleaded guilty. In **Elijah Njihia Wakianda –Vs- Republic, Nakuru Criminal appeal No. 437 of 2010 (2016) eKLR** the Court of Appeal held that:-

> ***"… We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare.***
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> ***… The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often-intimidating judicial process."***

17. The applicant was facing a charge of dealing with alcoholic drinks without a licence. The punishment for the said offence is a fine of upto Ksh. 500,000/= or imprisonment for a term not exceeding three years. The court record indicates that the applicant was a repeat offender. It is therefore most likely that she knew the punishment for the offence. In my view I do not think that failure to warn the applicant of the punishment provided for the offence was a manifest error in the case.

18. Article 50 of the Constitution requires for an accused to be informed of the charge with sufficient detail to answer it. It also requires the accused to be informed in advance the evidence the prosecution intends to rely on in the case and to have reasonable access to that evidence. In **Joshua Njiri –Vs- Republic** (Supra) Nyakundi J. was of the view that an accused person ought to be supplied with the information before the court takes any step in the case so as to give effect to the due process and right to fair hearing.

19. I am of the view that it is not every breach of the constitution that should lead to the conclusion that there was a violation of the constitution. Every case must be considered in light of its own circumstances as was held by the Court of Appeal in **Simon Ndichu Kahoro –Vs- Republic, Nairobi CA Criminal Appeal No. 69 of 2015 (2016) eKLR** that:-

> ***"We should not be understood to be setting up a general principle or precedent that every breach of Article 50 of the Constitution, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case."***

20. In the case against the applicant she was facing a simple charge of being found with changaa without a licence. There was thus no technicality in the charge. The applicant had the right to decline to take plea until when the charge sheet and witness statements had been supplied to her. Where, in my view, an accused person takes plea without raising any complain in such a case as that which the applicant was facing, it is not a violation of a right under Article 50 (2) of the Constitution not to supply the accused person with a copy of the charge sheet and witness statements before a plea is taken. I thereby find that in the case for the applicant there was no violation of her right under Articles 50 (2) (b), (c) and (j) of the Constitution of Kenya.

21. In the foregoing I find that the plea taken against the applicant was not unequivocal. I therefore on that basis quash the conviction and set aside the sentence imposed on the applicant by the trial court.

22. The applicant has served a month of the sentence imposed on her. There is no need of a retrial in the case. The applicant is set at liberty forthwith unless lawfully held.

Delivered, dated and signed in open court at Kakamega this 7th day of August, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Ombega for state/respondent

Applicant - present

Court Assistant - George

14 days right of appeal.