



## **REPUBLIC OF KENYA**

### **IN THE HIGH COURT AT MACHAKOS**

#### **CRIMINAL APPEAL NO. 9 OF 2017**

**SOLOMON MUCHUI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the judgment and sentence of Hon. J.A. Agonda (SRM) delivered on 20<sup>th</sup> January 2017 in Criminal Case No 35 of 2017 at the Senior Principal Magistrate's Court at Mavoko)**

#### **JUDGMENT**

Solomon Muchui, the Appellant herein, was charged in the trial Court with two counts under the Public Health Act. The first count was failing to comply with a Statutory Notice contrary to section 120(1) of the Public Health Act as read with Section 121 (1) of the same Act. The particulars of the offence were that on or before 16<sup>th</sup> August 2016, whilst being the caretaker of a developed Plot No.126765 situated at Mlolongo, Mavoko sub -county, Machakos County, the Appellant failed to comply with the Ministry of Health and Emergency Services Statutory notice Ref no. MLO/PHO/SN/3/2016 issued and served by the Public Health Officer of the same area.

The second count was the offence of causing nuisance contrary to section 115 of the Public Health Act as read with section 121 of the same Act. The particulars being that on or before 16<sup>th</sup> August 2016, being the caretaker of a developed plot No.126765 situated at Mlolongo, Mavoko Sub-County, Machakos County, the Appellant continuously discharged waste water from the plot into open public ground causing nuisance and risk of disease outbreak to the public.

The Appellant was arraigned in the trial court on 20th January 2017, and he pleaded guilty to both counts and was convicted on his own plea of guilty. The trial Magistrate proceeded to sentence the Appellant to payment of a fine of Kshs 231,000/=, and in default six (6) months imprisonment. The Appellant has now appealed against the conviction and sentence in a Petition and Grounds of Appeal filed in Court on 2<sup>nd</sup> February 2017 on the following grounds:

- a) That the trial magistrate erred in law and fact in convicting the Appellant on a plea that was not unequivocal.
- b) That the trial magistrate erred in fact by conducting the trial in a language that the Appellant did not understand.
- c) That the trial magistrate erred in law and fact by convicting the Appellant without considering that he is not the person who failed to comply with the said statutory notice as required by the law, and was not based on any objective criteria.
- d) That the trial magistrate erred in law and fact by failing to appreciate the medical condition and/or ascertain whether the Appellant was in the right state of mind to stand trial.
- e) That the trial magistrate erred in law and fact by failing to consider Appellant's mitigation on record thus passing a sentence that is manifestly harsh and excessive in the circumstances.

Both the Appellant and the Prosecution filed written submissions on the grounds of appeal raised.

The Appellant's counsel, Muchui & Company Advocates, filed submissions dated 22<sup>nd</sup> September 2017, and urged that the principles of determining whether or not to a plea of guilty is unequivocal were not adhered to. Reliance was placed on the case of **Adan vs Republic, (1973) EA 445** where the Court of Appeal set out clearly the steps to be taken in recording a plea. It was submitted that by looking at the typed proceedings provided to them, it was clear that the facts of the charges' essential ingredients and elements were never explained to the Appellant, and he was never given the opportunity to dispute or explain the facts of the charges against him.

The Appellant also alleges that the trial was conducted in a language he was not familiar with, as he was not asked whether he understood

English or Kiswahili sufficiently enough to merit the conducting of the plea taking process in the said languages. He went on to submit that there are no court records indicating that all the steps regarding verification of the language that the Appellant understood were followed, as stated in the case of **Sangei Nkuruna & 2 Others V Republic, Nakuru Criminal Appeal No 14 of 2015.**

Further, that his mitigation for leniency was not considered and therefore the conviction given was too harsh. In conclusion the Appellant prayed for a retrial since his conviction was in breach of Article 50(2) (b) of the Constitution, and also based on the fact that the steps for plea taking were not followed and the plea of guilty taken was not unequivocal.

The learned Prosecution Counsel, Ms. Mogoi Lilian, filed written submissions dated 23<sup>rd</sup> January, 2018, wherein she indicated that when the matter came up for plea taking in the trial court on 20<sup>th</sup> January, 2017, the substance of the two charges and the element were read out to the Appellant in Kiswahili, a language the Appellant understood, and the Appellant replied “Ni Kweli” and a plea of guilty was entered.

The Prosecution counsel however conceded that there was an error in the trial court because the facts of the two counts were not read to the Appellant, and the prosecution instead indicated that the facts were as per the charge sheet, and the court went ahead to convict the Appellant on his own plea of guilt.

In support of the submission that the matter should go for a retrial, the Prosecution counsel placed reliance on the case of **Judy Nkirote vs Republic, (2013) eKLR**, and urged the court to order for a retrial in the interest of justice, since there was no time lost between the time the Appellant was convicted, the time of filling the appeal, and the time of the Appellant was granted bond pending appeal. As a result no prejudice will be suffered by the Appellant in case the matter goes to full trial.

After perusing the proceedings in the trial Court I have noted that the plea of guilty was entered irregularly. The record shows that the proceedings on 20<sup>th</sup> January 2017 when the plea was taken were as follows:

**“Magistrate – J. A. Agonda**

**Prosecutor- Maingi**

**Court clerk – Tupet**

**Interpretation –English/Kiswahili**

**Accused - present**

**The substance of the charge(s) and every element thereof has been stated by the Court to the accused in the language that he/she understands (English/Kiswahili) who being asked whether he/she admits/denies the truth of the charge(s) replies in English/Kiswahili.**

**Count I:**

**Accused: Ni kweli - true.**

**Plea of guilty entered**

**Count II:**

**Accused: Ni kweli - true.**

**Plea of guilty entered**

**Prosecutor: The facts are as per charge sheet and the Accused was served with notice which I wish to produce as exhibit.**

**Court : Accused is convicted on his own plea of guilty.**

**Mitigation: I am praying for leniency.**

**Court : Accused is fined Kshs 231,000/= in default six (6) months imprisonment. Right of Appeal 14 days**

**J. A. AGONDA SRM,**

**20/1/2017.”**

The procedure to be applied in taking a plea of guilty was well enunciated in the case of **Adan vs Republic, [1973] EA 445** where the Court held 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 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 with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***

***(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.”***

The procedure as laid out in ***Adan vs Republic*** (supra) is also provided for under section 207 of the Criminal Procedure Code which provides as follows:

**(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.**

In addition, in ***Ombena vs Republic*** (1981) KLR 45 it was held by the Court of Appeal that where an accused person is charged with more than one count, the Court should record a plea on each count separately to ensure that if there is a plea of guilty, the same is unequivocal.

The elements of a charge, the particulars thereof and the facts giving rise to the charge are therefore a package so to speak, when it comes to the recording an unequivocal plea of guilty. Consequently, the 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 that he or she is pleading to that constitute the offence he or she is accused of, and is still at liberty after the facts are read to dispute the same and plead not guilty. This also enables the trial court to relate the facts to the offence charged, and determine if they disclose the occurrence of the alleged offence, before proceeding to convict an accused person.

Coming to the present appeal, two errors are manifest in the proceedings before the trial Court. Firstly, while it is apparent from the record that the charges were read to the Appellant and to which he responded, no facts on the two charges were provided by the Prosecution. Secondly, the record of the trial Court does not indicate the offence for which the trial magistrate was convicting and sentencing the Accused person to a fine of Kshs 231,000/= and in default six (6) months imprisonment, given that the said Accused person was charged with two offences. To this extent the proceedings for taking the Appellant’s plea were irregular, and his plea of guilty was not unequivocal. His conviction was accordingly also unlawful.

Both parties have sought a retrial. I am however of a contrary view, to the extent that a retrial might serve the purpose of filling up the gaps in the prosecution’s case, given that they had no facts available to show commission of the offence. I am in this respect guided by the decision of the East Africa Court of Appeal in ***Fatehali Manji v Republic*** [1966] EA 343 where it was held as follows:

***“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 insufficiency 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; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”***

I accordingly quash the conviction of the Appellant, and set aside the sentence of a fine of Kshs 231,000/= and in default six (6) months imprisonment imposed for this conviction. I also set the Appellant at liberty forthwith unless he is otherwise lawfully held.

It is so ordered.

**DATED AT MACHAKOS THIS 21<sup>ST</sup> DAY OF MARCH 2018.**

**P. NYAMWEYA**

**JUDGE**