REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CRIMINAL APPEAL NO. 61 OF 2017

(Being an appeal arising from Kitale Chief Magistrate's Court in Criminal case No. 633 of 2017 delivered by P. Biwott Senior Principal Magistrate on 25/7/2017)

JOSEPH MANDEGWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The appellant was charged with the offence of **Tampering with Communication equipment contrary to Section 32 of the Kenya Information and Communication Act**. The particulars of the charge are that **on the diverse dates between 29th November 2016 and 11th February 2017 at Kwanza Location, within Trans -Nzoia County, tampered with four M'kopa 3 devices bearing S/No 1215010701-002219, S/No 1415010101-018849, S/No 0415010101-016137 and S/no. 1214010101-018375 all valued at Kshs 74,547/-, the property of M'kopa Solar Kenya Limited.**

2. The 2nd count was **Electronic fraud contrary to Section 84B of the Kenya Information and Communication Act**. The particulars of the charge were that **on the diverse dates between 29th November 2016 and 11th February 2017 at Kwanza location, within Trans-Nzoia County, unlawfully suppressed the Data on the M'kopa Solar control boxes serial Nos 1215010701-002219, 1415010101-018849, 0415010101-018375, the property of M-Kopa Solar Kenya Limited Company thereby causing the devices not to communicate to the company's server thus interfering with the proper function of the system.**

3. The appellant on his own plea of guilty on the first count was convicted and fined Kshs 5 million or 10 years imprisonment. He pleaded not guilty on the 2nd count but the same was later withdrawn by the prosecution.

4. He has filed this appeal citing several grounds. In his submissions however counsel for the appellant abandoned grounds 3 and 4 and dwelt on grounds 1 and 2 only, namely that the plea of guilty was not unequivocal. He argued that the language which was used by the prosecution was not clear hence the appellant did not understand the charge as well as the facts as presented.

5. Apparently at the time of writing this judgment I did not see the respondents written submissions but only those of the appellant. Be it as it may, the only ground which the appellant has hinged his appeal is the issue of language used by the court when taking plea.

6. The record of the court reads as follows;

> **"Before Hon. P. Biwott (SPM)**
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> **Court prosecutor – Konga for state**
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> **Court Assistant – Abuya/Joan**
>
> **Interpretation – English/Kiswahili**
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> **Accused – present/Absent**
>
> **Accused represented by -**
>
> **The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language he/she understands who being asked whether he/she admits or denies the truth of the charge(s) replies:-**

Count 1: It is true

Count 2: It is not true

Court: Plea of not guilty in count 1."

7. The facts were read to the appellant in respect to Count 1 and he stated in response "It is true".

8. The celebrated case of ***Adan V Republic (1973) E.A. 445*** clearly set out the parameters of taking plea and it is worth quoting here .

At page 446, the learned Judges stated that;

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, that a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of not guilty. The magistrate should next ask the prosecution to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused reply must, of course, be recorded."***

9. Taking cue from the above authority, I am inclined to agree with the appellant counsel that the plea here was unequivocal. The language as stated by the court shows "English/Kiswahili". I appreciate that this is almost the style adopted by most of the courts. Whereas this could be a standard, the same is not a legal standard,

so to speak. The court must indicate precisely whether it is English or Kiswahili or any other specific language used and understood by the accused. To state "English/Kiswahili" in my view is too simplistic and almost a short cut of some sort. The court ought to be precise and specific.

10. In respect therefore to this appeal, I shall grant the appellant the benefit of doubt. The doubt here is what the counsel stated, namely, that he did not understand English, a language used by the court.

11. The appellant has also prayed that the court should not order a retrial but should instead reckon that one year in jail spent by the appellant to be sufficient.

12. I do not think this argument would be logical. The offence which the appellant faced was a serious one, and it attracted serious penalty.

13. In the premises I shall allow the appeal only on the grounds that the plea was unequivocal. This matter is remitted to lower court for retrial.

Orders accordingly.

Delivered, signed and dated at Kitale this 11th day of April 2018.

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H.K. CHEMITEI

JUDGE

11/4/2018

<u>In the presence of:</u>

Mr Kakoi for State

Appellant – present

Court Assistant – Kirong

Judgment read in open court.