REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL APPEAL NO. 138 OF 2017

REPUBLIC

VERSUS

CHEPSERGON KENNEDY.....APPELLANT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 58 OF 2017

PAUL ROTICH .....APPELLANT

[Being Appeals from original conviction and sentence by the Resident Magistrate's Court at Kabarnet in Criminal Cases Nos. 19 & 17 of 2015 on 6th January 2015]

JUDGMENT

[1] The consolidated appeals arise from original conviction and sentence of the appellants purportedly on their own plea of guilty to the offence of entering a national reserve contrary to section 102 (1) (a) of the Wildlife Conservation and Management Act, 2013 the particulars of which were that on the 5th day of January 2015 at about 10.40pm at Lake Kamnarok National Reserve in Baringo North sub-County within Baringo County entered the said National Reserve without authorization.

[2] The brief proceedings of 6th January 2015 indicate that following the entry of a plea of guilty, the facts are not set out before conviction on their own plea of guilty but only a minute record that –

> **"Court Prosecutor – facts as per charge sheet."**

[3] From such record, it is not clear whether the facts of the case were read and explained to the accused in language they understood and requiring them to confirm the facts as true as required under section 207 of the Criminal Procedure Code before convicting them on their own plea of guilty.

[4] Upon conviction, the appellants were sentenced to pay a fine of 200,000/- in default to serve 2 years imprisonment.

[5] The appellant's counsel urged Ground No. 3 of the Petition of Appeal that –

> ***"The Learned Trial Magistrate erred in both law (sic) by convicting and sentencing the appellant without the facts of the case being read to him."***

[6] The Counsel for the DPP, did not oppose the appeal and cited the leading case of ***Adan v. R*** (1973) EA 445 which sets out the procedure for taking of plea, which requires that the facts be read to the accused and the accused be given an opportunity to dispute the same..

[7] The procedure for the taking of plea is set out in ***Adan v. R*** (1973) EA 445 as follows:

> *1. The charge and all the essential ingredients of the offence should be explained to the accused in his own language or in a language he understands;*
>
> *2. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;*
>
> ***3. The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts to add any relevant facts;***
>
> *4. If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered;*
>
> *5. If there is no change of plea a conviction should be recorded and a statement of the facts relevant to the sentence together with the accused's reply should be recorded.*

[8] With the statement of the record only that facts as per charge sheet, it is not demonstrated that the appellants were given an opportunity to dispute the facts, and the conviction on purported plea of guilty must be quashed, and the sentence consequently set aside. The trial was defective and it therefore declared a mistrial for which an order for retrial may be made.

[9] However, the Prosecution did not seek an order for retrial, and this court does not have relevant facts as to availability of witnesses or the intention of the DPP to proceed with a retrial to warrant a consideration of appropriateness of such an order. See ***Opicho v. R*** [2009] KLR 369, where the Court of Appeal held that –

> *"In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice required it."*

ORDERS

[10] Accordingly, for the reasons set out above, the conviction of the appellants for the offence of entering a national reserve contrary to section 102 (1) (a) of the Wildlife Conservation Act 2013 is quashed and the sentence of a fine of Ksh.200,000/- imposed on each of the appellants is set aside.

DATED AND DELIVERED THIS 18TH DAY OF APRIL 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Chebii for the appellants

Ms. Macharia for DPP