REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. CASE NO. 96 OF 2017

SAMUEL WAFULA OMINDE…….....APPELLANT

VERSUS

REPUBLIC …….....RESPONDENT

(Being an appeal from the judgment of Honourable Mr. Kituku, Principal Magistrate, Kiambu delivered on 13th June, 2017 in Kiambu CMCC No. 957 of 2017)

JUDGMENT

1. On 13/06/2017, Samuel Wafula Ominde (the "Appellant") was presented before the Honourable Kituku faced with a single count of willfully obstructing Police Officers in the due execution of duty contrary to section 253(b) of the Penal Code. The particulars of the charge were that on 10/06/2017, at around 7:30pm at Ngegu village in Kiambu sub-county within Kiambu county, the Appellant willfully obstructed Police Officers No. 47352 Cpl James Kimuhu and No. 92707 PC Maurice Musyoka and No. 77941 PC (Driver) Charlton Muriithi, in due execution of their duties by locking them inside premises.

2. According to the typed proceedings, the charge was read over and explained to the Appellant in Kiswahili. He responded by stating: "It is true." While the typed proceedings indicate that the Court entered a plea of not guilty, the original record shows that the Court actually entered a plea of guilty.

3. The Learned Trial Magistrate then asked the Prosecutor to lay down the facts of the case. It is important to reproduce the facts as presented to the Court in verbatim:

> *On 10/06/2017, Officer PC James Kimuhu and PC Musyoka received information [that] a lady had been locked inside a house and was sickly.*
>
> *Officers went to the said compound and accused who is a security guard locked the gate and disappeared.*
>
> *Officers had to contact DCIO who ordered [the] Landlord to open the gate. Accused was arrested and charged with this offence.*

4. After this reading, the Appellant responded: "Facts are true." The Learned Magistrate proceeded to re-confirm the plea of guilty and invited the Appellant to mitigate. After, the Learned Magistrate imposed a fine of Kshs. 100,000/= and in default the Appellant to be imprisoned for two (2) years.

5. During the trial, the Appellant was unrepresented. He was able to engage a lawyer soon after. Mr. Charagu, for that is the lawyer, filed a Petition of Appeal in which he listed six grounds. They are as follows:

a. THAT the Honourable Magistrate erred in convicting the appellant an equivocal plea of guilty.

b. THAT the Honourable Magistrate erred in entering a plea of guilty and in failing to note that the accused did not understand the charge before him.

c. THAT the Honourable Magistrate erred in entering a plea of guilty when it was not clear which language the accused person understood.

d. THAT the Honourable Magistrate erred in convicting the appellant of a charge which was ambiguous.

e. THAT the Honourable Magistrate in convicting the appellant whereas the charge as drafted and read in Court was not supported by the facts contained in the charge sheet or as read to the accused in Court.

f. THAT the sentence was manifestly excessive bearing in mind the nature of the charge and the circumstances surrounding the case.

6. After a number of scheduled preliminary dates, the parties agreed to list the appeal for hearing on 28/09/2017.

7. Mr. Charagu argued the grounds of appeal together. He argued that the plea was equivocal and should not have been accepted. He also argued that it is not clear which language the Court used as the Appellant did not understand English. Mr. Charagu also argued that the facts as read did not disclose the offence charged for the following reasons:

a. First, Mr. Charagu argued that the facts do not disclose whether the officers were locked inside the compound or outside.

b. Second, it is not stated in the facts whether the Police Officers identified themselves. This is crucial, Mr. Charagu argued, because for charges to be sustainable, the persons obstructed must be police officers who must be in the course of their duty. The facts do not state whether the Appellant identified themselves.

c. Third, Mr. Charagu found the charge ambiguous.

8. State Counsel, Mr. Ongira, conceded the appeal but urged me to order a re-trial. His position was that the plea was equivocal. However, he did not think there were any language issues as it was clear that the charges and the facts were explained to the Appellant in Kiswahili. However, Mr. Ongira conceded that the material facts were not explained to the Appellant and that this prejudiced him. He requested the Court to order a retrial stating that the two-part test used to determine if a case is fit for a retrial has been satisfied: that the earlier trial was defective and that there appears prima facie to be sufficient evidence which could lead to a conviction.

9. This is a first appeal. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. This principle constrains me to reach my own conclusions on the totality of the evidence as opposed to merely using the Trial Court's findings as a foil to endorse or reject its findings. See ***Okeno v Republic*** **[1973] E.A. 32**; ***Pandya vs. R*** (1957) EA 336, ***Ruwala vs. R*** (1957) EA 570.

10. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in ***Adan v Republic*** *(1973) EA 445* at 446:

When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in 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 guilty. The magistrate should next ask the prosecutor 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 guilty, 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's reply must, off course, be recorded.

11. The first point for analysis is an important point of departure namely the trite law stated by the Court in ***Ombena v Republic****1981 KLR 450* to the effect that whether a guilty plea is unequivocal or not depends on the circumstances of the case. Differently put, an appellate or a revising court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.

12. Looking at the present appeal with this in mind, I have come to the conclusion that Mr. Ongira was right in conceding this appeal. The guilty plea was not unequivocal.

13. As Mr. Charagu argued, the facts as stated are ambiguous and incomplete. It is unclear whether the Police Officers were locked outside the gate or inside the gate. The facts are also at variance with the charge sheet: the charge sheet discloses the names of three Police Officers while the facts as read out in Court talks of two Officers. Even then, as Mr. Charagu pointed out, it is not clear in the facts as read out who these two Officers were.

14. As our Courts have variously held, Courts need to be more cautious when entering guilty pleas for Accused Persons who are not represented by Counsel and who are facing charges that could lead to custodial sentence or serious sentences. In those cases, care should always be taken to see that the Defendant understands the elements of the offence, especially if the evidence suggests that he has a defence. See ***R v. Griffins****, 23 Cr. App. R. 153* and ***R v. Blandford Justices ex p. G (an infant)*** *[1967] 1 QB 82*. In ***R v. Blandford*** at pp. 90C-G-91 Widgery J. had this to say by way of expressing the heightened obligation of the Court in these circumstances:

In cases where the defendant is not represented or where the defendant is of tender age or for any other reasons there must necessarily be doubts as to his ability finally to decide whether he is guilty or not, the magistrate ought, in my judgment, in these cases, to defer a final acceptance of plea until he has a chance to learn a little bit more about the case, and to see whether there is some undisclosed factor which may render the unequivocal plea of guilty a misleading one.

15. Here, the Learned Magistrate ended up imposing a pretty stiff fine of Kshs. 100,000/= and, in default, two years imprisonment. The Court should, in my view, have taken some extra effort to ensure the Appellant understood the circumstances and that the facts aligned with the charge sheet and then warn the Appellant of the possible consequences of a guilty plea.

16. Consequently, looking at the totality of circumstances, I have come to the conclusion that the guilty plea in this case is not unequivocal. It must be set aside.

17. The next question I need to consider is whether to order a retrial in this case. Having looked at the circumstances here, my view is that a re-trial is appropriate. The case of **Makupe v Republic**, Criminal Appeal No 98 of 1983, the Court of Appeal at Mombasa on July 18, 1984 (Kneller JA, Chesoni & Nyarangi Ag. JJ A) set out the general test to be utilised in determining whether a retrial should be ordered or not: In general a retrial will be ordered when the original trial was illegal or defective. Conversely, a retrial will not be ordered where the conviction is set aside because of insufficient evidence. The court must in ordering a retrial take the view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly result.

18. I am persuaded here, from my view of the case that properly prosecuted there might be sufficient admissible evidence to result in a conviction. The less I say about this, the better.

19. In the end, therefore, the orders and directions of the Court are as follows:

a. The conviction entered in Kiambu Law Courts Criminal Case No. 957 of 2017is hereby set aside. In its place a plea of not guilty shall be recorded in the case.

b. The sentenced imposed on the Appellant is hereby consequently set aside.

c. The Appellant shall be released from Prison forthwith and shall, instead, be placed on remand pending his presentation before the Kiambu Magistrates' Court to take plea.

d. The Appellant shall be presented before the Chief Magistrate's Court, Kiambu on Monday, 2nd October, 2017 to take plea. The case shall be allocated to a magistrate other than the Learned Honourable J. Kituku who initially heard the case.

e. The Deputy Registrar is directed to send back the Trial Court file in Kiambu Law Courts Criminal Case No. 957 of 2017and a copy of this ruling to the Chief Magistrate's Court, Kiambu for compliance.

Dated and delivered at Kiambu this 29th day of September, 2017.

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JOEL NGUGI

JUDGE