REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CRIMINAL REVISION NO. 4 OF 2017

JANE MUTHONI GIKIRA.......................................APPLICANT

- VERSUS -

REPUBLIC..RESPONDENT

RULING

JANE MUTHONI GIKIRA the applicant was convicted as charged by the Chief Magistrate Court at Ngong with the offence of removing forest produce without licence or permit contrary to section 52(1) (a) as read with section 52(2) of the Forest Act No. 7 of 2005. She pleaded guilty to the charge of being found to have removed 5 tones pine timber on 12/2/2017 along Kiserian Magadi road in motor vehicle registration KCK 199Q without a permit or licence from the Director of Kenya Forest Service. Having been so convicted the trial magistrate sentenced her to a fine of Ksh.50,000 in default six (6) months imprisonment.

Being dissatisfied with the convictions the applicant being represented by Mr. Webale learned counsel filed a revision under section 362 of the Criminal Procedure Code and Article 165 (6) and (7) of the Constitution. Mr. Webale submitted that the learned trial magistrate erred in basing the convictions on an equivocal plea of guilty.

The respondent in this application is represented by Mr. Akula, the senior prosecution counsel. Mr. Akula submitted that the trial magistrate correctly read the charge in a language the applicant confirmed she understands. Mr. Akula further argued and submitted the record of the reply to the charge was followed by a narration of the facts by the prosecution counsel. The applicant response to the facts by the prosecution was an admission that the circumstances upon which the offence was committed were true. It is in that basis the trial magistrate convicted and passed the appropriate sentence of a fine of Ksh.50,000 in default six (6) months imprisonment.

The bone of contention by Mr. Webale learned counsel for the applicant is that the arresting officers ignored the official delivery note of the timber from a licenced saw miller. Thereafter moved to indict the applicant without disclosing to the prosecutor existence of the delivery note which gave the description of the tonnage and mode of transport. Mr. Webale further submitted that the applicant stated very clearly in mitigation that she bought the timber from a yard but did not get the permit to transport. She also mitigated that the timber belonged to her. According to Mr. Webale in convicting and sentencing the applicant the learned magistrate erred in holding that the plea was unequivocal. This conclusion Mr. Webale submitted is at variance with the facts read by the prosecution which the learned magistrate applied to convict the applicant in her own plea of guilty. Learned counsel cited and relied on the following authorities: ***Republic v Simon Wambugu Kimani & 20 Others Criminal Revision No. 1 of***

2015 at Garissa.

In essence Mr. Webale urged this court to find that it was a misdirection for the learned magistrate to have reached a decision that the applicant had no defence to the charge.

The real point in this revision which Mr. Webale has vigorously submitted and urged this court to consider is: ***whether the plea of guilty entered against the applicant is unequivocal?*** Section 207 (1) of the Criminal Procedure Code deals with the procedure on plea taking and the steps to be complied with by the trial magistrate. The safeguards under section 207(1) (2) provide as follows:

> **"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 or guilty subject to 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 request the complainant to outline to the court the facts open once the charge is founded."**

In the procedure of plea taking under section 207 the language of interpretation or the one accused understands should be indicated clearly. According to the same provisions the answer to the plea by the accused should be recorded as nearly as possible in his own language or that of interpretation. The assertion here is that words and phrases contain different meaning(s). The rationale of such process is to ensure that the acceptance of plea of guilty by the court reflects admission of the essential elements of the offence.

Looking at the issue on the proper procedure to be followed the East African Court of Appeal in the case of ***Adan v Republic [1973] EA 45*** held as follows on the safeguards to guide trial courts:

> **"(1) The person pleading guilty fully understands the offence with which he is charged. The court taking plea of guilty must in its record show the substance of the charge and every element or ingredient constituting the offence has been explained to him in a language that he understands and that, with that understanding and out of his own free will, the pleader admits the charge. That if an accused disputes the facts of the charge a plea of not guilty must be entered where there is more than one accused jointly charged, the plea of each should be recorded separately and if a charge or indictment contains several counts, the accused must be asked to plead to them separately. If an accused does not change his/her plea of guilty should be entered and a conviction recorded and after mitigation and facts relevant to sentence can be meted out."**

(See also an outcome of ***Criminal Procedure in Kenya by P.L.O. Lumumba Law Africa at pg 143***).

From the above principles the duty is cast upon the trial magistrate to be vigilant that the objects of taking an unequivocal plea has been met and what it entails to enter a plea of guilty. This is more critical where unrepresented accused person not knowledgeable on how courts work is confronted with the process for the very just time. It is not unusual for trial magistrates to be confronted with persons pleading guilty without understanding the ramifications of the plea of guilty.

In ***Njuki v Republic [1990] KLR 334*** the court expressed concerns that magistrates allow and record words such as I admit, I accept it, I plead guilty. It is true as evidence in answer to the plea of guilty to the charge. The court held interalia that, ***"such words cannot be considered as unequivocal pleas to the charge."***

In applying section 207 of the Criminal Procedure Code and the principles in ***Adan and Njuki Case (Supra)*** to the facts of this case there is evidence that the language the accused understands was not

indicated nor the one used to explain the nature of the charge. What the record reveals in the coram side is provision for English/Kiswahili. Whether the two languages were used interchangeably there is no material for this court to draw any inference to that effect.

Secondly the answer to the charge by each of the accused is recorded as follows:

Accused 1: I am guilty

Accused 2: I am guilty

Accused 3: I am guilty

The question which begs for answer is what was the initial language of interpretation or the accused possessed knowledge of or understanding to have the charge and elements be explained in that language. There is no evidence to suggest that the accused persons were proficiency in either English or Swahili language. That duty is for the trial magistrate to be diligent and comply with the safeguards as illustrated in ***Adan's Case (Supra).*** Thirdly in the case of ***Bolt v Republic [2002] 1KLR 815*** the court held interalia on the other safeguards like the court recording plea to show in its record that the person pleading guilty understands the consequences of his plea.

In the instant case there is no indication on the record to show that the accused in pleading guilty knew the consequences of the plea including the sentence to be imposed on her. Similarly in the same trial the accused was not informed that her forest produced five (5) tones of timber and the carrier, the vehicle could be forfeited to the state. It is clear on the record that forfeiture proceedings were held after conviction as a consequence of the plea.

In my view the ascertainment from by the trial magistrate that the accused persons understands the plea of guilty and its consequences is a safeguard to exclude possibility of plea obtained under-dress or force or had licence that there ought be a leave sentence. When I appraise the entire record more specifically the mitigation the accused to the trial court that she had bought the timber from a yard, the matters arising from mitigation to me did not supplement the facts by the prosecution but stood at variance rendering the plea of guilty equivocal. Remarkably I also hold that if the accused should have been given an opportunity of explaining the circumstances under which the offences was committed.

I draw this inference from the words like, ***"I am new to this business, the timber belonged to me."*** Furthermore I am duty bound to take notice of the annexed delivery note attached to this application for review. The police charged the accused of removing forest produce constituting of five (5) tones while the delivery note indicates it to be eight (8) tones. The lower court record shows no evidence as to what happened to the three (3) tones. These are matters the plea court should have taken into account before finally making an order of conviction, sentence and forfeiture of the timber to the state.

In dealing with this review I would not loose sight of Article 159 (2) (d) of our Constitution which provides for the principle that, ***"substantial justice should be done without undue regard to technicalities at all times."*** The trial court should bear in mind and adhere to Article 159 (2) (d) when applying the provisions of the Criminal Procedure Code (Cap 75 of the Laws of Kenya).

In conclusion my parking shot is the provisions under section 382 of the Criminal Procedure Code which states:

> **"Subject to the provision herein before contained, no finding, sentence or order passed by court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings before or during the trial or in any inquiry or other proceedings under this code unless the error, omission or irregularity has occasioned a failure of justice."**

In determining whether an error, omission or irregularity has occasioned a failure of justice, I take into consideration the reasons I have advanced elsewhere in this ruling. Secondly, the narration by the accused during mitigation on how she came to transport the timber as evidenced by the delivery note. Thirdly whether the evidence held by the accused which she did not have the opportunity to present to the court was sufficient to alter the character of the case. Fourthly whether this court could not reasonably argue that the trial court erred in accepting those facts and concluding that the accused plea was unequivocal notwithstanding the language issue and the manner the plea was administered. This court has taken note of the entire record and trial process by the learned magistrate.

I am satisfied that the plea taking on the procedure laid down in section 207 of the Criminal Procedure Code and the pronouncements in ***Adan v Republic, Njuki v Republic (Supra)***. There is a failure of justice in the proceedings before the trial court. This court under the powers conferred under section 362 of the Criminal Procedure Code and Article 165 (6) and (7) of the Constitution cannot close its eyes to such a failure which if left can occasion injustice on the part of the applicant.

I therefore quash the conviction, set aside the sentence of Ksh.50,000 fine in default six (6) months imprisonment. In the event the applicant paid the fine the same should be refunded forthwith.

Borrowing from the principles in ***Koome v Republic [2005] 1KLR 575*** where the court laid out guidelines on whether or not to order for a retrial in a criminal appeal case, it is my judgement that the trial magistrate had the duty to ensure that the case before him was handled fairly and with justice.

In the present case it appears to me that the circumstances of this case demand a sufficient finding of fact by the trial court on the source of the forest produce given the mitigation by the applicant. In my view that was compelling evidence and in the interest of justice the trial court ought to have remanded the case to interrogate the issue interpartes. The law is silent as to who provides the permit on purchase of timber from a hardware.

I therefore set aside the conviction and order for a retrial. The Chief Magistrate do allocate the file to another court for hearing and determination.

It is so ordered.

Dated, delivered and signed in open court at Kajiado this 21st day of September, 2017.

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R. NYAKUNDI

JUDGE

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

Mr. Muchina for Webale for the applicant

Mr. Akula for DPP present

Mr. Mateli Court Assistant