REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 1 OF 2015

FELIX MBEVO.....APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Being an appeal from the original conviction and sentence in ***Kitui Chief Magistrate's Court Traffic Case No. 394 of 2015*** *by* ***Hon. R. Ombata R M on 31/08/15)***

J U D G M E N T

1. **Felix Mbevo,** the Appellant, was charged with the offence of **Driving a Motor-vehicle while under the influence of alcohol** contrary to **Section 44(1)** as read with **Section 44(2)** of the **Traffic Act, Cap 403** of the **Laws of Kenya.** Particulars of the offence were that on the **28th** day of **August, 2015** at about **10.14 p.m.** at **Kaveta Area along Kitui – Machakos road** within **Kitui County** being the driver of motor vehicle **Registration Number KAY 875R** make **Toyota Harrier,** drove the said vehicle along the said road while under influence of alcohol in such an extent as to be incapable of having a proper control of the said vehicle.
2. The Appellant admitted the charge. He was disqualified from holding or obtaining a driving licence for a period of **12 months.**
3. Being dissatisfied with the decision of the court, the Appellant appealed on grounds that:

- The plea was not unequivocal.
- The language used in taking of the plea was not indicated.
- Facts of the charge upon which the Appellant was convicted were not recorded or read out to him to respond to.
- The charge was defective, it did not contain particulars of the offence and the exhibit was not clear.
- The sentence imposed was manifestly excessive in the circumstances as the Appellant was a first offender, was co-operative and a Civil Servant from the Prisons Department.

4. This being the first appeal, as a court I have the duty to re-consider the evidence, re-evaluate it and come to my own conclusion bearing in mind the fact that I never had an opportunity of either seeing or hearing witnesses who testified. **(See Okeno vs. Republic (1972) EA 32).**
5. This is a case where the Appellant pleaded guilty to the charge. Under **Section 348** of the **Criminal Procedure Code,** a person charged and convicted on his/her own plea of guilty has no right of appeal against a conviction resulting from his/her plea of guilty. He/she can only question the legality of sentence. However, there are exceptions to the rule. A good example is an equivocal plea which can be a basis of an appeal. This was well put in the case of **P. Foster (Hallege) Ltd vs. Robert (1978) 2 All ER 751, 754 – 755** where it was held thus:

"..... A court cannot accept an equivocal plea of guilty. For a plea to be unequivocal the defendant must add to the plea of guilty qualification which, if true may show that he is not guilty of the offence charged."

6. The procedural manner of recording a plea of guilty was stated in the celebrated case of **Adan vs. Republic (1973) EA 440** where **Spry J.** stated thus:

"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 facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or 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's reply must of course be recorded." (Also see Section 207 of the Criminal Procedure Code).

7. In the instant case, I have looked at the original and typed record, it is apparent that the learned magistrate explained the charge as drawn to the Appellant in Kiswahili, a language that he understood and he replied thereto as follows:

"It is true."

A plea of guilty was recorded as follows:

"P.O.G.E."

The Prosecutor then stated facts of the case as follows:

"F A P C S. I wish to produce the print out as exhibit in this matter."

The court remarked thus:

"Accused is C O O P G."

In mitigation the Appellant stated that he was a Government Employee. On that basis the court disqualified the Appellant from holding or obtaining a driving licence for a period of **twelve (12) months.**

8. The Appellant was not given an opportunity of disputing or explaining the facts of the case as presented or even to add something that would be considered relevant. In any case, facts as presented did not make any sense. The purported facts did not disclose the offence. It is not stated what the print out alluded to was about and where it emanated from.
9. When an accused person admits facts presented, the court must record a conviction. What the learned magistrate recorded was so unintelligable such that the typist typed thus:

"Court: Accused is cooperating."

Proceedings were certified as having been accurate by the magistrate which would indicate that there was no conviction recorded as required by the law.

10. This was an error on the part of the court. In such circumstances, a retrial would be ordered. In the case of **Muiruri vs. Republic (2003) KLR 552,** it was stated thus:

> ***"Generally whether a retrial should be conducted or not must depend on the circumstances of the case.***
>
> ***It will only be made where the interest of justice requires it and it is unlikely to cause injustice to the Appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the Appellant; whether the mistakes leading to quashing of the conviction were entirely the prosecution's making or not ....."***

11. Having perused the charge and its ingredients and the fact of admission of the charge at the outset, it will not be prejudicial to the Appellant when a retrial is ordered. I therefore quash the order of the court and direct the Appellant to be retried by a magistrate of competent jurisdiction other than **Ombata R. Resident Magistrate.** He will be required to present himself to the **Chief Magistrate's Court, Kitui** on the **9th March, 2016** for a retrial. In default, a warrant of his arrest shall be issued.
12. It is so ordered.

Dated, Signed and **Delivered** at **Kitui** this **25th** day of **February,** 20**16.**

L. N. MUTENDE

JUDGE