



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**CRIMINAL REVISION NO. 1 OF 2016**

**1. LIYESU OLE DAINE**

**2. LAZARUS OLE MUNDO.....APPELLANTS**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence by Hon. S. Mbungi SPM in Criminal Case No. 62 of 2016)*

**RULING**

The appellants LIYESU OLE DAINE and LAZARUS OLE MUNDO were charged before the Senior Principal Magistrate with the offence of being unlawfully present in Kenya Contrary to Section 53(j) of the Kenya Citizenship and Immigration Act No. 12 of 2011.

The brief facts were that on 13 day of January 2016 at Bissil township along Namanga road in Kajiado Central Sub-County within Kajiado County being a Tanzanian National were found being unlawfully present in Kenya without valid entry permits in violation of the said Act.

In the forenoon of 13/1/2016 the appellants were arraigned in court before S. Mbungi SPM at Kajiado. They were recorded as having pleaded guilty to the charge, convicted on the same plea and sentenced to a fine of Ksh.50,000/= in default one year imprisonment.

There was a further order that upon payment of fine or serving sentence the Officer Commanding Station Kajiado do repatriate them to Tanzania.

The applicants dissatisfied with the conviction and sentence appealed and sought revision of sentence vide a letter dated 2/2/2016.

The application for revision was brought under the provisions and authority of Section 362 of the Criminal Procedure Code Cap. 75 of the Laws of Kenya.

In their letter the appellants contend that the plea was not taken properly. That they did not understand the nature of the charge and ingredient of the charge was not explained to them.

In view of the challenge to the pleas taken by the trial court it is necessary to set out the full record as recorded in the proceedings.

**“Coram**

S. Mbungi SRM

CC Caleb

Language – English/Swahili

Accuseds present

Accused 1 plea of guilty

Accused 2 plea of guilty

Accused 3 plea of guilty

COURT: Pleas of guilty entered.

### **Facts**

On the 13/1/ 2016 police officers were in patrol when they came across the 3 accused person. They had not provided any documents allowing them to be in Kenya yet they are Tanzanians, they were arrested and arraigned as .....

Court

Accused 1 Yes

Accused 2 Yes

Accused 3 Yes

COURT: Each of the accused is convicted on his own plea of guilty.

PROSECUTOR: They can be treated as first offenders.

### **MITIGATIONS**

ACCUSED 1: I pray for leniency

ACCUSED 2: I pray for leniency

ACCUSED 3: I pray for leniency

COURT: Each of the accused is fined Ksh.50,000/= in default one year imprisonment. After payment of fine or serving sentence the OCS Kajiado to repatriate them to Tanzania.

R/A 14 days.”

I have read and considered the record and proceedings of the trial court.

The legal principles to be applied in taking plea in all criminal cases in our courts is now settled; as spelt out in the case of **ADAN Vs. REPUBLIC 1973 EA 445**. The court set out the steps to be followed by a trial court when taking plea.

It was held thus:

- a. *The trial magistrate & judge should read and explain to the accused the charge and all*

*ingredients in the accused language or in a language he understands.*

- b. *That he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded.*
- c. *The prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts.*
- d. *If the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded with a statement of the facts relevant to the sentence and accused's reply."*

The legal principles in Adan's case goes hand in hand with the right to a fair hearing provided for under Article 50 of the Kenya Constitution 2010. The rights interalia include right to be informed of the charge, with sufficient detail to answer it, right to have assistance of an interpreter.

In the case before me, appellants' plea was taken on 13/1/2016. The record shows that the language being used was English/Swahili. However scrutiny of the record is wholly silent as to what preferred language appellants elected the proceedings to be conducted.

When the charge was read to the appellants it is not shown which language of the two indicated appellants understood. The record shows English language was mode of communication at the trial but one cannot deduce it was language appellants addressed the court with.

The constitution 2010 has entrenched the right to interpretation in a criminal trial under Article 50(m).

The purport being that the framers of the constitution appreciated that it is a fundamental right to a fair hearing for an accused person to fully appreciate the charge and evidence against him or her.

It is the duty of the trial court to ensure that accused right to interpretation is safeguarded and demonstrate its protection throughout the trial. This was the general concern in part of Adan's case holding regarding courts convicting the accused person without ascertaining that he understands the charge.

It was clearly stated at pg 446 as follows:

***"The courts have always been concerned that an accused person should not be convicted on his own plea unless it was certain that he really understand the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greivous where the accused is unrepresented, is of limited education and does not speak the language of the court."***

In this case the appellants have raised the issue of language and that they did not understand nature of the charge.

The appellants were not represented.

When this court reads the record of the trial court there is nothing to go by as to whether communication between the court and appellants was in English or Swahili English. The record misses out to indicate language elected by the appellants to be explained the charge. The appellants in their application for revision have challenged the aspect of plea taken not being unequivocal.

In the court's decision in **LAWRENCE M. KUIGA Vs. REPUBLIC 1983 KR 166** the court was faced with a similar situation. In that case the position was remarkably similar to that obtained in this revision. The court laid down the principles and criteria for appellate court to interfere with a plea of guilty.

The court held thus:

***"(1) That even taking into consideration the admitted facts, the plea was imperfect, ambiguous or unfinished and for that reason , the lower court erred in treating it as a plea of guilty.***

***(2) That the appellants pleaded guilty as a result of mistake or misrepresentation.***

***(3) That the charge laid all the appellants door disclosed no offence known to law and***

***(4) That upon the admitted facts the appellants could not in law have been convicted of the offence charged in applying the set criteria to the case before me.”***

I am of the conceded view in considering the admitted fact and record, the plea was imperfect and ambiguous. The trial court has not shown nor demonstrated the rights of the appellants under Article 50 on interpretation and information of the charge with sufficient detail to answer it have been met.

In view of the foregoing I am satisfied that the appellants’ trial was flawed in failing to comply with the law. As a result I consider the conviction and sentence unsafe.

I quash both conviction and sentence. The appellants are hereby set free unless otherwise lawfully held. The appellants be repatriated back to Tanzania.

***Dated, delivered on 23/2/2016 at Kajiado***

R. NYAKUNDI

JUDGE

Representation

Mr. Akula for the State

Mr. Mateli Court Assistant

Appellants present