



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 80 OF 2014

DANIEL CHEGE GICHUNGU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kiambu in Cr. Case No. 1627 of 2014 delivered by Hon. D. K. Mochache, PM dated 11th June, 2014).

JUDGMENT

The Appellant herein was charged with two counts.

Count I: making a false document contrary to **Section 347(d)(i)** of the **Penal Code**. It was alleged that on the 20th of May, 2014, at Equity Bank Kiambu Branch, within Kiambu County, signed an equity Bank Cheque number 000350 in the name of Gicsons Holdings Limited without his authority.

Count II: Uttering a false document with intent to defraud contrary to **Section 357(a)** of the **Penal Code** in that on 20th May, 2014 at Equity Bank Kiambu Branch within Kiambu County with intent to defraud knowingly uttered an Equity Bank cheque number 000350 which had been made without authority.

The Appellant was convicted on his own plea of guilty and was sentenced to serve 15 months imprisonment on each of the counts. The sentences were to run concurrently. The plea was entered on 21st May, 2014. On 11th June, 2014, the Appellant instructed a lawyer to come on record namely Mr. Nduati who made an application before the learned magistrate for release of the Appellant on bail pending appeal pursuant to **Section 357(1)** of the **Criminal Procedure Code**. The Appellant was accordingly released on a surety bond of Kshs. 50,000/= or a cash bail of Kshs. 30,000/=.

The main ground advanced in the application for bail pending appeal was that the Appellant was not fit to plead in the first instance because he suffered a mental illness alongside bouts of epilepsy which caused convulsions. The trial court was presented with a medical report from Dr. Fredrick R. Owiti of University of Nairobi College of Health Sciences, Department of Psychiatry.

Subsequently on 8th July, 2014, the Appellant filed this appeal and in the Memorandum of Appeal dated 30th June, 2014, raised the following grounds of appeal;

1. **The learned trial magistrate misdirected herself by failing to establish and/or satisfy herself whether the Appellant was mentally fit or competent to stand trial or whether he understood or was aware of the consequences of pleading guilty of the offences with which he was charged.**
2. **The learned trial magistrate erred in law and in fact by failing to inquire from the accused person the language which he understood and/or was comfortable with.**
3. **The learned trial magistrate erred in law and in fact by failing to have regard to the Appellant's assertion in mitigation that he was a director of the complainant company.**
4. **The learned trial magistrate erred in law and in fact by failing to have regard or to consider the fact that the complainant company is owned by the Appellant's father and whether the case could be resolved by alternative means.**
5. **The learned trial magistrate erred in law and in fact by convicting the Appellant on a defective charge sheet.**
6. **The sentence passed is manifestly excessive given the mental status of the Appellant.**

The appeal was canvassed by way of filing written submissions. Those of the Appellant were filed on 12th May, 2016 by Ms. Nduati Charagu and Company Advocates. The gist of the same is that at the time the Appellant took the plea, he was laboring under a mental illness which incapacitated him to plead. For that reason, he did not have the mental capacity (*mens rea*) to commit an offence. More importantly, it was submitted that when he was given an opportunity to mitigate, he stated that “***it just happened***” which ought to have raised an eye brow to the magistrate that all was not well with the Appellant. Respectively, even if the Appellant pleaded guilty, he was not in a position to understand the implications of what he pleaded to. The court was referred to the case of **Patrick Sang'anyi Ongeru vs Republic [2015] @KLR** in which the High court held that:

“...criminal culpability is determined by the mental status of an accused. Where it is established that an accused person lacks the requisite mental status (mens rea) to commit an offence he cannot be found culpable of committing such criminal offence...”

With regard to defective charge sheet, it was submitted that in regard to Count I, **Section 347(d)(i)** of the **Penal Code**, is only a definitive section which describes the circumstances under which a person is said to have made a false document but does not purport to create an offence and the consequence thereof. In the counsel's view, the offence is created under **Section 349 of the Penal Code**. Accordingly, **Section 347(1)(d)(i)** ought to be read together with **Section 349 of the Penal Code**. With regard to Count II, counsel submitted that the statement of the charge was not supported by the particulars thereof.

On behalf of the Respondent, learned state counsel Ms. Aluda filed written submissions on 19th May, 2016. Ms. Aluda conceded that Count I was defective in that it ought to have been brought under **Section 347(1)(d)(i)** as read with **Section 349 of the Penal Code**. The first provision describes the offence whereas the second provides for the penalty. She conceded therefore that the second count ought to have been an alternative to the first. With regard to the mental status of the Appellant, Ms. Aluda submitted that the Appellant properly followed the proceedings and understood what was happening and even responded to all the proceedings. Hence, he cannot raise a ground of mental insanity on appeal. The court was referred to the case of **Phillip Makhoha Keya vs Republic [2014] @KLR Eldoret Criminal Appeal No. 78 of 2014.**

On 30th May, 2016, parties were given an opportunity to highlight their written submissions. On emphasizing the mental incapacity of the Appellant, learned counsel Mr. Nduati submitted that the Appellant suffered from both psychosis and epilepsy which made him incapable of pleading guilty. Ms. Aluda on the other hand submitted that the mental insanity of an accused cannot be raised on appeal. She emphasized that Count II ought to have been an alternative to Count I whereas Count I was defective for failure to provide for the penalty provision.

I have accordingly considered the respective submissions. It is now the duty of the court to determine, first, whether the plea was unequivocal, second, whether the Appellant suffered from a mental illness which incapacitated him to plead and, third, whether the charge sheet was defective.

On whether the plea was unequivocal for want of use in proceedings the language the Appellant understood, I have looked at the proceedings and noted that the proceedings were conducted in the English and Kiswahili languages which the Appellant understood. He fully participated in the proceedings and responded to all the issues raised. That ground of appeal then has no merit.

On the Appellant's mental status, suffice it to note is that this issue was not brought to the attention of the court at the time he took plea. Therefore, Section 11 of the Penal Code which provides that **"every person is presumed of sound mind, and to have been of sound mind at any time which comes to question, until the contrary is proved,"** may appear to have been appropriately applied. The issue of the Appellant's illness was first raised when the Appellant applied for bail pending appeal before the learned magistrate on 11th June, 2014. It was at that point that a medical report from Dr. Owiti dated 22nd May, 2014 was shown to the court. It indicated that the Appellant was a person with a mental disorder which he had had for many years since he was a High School student. He was described as a person who also suffered epileptic disorder. It was said that as he matured, his condition was complicated by use of alcohol. As noted above, whereas Section 11 of the Penal Code implies that an accused cannot raise a defence of mental illness on appeal, the said provision ought to be interpreted liberally and objectively. This is so because where on a preliminary finding, it is drawn to the attention of the court that an accused has had a history of mental illness, which may have incapacitated him to plead, courts cannot shut him from appealing against a conviction on that ground. See the case of **Regina vs Padola [1960] QB 325** in which it was stated that:

"That there is no direct appeal against a preliminary finding does not mean that a convicted person is not entitled to appeal on the ground of mistrial and to say that he ought not to have been required to plead and he may say so for varying reasons."

"Persons who feel themselves to have been prejudiced by some mistake or error in preliminary proceedings in the trial court should not be shut out from access to this court."

"[That] there are indications that an irregularity only amounts to a mistrial when there has been an omission of a material step in procedure or something has been done whereby the trial court would have no power to deal with the situation unless it could be said to be a mistrial, and would have no alternative but to quash the whole conviction."

I agree with the learned counsel for the Appellant that if it is proved that an accused suffers from a mental illness he would not be possessed of the capacity to commit an offence. Simply said, he would not possess the requisite criminal culpability which is determined by the mental status (*mens rea*) to commit the offence. I therefore, wholly align myself with a similar observation by Hon. Justice Kimaru in **Patrick Sing'anyi Ongeri vs Republic [2015] @KLR.**

The circumstances of the instant case do however contrast with **Patrick Sing'anyi Ongeri's** case in that in the latter, the court was ceased with evidence of history of the Appellant's long mental illness dating prior to the plea date. The case is also in consonance with my observations in my own decision in **Criminal Appeal No. 12 of 2015. Abdullahi Farah Ibahim vs Republic** in which the Appellant was set free on account that he was not in a position to plead owing to his mental illness dating prior to the date of the plea. In the present case however, the medical document being a letter (report) of Dr. Fredrick Owiti dated 22nd may, 2014 did not enunciate in detail the mental illness of the Appellant. Save for stating that the Appellant suffered a mental disorder for many years it did not state when the illness began. It did not also state that the author was seized of the management of the health of the Appellant. The nature of the mental disorder was also not disclosed. It leads me to conclude that this is a document that was fetched probably to persuade the court to give bail pending appeal. I am therefore, not in a position to ascertain that the Appellant was mentally incapacitated to plead as at the time the plea was taken. At this point therefore, the submission that he was mentally incapable of understanding what he pleaded to cannot bail him out.

With regard to defective charge sheet, in Count I, the Appellant was charged under Section 347(d)(i) (***should have read 347(1)(d)(i)***). The entire Section 347 provides for instances under which a person may

be said to make a false document. It does not create an offence. Therefore, a charge brought under that provision cannot at all hold. Furthermore, a charge is said to be defective if its statement is not supported by the particulars. The particulars of Count I read as follows;

“making a false document contrary to Section 347(d)(i) of the Penal Code. It was alleged that on the 20th of May, 2014, at Equity Bank Kiambu Branch, within Kiambu County, signed an equity Bank Cheque number 000350 in the name of Gicsons Holdings Limited without his authority”.

There is no doubt then that the particulars disclosed the offence of making a document without authority, in this case, a cheque. The offence of making a document without authority is provided for under Section 357 (a) of the Penal Code. It follows then that Count I was defective on ground that the statement of the offence was not supported by the particulars.

The same scenario obtains in regard to count II. The Appellant was charged with uttering a false document with intent to defraud contrary to **Section 357 (a) of the Penal Code.** (*It is important to note that the offence is provided for under Section 357 (d) of the Penal Code*). The particulars of the same are spelt out as follows:

“on 20th May, 2014 at Equity Bank Kiambu Branch within Kiambu County with intent to defraud knowingly uttered an Equity Bank cheque number 000350 which had been made without authority”. (*emphasis mine*).

The last three words of the particulars imply that the Appellant committed the offence of making a document without authority whereas the statement of the offence itself is of uttering a false document with intent to defraud. It follows once again that the statement of the offence in count II were not supported by the particulars of the offence.

It is my view, owing to the above circumstances, that he Appellant pleaded to the wrong offences. The charge sheet as drawn was ambiguous as the statements of the offences were not supported by their particulars. This heavily prejudiced the Appellant as he may not have known the distinction between the statement of the offence and the particulars. Furthermore, he was not represented by a legal counsel who would have intervened on his behalf. I accordingly find and hold that the charge sheet was defective, reasons wherefore the plea was a total mistrial. For that reason, this court would have no alternative but to set the Appellant free.

In sum therefore, I find the appeal with merit. I quash the conviction and set aside the sentence. I order that the Appellant be and is hereby set free unless otherwise held. He is entitled to a refund of the cash bail paid for his release on bail pending appeal. If he deposited a security bond, the security shall be released to the depositor. It is so ordered.

DATED and DELIVERED this 22nd day of June, 2016

G.W. NGENYE-MACHARIA

JUDGE

In the present of

1. Gichuki holding brief for Nduati for the Appellant.
2. Miss Nyauncho for the Respondent.