**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NUMBER 12 OF 2015**

**ABDULLAHI FARAH IBRAHIM……..……..…..APPELLANT**

**VERSUS**

**REPUBLIC ……..……...RESPONDENT**

*(Being an appeal from the original conviction and sentence in the Chief's Magistrate's Court at Kibera Cr. Case No. 5728 of 2014 of Hon. Onyina, S.P.M dated 22nd December, 2014).*

## JUDGMENT

**Background.**

The Appellant, Abdullahi Farah Ibrahim was charged with the offence of preparation to commit a felony contrary to Section 308(3)(b) as read with Section 308(4) of the Penal Code. The particulars of the offence were that on 20th December, 2014 at Milimani in Westlands District within Nairobi County was found on the roof of a building namely Media Centre a studio of the Seventh Day Adventist Church at night with the intent to commit a felony to wit theft(or any other felony as the case may be).

He was arraigned before Hon. Onyina SPM on 22nd December, 2014 and pleaded guilty to the charge in question. He was convicted on his plea of guilty and sentenced to serve 12 months imprisonment.

Being dissatisfied with that court's decision he preferred this appeal. Theappeal is against both the conviction and sentence. Learned counsel, M/s Simiyu, Opondo, Kiranga& Co. Advocates filed the Petition of Appeal on 23rd January, 2015. It contains eleven grounds of appeal which I duplicate as under;

**1. The the trial magistrate failed to appreciate that the Appellant was at the time he was charged suffering from a mental illness, namely schizophrenia since the year 2010 which made him unfit to plead, rendered him incapable of knowing what he was doing and knowing who he was.**

**2. That the charge sheet was defective since the person charged was Abdullahi Farah Ibrahim and not the Appellant.**

**3. That the plea was not unequivocal.**

**4. That the conviction was against the weight of evidence as no witnesses were called to testify.**

**5. That the sentence imposed was harsh and excessive in the circumstances.**

***Submissions.***

*The Appellant was represented by Mr. Turunga for Simiyu, Opondo, Kiranga & Company Advocates while the Respondent was represented by learned counsel Ms. Aluda. Oral submissions were heard from both parties on 16th May 2016. Mr. Turunga for the Appellant submitted that the Appellant suffered from schizophrenia which is a mental disease that caused him to labour under hallucinations and at the time of his arrest at the church he had escaped from Kiambu District Hospital where he had been admitted. He submitted that the Appellant's case was one of someone being at the wrong place at the wrong time. He submitted that the Appellant had been diagnosed with the disease in 2010 and had been undergoing treatment ever since. He stated that the fact that the Appellant gave his name as Abdullahi Farah Ibrahim instead of his real name was testamentary of the fact that he was mentally incapacitated. He further submitted that this meant that the Appellant was not in a position to take a plea. He relied on the case of* ***Kaprowa s/o Tarino vs Regina[1957] EA 553.***

*Counsel further submitted that the fact that the Appellant had been incarcerated from December 2014 until the date he was granted bail by this court in Misc App. No. 34/2015 in May of 2015 meant that he had suffered more than enough and had effectively atoned for his crime. He urged that the Appellant be set free.*

*Ms. Aluda, for the Respondent, opposed the appeal on the conviction. She submitted that the plea was unequivocal and as such was not subject to review. She further stated that when the Appellant was given a chance to mitigate he offered nothing in mitigation. She said that the issue of the Appellant's disease had been raised too late in the appeal which fact could not bail him out.*

*On sentence she submitted that the same could be reduced to the period served.*

*This court, after considering the submissions deems the following issues as arising for determination:*

***1.Whether the Appellant's plea was properly taken and unequivocal.***

***2. Whether the Appellant was mentally fit to plead.***

***3. Whether the sentence imposed was excessive.***

I shall delve into the issue of whether the plea was properly taken and unequivocal. The reknown case of **Adan Inshair Hassan vs Republic, Criminal Appeal 680 of 1972** clearly set out what constitutes a properly taken plea and one which is unequivocal in the following words;

> ***"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 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."***

Looking at the proceedings in this particular case it is clear that the magistrate did comply with the requirements as set out above and as such the plea of guilty was and can clearly be seen was unequivocal. In that case, prima facie, under Section 348 of the Civil Procedure Code ***"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."*** This means that where an Appellant has pleaded guilty he is confined to appealing only on the sentence imposed in that original conviction. But exceptions lie where the court may allow an appeal on conviction notwithstanding that the conviction was on a plea of guilty. This was set out by the Court of Appeal in **Alexander Lukoye Malika vs Republic[2015] eKLR** where it stated:

> ***"A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged."***

In the present case, it was submitted that the Appellant's mental health issues, specifically that he was and is schizophrenic, made him incapable of taking the plea. It must be noted that a presumption as to an accused's state of mind does exist as provided under Section 11 of the Penal Code at Section 11, which states:

> ***"Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."***

The court at first instance relied on this assumption and convicted the Appellant on his own plea of guilty. The issue of the Appellant's insanity was never brought up and thus the learned magistrate did not have a chance to comment on the issue of the fitness of the Appellant to plead. He took the plea as an admission of guilt and convicted the Appellant on the same. The question then is whether this court should overlook the fact of the Appellant's mental illness merely because it was brought to the attention of the court too late in the day. Courts of concurrent jurisdiction have held that if the court of first instance is not seized of the knowledge as to the mental illness of an accused, then the accused cannot raise it at the appellate level with a view to mitigating against the conviction. My view, in light of the present case is that Section 11 of the Penal Code should be interpreted objectively and liberally as strict interpretation of the same may often occasion injustice to an accused. It does obviously follow that since the trial court was not aware of the mental ill health of an accused, means that the appellate court shuts its doors towards executing justice. The departure from the trick interpretation of Section 11 of the Penal Code must be on a case to case basis. That is to say that, where the court is convinced that an accused was of ill mental health and therefore incapable of taking a plea, it should pronounce that there was a mistrial. This is vindicated by the fact that criminal culpability is determined by the mental status of an accused person. The trial begins with a plea. Therefore, when a plea is taken from a mentally ill person, the entire trial is vitiated.

In furtherance to the above observation, I am minded of **Section 12 of the Penal code** which provides thus;

> ***"A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."***

The question that follows is, did schizophrenia render the Appellant incapable of comprehending what he was doing, where he was and who he was? In attempting to answer this question I am reminded by Lord Dunedin, Lord Justice General in **H.M. Advocate vs Brown[1907] S. C.(J.) 67,77,78** where they said:

***"insanity [is that] which prevents a man from doing what a truly sane man would do and is entitled to do – maintain in sober sanity his plea of innocence and instruct those who defend him as a truly sane man would do and that a person giving those instructions should not only intelligently but without obliteration of memory as to what has happened in his life, give a true history of the circumstances of his life at the time the supposed crime happened."***

The disease is described in the Concise Oxford English Dictionary, 9th Edition as;

***"a long term mental disorder of a type involving a breakdown in the relation between thought, emotion and behavior, leading to faulty perception, inappropriate actions and feelings, and withdrawal from reality into fantasy and delusion."***

There is no doubt then it is a disease that would have rendered the Appellant to misapprehend where he was, what he was doing and who he was. That may explain why he gave the wrong name as opposed to his real name, Steve Mwangi. He could not be said to be sane at the time of committing the crime. He suffered from a disease that obviously made it impossible for him to know what he was doing. He was also not a person who could give 'a true history of the circumstances of his life' since he was laboring under a delusion that he was Abdullahi Farah Ibrahim instead of Steve Mwangi and was as such not in a position to be considered sane. He also did not exercise his sober sanity by pleading guilty and getting himself convicted. He also did not attempt to mitigate when granted the chance.

It is abundantly clear that the Appellant was not fit to take plea and the fact that the plea in question formed the basis of his conviction makes his fitness to plead an issue so fundamentally important that this court cannot wish away. I would not hesitate, in the circumstances, to find that the plea amounted to a mistrial as was observed in **Regina vs Padola[1960] QB 325** 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."***

Therefore, although the matters brought to the attention of this court at the time of hearing the application for bail pending appeal were not within the knowledge of the trial court, which included evidence of the long medical history of the appellant, justice would demand that a retrial be conducted. But would a retrial serve any purpose? The facts of the case were that the Appellant was found on top of a church building. When he was confronted by a security guard he started running away. There was no material found with him that demonstrated that he intended to commit a felony. Furthermore, the available medical evidence of his mental illness would currently still not enable him to take a plea. It is most prudent that he is set free to enable him continue with his treatment.

This is an unfortunate case that represents a replica of many. Save for a few isolated cases such as murder trials, inquiries as to the mental status of an accused are not conducted. Many accused persons who find themselves in a similar situation are often prejudiced. Probably it is ripe time that the trial courts began making enquiries as to the mental fitness of accused persons before plea is taken as nothing prevents them from doing so. This is important because the burden that is placed on a party who pleads guilty is so high given the fact that he has no recourse to appeal against the conviction and it is therefore necessary to ensure that such a person before the plea of guilty is entered is fit to plead. It is the least that the court can do in the ensuring that the ends of justice are met.

On sentence, under Section 308 (4) of the Penal Code, any person convicted for the offence of preparations to commit a felony is liable to imprisonment with hard labour for 5 years or, if he has previously been convicted of a felony relating to property, to such imprisonment for 10 years. In the present case, there was no evidence of the Appellant's previous convictions. He was therefore liable to imprisonment with hard labour for 5 years. Therefore, the sentence of 12 months imprisonment imposed was not only legal but reasonable. If I were to uphold the conviction, I would probably not have varied the same.

In the end, I quash the conviction, set aside the sentence and order that the Appellant be and is hereby forthwith set free unless otherwise lawfully held.

**DATED AND DELIVERED IN THIS 21ST DAY OF JUNE, 2016.**

**HON. G. NGENYE-MACHARIA**

**JUDGE**

**In the presence of :**

*1. Mr. Turunga for the Appellant.*

*2. Miss Nyauncho for the Respondent.*