REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.124 OF 2016

DENNIS OKOTA OYULE……..APPLICANT

VERSUS

REPUBLIC…….....RESPONDENT

RULING

The Applicant, Dennis Okota Oyule together with others, was charged **with taking part in an unlawful assembly** contrary to **Section 79** of the **Penal Code**. The particulars of the offence were that on 19th December 2014, along Parliament Road in Nairobi, the Applicant, jointly with others not before court, took part in an unlawful assembly. The Applicant was further charged **with incitement to violence** contrary to **Section 96** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, without lawful excuse uttered words ***"occupy parliament na polisi ni wale wale wakitambo"*** which words implied that they were intending to go and occupy Parliament where the Security Bill was to be discussed and disrupt Parliament proceedings, an act which was calculated to lead to violence at Parliament buildings. When the Applicant was arraigned before the trial magistrate's court, he pleaded guilty to the charges. He was convicted on his own plea of guilty. He was sentenced to pay a fine of Kshs.5,000/- on each count or indefault he was to serve three (3) months imprisonment. The default sentence was ordered to run consecutively. The Applicant did not pay the fine. He is serving the default sentence.

On 31st May 2016, the firm of Mbugua Mureithi & Company Advocates invoked this court's jurisdiction pursuant to **Sections 362** and **364** of the **Criminal Procedure Code** seeking to have the decision overturned. In the letter, Learned Counsel stated that the Applicant was not, at the time he pleaded guilty to the charges, represented by counsel. If he had so been represented, he would not have pleaded guilty to the charges. He observed that the particulars which the Applicant pleaded guilty to did not support the charges. In essence, Learned Counsel was saying that the Applicant pleaded guilty to charges that were not supported by facts which disclosed the particular offences. He also took issue in the manner in which the Applicant was sentenced to serve consecutive sentences instead of a concurrent sentence.

During the hearing of the application, Mr. Mureithi amplified these grounds in his submissions. Ms. Sigei for the State opposed the application. She submitted that the Applicant pleaded guilty to the charges and cannot be allowed to challenge his conviction on appeal. He can only challenge the propriety of the sentence that was imposed on him. She submitted that the sentence that was imposed on the Applicant was legal and was extremely lenient taking into account the fact that the maximum sentence that the Applicant could have been sentenced to serve was five (5) years imprisonment. In the premises therefore, she urged the court to disallow the application.

This court has carefully considered the facts in issue in this application. The Applicant forcefully argued that he was convicted on the basis of facts that did not support the charge. Having carefully evaluated this argument, this court is not persuaded that the plea of guilty that was recorded did not accord with the directions given in **Adan –Vs- Republic [1973] EA 445**. In **Willy Kipchirchir –vs- Republic [2015]**

eKLR, the court held as thus:

> "***From the foregoing, it cannot be gainsaid that a plea court in recording a plea of guilty must ensure that an accused person fully understands the offence which he is charged and the manner in which it is alleged that he committed the offence. In order for the accused to fully understand the charge preferred against him, the charge must be read and explained to him in a language that he or she understands and this language must be reflected in the court record. The duty of the court goes beyond just reading the charge to the accused. As emphasized by the Court of Appeal in Kariuki –vs- Republic (supra):***
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> ***"The trial court or Judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands."***
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> ***In Kennedy Odhiambo Nyangile –vs- Republic [2004] eKLR, the court held thus:***
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> ***"Regarding the facts of the case, the court Judy Nkirote v Republic (Supra) observed that, "The facts of the prosecution case are supposed to give further details of what it is the accused person is accused of doing or failing to do which led to the circumstances which constitute the offence charged. The statements of facts given by the prosecution must be explained to the accused person by the court in order for the court to be certain that he has understood the facts. The accused is then given an opportunity to either admit or deny those facts. At that point the court should give the accused person an opportunity not merely to admit or deny but also to dispute the facts or explain the facts or add any relevant facts. If the accused person denies the facts then a plea of not guilty is entered. If he admits the facts then the court will enter a plea of guilty and convict him for the offence."***

In this application, the Applicant pleaded guilty to the charges. The facts were read to him two months after the plea of guilty was recorded. He admitted the facts. The Applicant is not saying that he did not understand the language in which the plea was taken. The facts of the case broadly support the charges that were brought against the Applicant. This court does not agree with the submission made on behalf of the Applicant that the facts did not support the charges.

As regard sentence, the Applicant is on firmer ground. In **Republic –vs- Jagani & Another [2001] KLR 590** at page 593, Hayanga J stated thus:

> "***The principle the Court applies on appeal is normally sentence is a discretionary exercise by the trial court. The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter offender from committing offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in retribution by providing for reparation for harm done to victims in particular and to society in general. It is also seen as promoting a source of responsibility in offenders".***

In the present application, although **Section 37** of the **Penal Code** granted discretion to the trial magistrate's court to impose consecutive custodial sentences in default of paying the fine, this court is of the view that the period that the Applicant has been in prison is sufficient punishment. In the premises therefore, the custodial sentence of the Applicant is commuted to the period that he served between the time he was convicted to the time he was released on bail pending the delivery of this Ruling. He set at liberty forthwith unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JULY 2016

L. KIMARU

JUDGE