



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL CASE NO. 39 OF 2016

(An appeal from original conviction and sentence of Kisii CM'S COURT Criminal Case No. 3110 of 2016 by Hon. Njoroge SPM dated 26TH November, 2016)

JOSEPH BOSIRE OGAO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein JOSEPH BOSIRE OGAO, was on 24th October charged before the Chief Magistrate's Court at Kisii in Criminal Case No. 3110 of 2016 with offence of transporting coffee without permit contrary to **Section 19 (1) (b) (i) of the Crop Act of 2013**. The particulars of the charge were that on 20th October 2016 at Mwamosioma Sub-location in Marani Sub County, he was found transporting dry coffee (Mbuni) to wit eight and half sacks valued at Kshs. 51,799/= using motorcycles registration numbers **KMDW 407G, KMDV 703Q** and **KMDN 374H**, a fact he knew was wrong.

2. The appellant pleaded guilty to the said charge and was consequently convicted on his own plea of guilty after which he was sentenced to pay Kshs. 50,000/= fine and in default, to serve one (1) year imprisonment.

3. The appellant has now appealed against both the conviction and sentence and has set forth the following grounds of appeal in his petition of appeal:

1. The plea was not unequivocal.

2. The learned trial magistrate misdirected himself on the principles and procedure of taking plea

3. The appellant did not understand the charge against him.

4. The sentence meted against the appellant was manifestly excessive and oppressive in the circumstances.

4. The matter came up for hearing of an application for bond pending appeal on 10th November 2016, however, Mr. Anyona for the appellant decided to argue the appeal instead in order to save on the court's time.

5. Mr. Anyona submitted that the plea was not unequivocal as the language used during the plea taking

was not stated. He also stated that the appellant's mitigation was not recorded before he was sentenced.

6. Mr. Otieno, for the state, on his part conceded to the appeal on the basis that the language used at plea taking was not shown. Mr. Otieno however observed that the appellant's mitigation was recorded by the trial magistrate before passing the sentence on the appellant.

7. This a first appeal and despite the fact that the state has conceded to the appeal, I am still under an obligation to reconsider and re-evaluate the evidence tendered before the lower court afresh with a view to arriving at my own independent conclusion. See **Pandya vs Republic [1951] EA 336**.

8. In this matter, the appellant pleaded guilty to the charge and therefore, no evidence was tendered before the trial court. I will in the circumstances, scrutinize the lower court record in order to establish if the plea was properly taken and it if was unequivocal or not.

9. The steps to be undertaken in recording a guilty plea were set out in the celebrated case of **Adan vs Republic** as follows:

“When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the 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.”

10. The need to exercise caution when recording a guilty plea was further reinforced in the case of **Njuki vs Republic [1990] KLR 334** wherein it was held that the court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.

11. In the instant case, the plea was recorded as follows:

“Date 24/10/2016.

Coram:

Magistrate: Hon. J. m. Njoroge (SPM)

Prosecutor: Nekesa

Court Assistant: Hezron

Accused; present

Language of interpretation: English/Kiswahili.

The substance of the charges and every element thereof has been stated by the court to accused person inlanguage that he understands who after being asked whether he admits or denies the truth of the charge replies in.....language.

Accused- True

Court – plea of guilty entered.”

12. From the above extract of the proceedings of plea taking, it is crystal clear that the language used in taking and recording the plea is not indicated

13. I am therefore not satisfied that the plea was properly taken or that the appellant understood every element of the charge or pleaded guilty to it unequivocally. The proceedings do not show the language used and therefore the plea taken was not unequivocal.

14. I therefore quash the conviction and the question which now arises is whether I should order a retrial. The court of appeal had the following to say about a retrial in the case of **Fatehali Manji vs Republic [1964] EA. 481.**

“even where a conviction is vitiated by a mistake of the trial court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

15. In the instant case, the appellant was convicted on 26th October, 2016 and sentenced to pay Kshs. 50,000/= fine in default to serve one year imprisonment. The appellant is reported to have been unable to raise the Kshs. 50,000/= fine and has been in custody from the date of his said conviction to the date of delivering this judgment. To my mind, the circumstances of this case militate against an order for a retrial because the appellant has already served a substantial part of his prison term. I am therefore of the view that a retrial will greatly prejudice the appellant.

16. Having allowed the appeal and quashed the sentenced, the order that now commends itself to me is the order that the appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

Delivered, dated and signed in at Kisii on **24th of November, 2016.**

W.A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Mr. Anyona for the Accused

Omwoyo court clerk