



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CRIMINAL REVISION NO. 354 OF 2016

PAUL OUMA ATINDA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Vide a letter dated 20th September, 2016, addressed to this court by the Applicant, PAUL OUMA ATINDA, the applicant, is seeking to have this court revise the proceedings of 14th September, 2016 in Mombasa Chief Magistrate's criminal case No 1804 of 2016, Republic Vs PAUL OUMA ATINDA as per the provisions of section 362 and 363 of the Criminal Procedure Code.

According to the applicant, he is seeking this court to determine the legality and propriety of the proceedings, conviction and sentence for the following reason.

1. that he did not understand the language of the proceedings.
2. that he was not aware that he was pleading guilty to the charges which he did not understand what they were about.
3. that he was not shown the exhibits as no exhibits were produced.
4. that he was jailed for two years.

Under section 362 of the criminal procedure code.

“The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and to the regularity of any proceedings of any such subordinate court”.

The applicant was charged with three counts.

In count 1, the applicant was charged with stealing contrary to section 268 (1) as read with section 275 of the penal code.

In count II, the applicant was charged with uttering document with intent to defraud contrary to section

357 (b) of the penal code.

In cont III, the applicant was charged with attempted stealing contrary to section 268 (c) as read with section 389 of the penal code.

I have examined the record in the magistrates criminal case No 1804 of 2016, Republic versus Paul Ouma Atinda.

I note that on 14.9.2016, the applicant appeared before the Resident magistrate, where all the three charges were read and explained to him and he replied;

Count 1- True

Count II- Not true

Count III- True

The magistrate entered a plea of GUILTY against the applicants own plea of guilty in counts I and III. For count II, the magistrate entered a plea of NOT GUILT.

The magistrate then deferred the reading of the facts of the case to 15.9.2016.

On 15.9.2016, the accused indicated that he was ready for the facts in count I and III and the same are indicated as having been read to him and he responded by saying

Accused – “It’s true”

The prosecutor then, informed the court that;

“No previous conviction record”

There was then mitigation where it is stated

“pray for forgiveness. I have responsibilities at home”

The court then deferred the sentencing to 2.30 pm.

And without indicting the time the court resumed its sitting and, it is just stated

“Court has considered the accused mitigation.

Count I and III

“To serve one year imprisonment on each count 14 days right of appeal”.

The manner of recording a plea and steps to be taken were set out in the case of ADAN versus REPUBLIC (1973) E A 554 as follows;

“When 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 these essential elements, the magistrate should record what the accused has said, as nearly by as possible in his own words, and then finally enter a plea of guilty. The magistrate should next ask the prosecution 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”.

In the present case, the record of court shows that the language that was used when the charge and particulars were read out to the applicant is not indicated. It is therefore not clear that the applicant understood the charges and the proceedings as a whole.

After the charges were read out to the applicant on 14.9.2016, the matter was deferred to 15.9.2016 for the facts to be stated. And on 15.9.2016, the magistrate did not read out and explain the charge and particulars to the applicant once again first to re-confirm that he was still pleading guilty. Again it is not indicated who stated the facts to the accused and court and who mitigated to court.

The sentence was then deferred to 2.30 pm and there is also no indication who imposed the sentence against the applicant as neither the coram nor the time the court resumed is indicated.

It is further not indicated whether the applicant was sentenced for all the counts and yet he pleaded guilty to only 1st and 3rd counts.

It is also worth noting that the applicant’s response to each of the charge was recorded as “ true”

Under section 207 of the criminal procedure code.

1 The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement”

2. If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as merely as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary”

Apart from requiring that each and every ingredient of the charge explained to accused person clearly and in a language that he or she understands well, the law also requires that the accused’s response be recorded as clearly as possible to each ingredient of the charge. This is so that the record clearly shows that the applicant understood each and every ingredient of the charge, and intended to and did admit them fully and freely.

In the case of KATO VRS REPUBLIC, (1971) E A 542, the court of appeal for East Africa said;

“The procedure relating to the calling upon the accused person to plead is governed by section 203 of the Criminal Procedure Code. In our view if it can be clearly shown that an accused person has admitted all the ingredients which constitute the offence charged, it is then proper to enter a plea of guilty. The words “**it is true**” when used by a accused person may not amount to a plea of guilty, for example, in a case where there may be a defence of self-defence or provocation

Therefore, the response by the applicant to the charges in this case was insufficient.

For the reasons I have pointed out, I find that there were irregularities in the manner and procedure in what plea was taken in this case. The same did not constitute to an unequivocal plea of guilt, hence a violation of the right of the accused. As provided for under Article 50 (2) (b) of the constitution, 2010 and procedure set out under section 207 a(1) and (2) of the Criminal Procedure Code.

In revising the proceedings in criminal case No 1807 of 2016, I set aside the earlier proceedings and order a retrial. The file to be pealed before the Chief Magistrate, Mombasa law courts for necessary action.

Ruling read, signed and dated this 20th day of December 2016.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Mutua for the state

Applicant in person

C/clerk- Kiarie