



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 43 OF 2015

(From original conviction and sentence in Criminal Case No. 1175 of 2015 of the CM'S Court at KISII by Hon. S.N. MAKILA (RM) dated 27th April 2015)

ENOCK OKARI MWABORA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, **Enock Okari Mwabora**, was charged in the lower court for **personating a public officer contrary to section 105 of the Penal Code**. The particulars were that on diverse dates between January 2015 to April 2015 at Kisii Teaching and Referral Hospital within Kisii County, personated as a nurse, a person employed in the public service.

2. When asked to plead to charge he said: "**It is true.**" And accordingly the plea of guilty was duly entered in Criminal Case No.1175 .of 2015 at Kisii Chief Magistrate's Court by S. N Makila, Resident Magistrate.

He was convicted on his own plea of guilty and there being no previous, records on the accused and having listened to mitigation, the accused was duly sentenced to serve one year imprisonment.

3. He being dissatisfied with the conviction and sentence appealed. He set out two grounds:

i) The trial magistrate erred in law and fact in convicting the appellant on his plea of guilt based on duplex charge.

ii) The trial magistrate erred in law and fact in failing to take into account that the charge as drawn was ambiguous.

Therefore the appellant prays that the appeal be allowed, conviction be quashed and sentence set aside.

4. The appellant's submissions

Miss. Sagwa raised several issues in support of the appeal:

i. That the charge sheet being duplex was defective.

ii. The charge affects the fair trial provisions under Article 50(2) (b) of the Constitution.

iii. *Section 105 of the Penal Code, creates 2 offences. The appellant was not informed sufficiently of the charge he was facing. Therefore, the conviction cannot stand. Even if the facts were true, the question is, to what offence, there are, were the facts relating?*

iv. *The consequence of that whole trial, the plea, could not be said to be unequivocal.*

Therefore, the appellant urge the court to quash the conviction, set aside the sentence and set the appellant free.

5. The Respondent's submissions

Mr. Otieno for the Director of Public Prosecutions opposed the appeal on the following grounds:

i) The appellant's submission has not laid any ground to show that the charge was duplex. Section 105 of the Penal Code creates but a single offence, not two as alleged by the appellant.

The fact that it has (a) and (b) cannot be said to create two offences. There is just one, a misdemeanor. The offence in itself is personating of person employed in public service. Sub-section (a) and (b) of that Section 105, merely illustrate how that offence can be committed.

ii) For the proceedings on page 1 of the proceedings cannot be said to be a violation of Article 50(2) (b). He was informed of the charge with sufficient details to answer to it pursuant to Article 50(2) (b) of the Constitution.

The appellant - the accused – did answer the charge: he said it was true. He pleaded guilty. Facts were read to him and they were unclear (unequivocal) he would, have de..... Therefore the whole process was in confirming it with Article 50 (2) (b).

iii) A charge is duplex where in one charge; there is more than one offence. In this case, there is only one offence of personating persons in public service.

Therefore this appeal has no merit. The plea was unequivocal. And because it was unequivocal, the appeal should be as to the legality of the sentence and the extent of the sentence.

The Respondent urges the court to dismiss the appeal and confirm the sentence of the lower court.

6. ANALYSIS AND FINDINGS:

The issue for determination here is whether the charge to which the appellant was asked to plead to was duplex or not?

From the submissions as put above and from the textual analysis of the relevant **Section 105 of the Penal Code**, the offence is not duplex, it is unitary offence i.e of personating persons in public service. And therefore, having pleaded guilty, volitionally, the consequential conviction and sentence must be upheld.

7. CONCLUSION

Accordingly the appeal dated 11th June 2015 be and is hereby dismissed.

Dated, signed and delivered in open Court this 27th day of November, 2015.

HON. C.B. NAGILLAH

JUDGE

In the presence of:

Emma Okok for the State

Nyawencha hold brief for Sagwe for the Appellant

Omayio -Court Clerk