REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO.81 OF 2013

From original conviction and sentence by the Chief Magistrate (H. N. Ndungu) in Garissa Chief Magistrate's Court Criminal Case No. 1848 of 2012.

ABDUL MOHAMED ABDULRAHMAN……APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGEMENT

Abdul Mohamed Abdulrahman, whom I will call the appellant in this judgement, was accused number two in Garissa Chief Magistrate's Criminal Case No. 1848 of 2012. He was charged jointly with Ali Shani Sakana and Kassim Mohamed Mohamud with giving false information to a person employed in public service contrary to section 129 (a) of the Penal Code. This was the first count and its particulars read that on 15th November 2012 at around 12.00pm at Dadaab Department of Refugee Affairs Offices in Lagdera District Garissa County, jointly informed Mr. Patrick Ongeri, CPL. Siyat Issa, Mr. Ibrahim and other members of the vetting panel, persons employed in the public service as police officers and immigration officers that they had been at Ifo Refugee Camp attending their grandmother's funeral, information they knew or believed to be false, intending thereby to cause the said vetting officers to issue them with a movement pass to travel to Mombasa, an act they ought not to have done if the true facts respecting which such information was given were known to them.

The appellant faced a second count individually of being in possession of an article for a purpose connected to instigation of serious crime involving an organized criminal group contrary to section 3(i) as read with section 4(1) of the Prevention of Organized Crimes Act (Cap. 59). It was alleged in this count that on 15th November 2012 at Dadaab Police Station in Lagdera District Garissa County he was found in possession of a memory card containing video clips Hadiya and Al-Shabaab footage of Al-Shabaab militia carrying out an execution, for a purpose connected to instigation of a serious crime involving an organized criminal group namely the Al-Shabaab.

The appellant was charged jointly with Ali Shani Sakana with residing outside the designated areas without permission from authority contrary to section 25(f) of the Refugee Act No. 13 of 2006. It was alleged that on the same date and place as in count one being Somali Refugees, resided outside Mombasa Kibokoni a designated area without permission from the authority.

On 20th November 2012 the charges were read over to the appellant. He pleaded guilty to all the three counts. The facts were presented by the prosecutor after which the appellant informed the court that the facts in the three counts were correct. The trial court proceeded to sentence the appellant on all the three counts. The appellant mitigated before sentence was imposed by informing the court that he had bought a

second hand phone from someone and he did not check inside; that he was innocent as he did not know the videos were inside.

The appellant was sentenced to 12 months imprisonment in count 1 and 10 years imprisonment in count 2. He was fined Kshs 10,000 in default to serve three months imprisonment in count 3.

The appellant was dissatisfied with the conviction and sentence and has appealed to this court. The appellant had on 4th December 2012 filed what he refers to as "Mitigation Petition Grounds of Appeal". He had listed nine grounds of appeal. To my understanding these can be summarized to one ground that of ignorance to the contents of the memory card.

The appellant through his advocate Mr. C.P. Onono filed on 8th July 2013 a Petition of Appeal with three grounds of appeal which can be narrowed down to one main ground of appeal that the plea by the appellant was not unequivocal.

In his submissions in support of the petition of appeal, counsel for the appellant stated that the trial court did not specify what language the three accused persons were individually conversant with when taking the plea leading to unfair trial; that the particulars of the charge were not sufficiently articulated for the appellant to understand what he was pleading to; that by stating that he bought a second hand phone and did not know what the memory card contained the appellant was pleading not guilty and this negated the earlier plea of guilty; that the facts of each count ought to have been given separately to enable the appellant understand what he was pleading to; that due to the shortcomings in the manner the plea was taken and facts were given this appeal ought to succeed in respect of count two and that the principles laid down in **Adan v. Republic (1973) EA** in respect of taking pleas were not followed.

In response, the learned state counsel opposed the appeal. He submitted that the appellant understood the charges before the trial court because the record clearly shows that the language of communication was English and Somali; that under section 3(i) of the Prevention of Organized Crimes Act the prosecution is only required to prove possession and not what that possession entailed; that by stating that he had bought the second hand phone and did not know what it contained, the appellant was just mitigating and not changing the plea. Counsel further submitted that since mitigation comes after the conviction, a trial court cannot change the record of the plea because at this stage the court is *functus officio.*

Counsel submitted that the plea was taken in line with the principles laid down in the **Adan case** (supra) and that the Al-Shabaab group is a proscribed group under the Prevention of Terrorism Act.

Counsel asked the court to correct the error made by the trial court in not specifying how the sentences should run. Counsel referred the court to **Mairura v. Republic (2009) KLR** on this issue.

I have considered the grounds of appeal, submissions and the authorities cited by each party. The issue on appeal is simple; that the appellant did not understand the proceedings before the lower court due to language of communication as a result of which he pleaded guilty to matters he did not understand and this made the plea equivocal.

I have read the proceedings in the lower court. I have noted that the court record shows three languages: English, Kiswahili and Kisomali. After the charges were read to the appellant, the court record indicates that the appellant responded in Kisomali: **It is true**. This is in reference to all the three counts. The facts were presented after which the appellant stated that the facts in respect to counts 1, 2 and 3 were correct.

I find that there is no merit in claiming that the appellant did not understand the language of the court. He must have understood Kisomali. Indeed this is the language this court has been using to communicate with the appellant. The appellant understood the charges and the facts as presented.

The facts were not separated for each count and the counsel for the appellant is correct in stating this. However, my reading of the facts shows that all the three counts were covered in the facts as given. In my view the appellant understood the facts as they related to each count. I find no merit in the claim that the

appellant did not understand the facts.

On the recovered memory card, I agree with counsel for the appellant that there was need to play the video clips during plea taking. I take the view that the nature of count two is such that it requires the playing of the video clips during the proceedings for the facts of the case to be complete. This ought to have been done in the presence of the appellant before he answered to the charges. This would have showed the contents of the videos and given the appellant the opportunity to know all the facts before he pleaded to the charges.

I have noted that the appeal was biased in favour of challenging count two. I will deal with counts 1 and 3 in the course of this judgement.

I however find that I have issues with count two. Justice dictates that an accused person be accorded a fair trial and that requires courts to do all that is within their power to ensure an accused person pleads to well-articulated charges. Failure to play the video clips in court in the presence of the appellant during plea taking was prejudicial to him. To correct this error, a retrial is necessary in this case.

In determining what case ought to be retried, courts have developed principles to guide them. These are found in decided cases including **Bernard Lolimo Ekimat v. Republic Criminal Appeal No. 151 of 2004** where the court stated as follows:

> ***"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."***

Courts have been of the view that a retrial will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant or give the prosecution an opportunity to fill gaps in their case (**see Muiruri v. Republic [2003] KLR 552**).

My understanding of this is that retrials are necessary where the original trial was illegal or defective; where interest of justice requires it; where no injustice will be occasioned to the appellant and where the circumstances of each case dictate that a retrial is necessary (**see Patel Ali Manji v. Republic [1960] EA 343**).

I think I have said enough to demonstrate that a retrial is necessary in this case. Although I have found that the appellant understood the proceedings in the lower court, I take the view that he was prejudiced by failure to play the video clips in respect to count two.

This appeal succeeds in respect of count two but only to the extent that the appellant shall be retried in respect of that count only. The court of appeal ordered a retrial on a case where the plea was found wanting (**see Mutungu v. Republic in Criminal Appeal No. 127 of 2006**). The case against the appellant in respect of count two shall therefore be subjected to a retrial before a different magistrate.

In respect of counts 1 and 3, I note that the appellant was sentenced on 20th November 2012. The trial magistrate did not state the manner the sentences should run. I will give the appellant a reprieve and commute the sentence to the time served in respect of counts 1 and 3. Whatever balance of the sentence in counts 1 and 3 is remaining shall be and is hereby set aside and the appellant set free in respect thereof. For the avoidance of ambiguity, the appellant is set free is respect of count 1 and count 3. He shall however be retried by a different court than the one that tried him initially in respect of count 2. Those are the orders of this court.

Dated, signed and delivered this 16th day of January 2014.

S.N.MUTUKU

JUDGE