REPUBLIC OF KENYA

IN THE HIGH COURT OFR KENYA AT MURANG'A

HIGH COURT REVISION NO. 7 OF 2014

STANLEY NJOROGE KAMANDE…….……APPLICANT

VERSUS

REPUBLIC …….…….RESPONDENT

RULING

By a letter dated 17th January, 2014 filed in court on 20th January, 2014, the applicant sought to have the record in **Murang'a Chief Magistrate's Court Criminal Case No. 858 of 2013** brought before this court for purposes of examining the proceedings therein with a view to having the conviction and sentence meted out against the applicant set aside, reversed or quashed. The applicant invoked the powers of this court under **section 362** and **section 364(1) (b)** of the **Criminal Procedure Code.**

The record in the **Chief Magistrates Court Criminal Case No. 858 of 2013** shows that on 14th November, 2013, the applicant was charged with two counts of disobedience of lawful orders contrary to **section 131** of the **Penal Code**. According to the particulars of the first count, the applicant failed to appear before the chief magistrate on the 24th day of September, 2013 in **criminal case number 2691 of 2009** where he is the accused person, apparently having been released on bond pending his trial. In the second count, the applicant failed to appear before the chief magistrate on 26th September, 2013 in **criminal case number 2690 of 2009** where he was the accused person but was again out on bond pending his trial. By failing to appear before the chief magistrate's court, so it was claimed, the applicant failed to honour the lawful orders of the court. The applicant is recorded to have pleaded guilty to both counts.

In his submissions, counsel for the applicant argued that the plea was not unequivocal because, firstly there is no indication on the record that the applicant understood the Kikuyu language in which the charges were read and secondly, the applicant pleaded to the charges only but not to the facts. In any event, so argued the applicant's counsel, the state counsel did not read out the facts to the court but only stated that the facts were as per the charge sheet.

Counsel also argued that the charges against the applicant were defective in the sense that the orders which the applicant is claimed to have disobeyed were never stated anywhere in the charge sheet and that it is only the case numbers which were indicated.

Counsel argued that the applicant was never given a fair hearing because on two different occasions, more particularly on 21st November, 2013 and 28th November, 2013 he was denied the opportunity to change plea despite his application to do so.

It was the applicant's case that there is no reason why the applicant was charged in a case different from

the ones in which the orders he is alleged to have disobeyed were issued and more so when those cases were still pending in court for hearing and determination.

Mr Naulikha for the state opposed the application and stated in the main that a party that has a right of appeal does not have the benefit of criminal revision **section 364** of the **Criminal Procedure Code**. According to the counsel criminal revision by its very nature is an administrative mechanism and it cannot be substituted for an appeal; in the counsel's view criminal review powers under **section 365 of the Criminal Procedure Code a**re limited.

As far as the language of the court is concerned, the state counsel stated that appellant understood Kikuyu language and he even mitigated in this language. He said further that the facts were read to the applicant as required and that he pleaded to them. On change of plea, counsel argued that the applicant could not change plea after he had been convicted.

I have duly considered both counsel's submissions.

The record indicates that when the charges were read to the applicant he pleaded guilty to both counts. When counsel was given the opportunity to state the facts, he began by saying the facts were as per the charge sheet and that there were warrants of arrest issued against the applicant in the cases against him for absconding trial. The state counsel proceeded to state that the applicant had abused his right to bail by absconding. The counsel said that it had been a tall order to trace the whereabouts of the applicant and arrest him.

After the facts were read, if what the counsel stated can be taken to be the facts, the record indicates that a plea of guilty was entered; there is nothing to suggest that the applicant confirmed facts to be correct or that he was given any opportunity to answer to the particulars as stated by the state counsel before the plea of guilty was entered. Instead he was asked to mitigate.

In his mitigation, the applicant said that he had been sick and traumatised after having been diagnosed to be HIV positive and that it is only after counselling that he had come back to his senses.

Before sentencing the applicant, the learned magistrate sought time to peruse the files in which the applicant had been charged and in which he was alleged to have disobeyed the court orders. On 21st November, 2013, the applicant is recorded as having applied to change his plea. The court stated in response to the applicant's application that the state counsel was in the High Court while the prosecutor was attending a seminar.

On 28th November, 2013, the state counsel is on record as having asked the court to take its time to counter check the records in the criminal files in which the appellant had been charged so that whatever orders the court was going to issue would be consistent with any orders issued in those respective files. On the same date the appellant revisited his application to change plea. The state did not respond to this application but the court, on its own motion, indicated that the applicant had already pleaded guilty and was going to be sentenced on 10th December, 2013.

The applicant was finally sentenced on 24th December, 2013. In sentencing the applicant, the learned magistrate said that she had read the record and the proceedings in criminal case number 2690 of 2009 and 2691 of 2009 and confirmed that the applicant had been charged with various counts of uttering documents without authority.

The learned magistrate noted that in criminal case number 2690 of 2009, the applicant failed to attend court on 2nd May, 2013 and that a warrant of arrest was issued; apparently, that warrant was subsequently lifted and the applicant was to appear in court for the hearing of his case on 19th June, 2013. On that day, the warrant was extended because once again the applicant did not appear; it is not clear why the warrant was extended yet it had earlier been lifted. Be that as it may, this particular warrant was lifted again after the applicant's counsel explained why the applicant was not in court. His case was scheduled for hearing

on 7th August, 2013; on the material date the applicant did not appear and perhaps because of the applicant's negative trend, the court not only issued fresh warrants of arrest but also cancelled the applicant's bond terms. On 14th November, 2011, the court ruled that the applicant, who had apparently been arrested, will remain in custody pending the hearing and determination of the two cases against him. The applicant's bond having been cancelled and the applicant remanded in custody, the sureties were accordingly discharged.

Having considered these facts, the learned magistrate's assessment of the applicant was that he was "a slippery person who can easily abscond and go very far in order to thwart justice". His explanation that he was sick was not supported by any evidence, so the learned magistrate established. In the circumstances, the learned magistrate held that the applicant would rather be retained in custody until his two cases are determined and on that ground she sentenced the applicant to serve two years in prison on each of the two counts with both sentences running concurrently.

Section 131 of the **Penal Code** under which the applicant was charged reads as follows:

> ***131. Everyone who disobeys any order, warrant or command duly made, issued given by any court, officer or any person acting in any public capacity and duly authorised in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of the disobedience, to imprisonment for two years.***

I understand the tenor of this provision of the law to mean that it is inappropriate to charge any person under it if any other penalty or mode of proceeding is prescribed for the alleged disobedience. The disobedience of the lawful order, which the applicant was charged with, if it can be so described, was that he absconded court and thereby breached the bail or bond terms. The consequences of his actions or omissions were that his bond was cancelled and the sureties discharged. This is clear from the learned magistrate's remarks while sentencing the applicant.

The relevant provisions of the law on bail which are pertinent to these proceedings are **sections 123** and **124** of the **Criminal Procedure Code**; **section 123 (1)** states as follows:

> ***123. (1) When a person, other than a person accused of murder, treason robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:***
>
> ***Provided that an officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.***

Under the Constitution of Kenya 2010, every offence including capital offences are now bailable and to some extent this provision of the Criminal Procedure Code has been overtaken by times.

Section 124(1) of the Code is to the effect that though bail is available pending trial, it is only conditional upon the applicant meeting conditions that may be prescribed by the court or a police officer. It states:

> ***124. (1) Before a person is released on bail or own his own cognisance, a bond for such a sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue to attend until otherwise directed by the court or police officer.***

The conditions prescribed by the court or the police officer are meant to ensure that the applicant attends court whenever he is required to and failure to comply with those conditions obviously leads to some form of penalty.

It is apparent in the application herein that though the appellant was entitled to be admitted to bail pending his trial and indeed he had been so admitted as a matter of his constitutional right, that right was withdrawn when he failed to comply with the conditions for bail. The withdrawal of that right as evidenced by the cancellation of the bond; the discharge of sureties; and the forfeiture of security where any is deposited, appear to me to comprise what may be understood as the alternative penalty or mode of proceedings contemplated under the proviso to **section 131** of the **Penal Code**.

It follows that to subject the applicant to that penalty or alternative proceeding and to proceed to charge and convict him in separate proceedings would amount to punishing him twice for the same mistake. That course would not be proper in law.

The second issue which merits consideration in this decision is whether, assuming that the charges against the applicant were proper, he was accorded a fair trial. In this regard, considering what appears on record, one is bound to ask whether the plea was unequivocal. Although the applicant entered a plea of guilty to the two counts against him, there is no evidence that he confirmed the correctness of the statement of facts which was read to him pursuant to the proviso to **section 207(2)** of the Criminal Procedure Code before he was convicted. In my humble view, the plea was therefore not unequivocal.

In the case **Adan versus Republic (1973) E.A.445,** the Court of Appeal set out the procedure for taking plea where the accused pleads guilty. The court said at page 446:

> **When a 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 those 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 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.**

The court proceeded to explain the importance of the statement of facts; it said that firstly, it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and secondly, it gives the magistrate the basic material on which to assess the sentence. The court noted that it is not unusual that an accused person, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty; it is for this reason that it is essential for statement of facts to precede the conviction.

In the case under consideration, the court did not enter any formal plea after the charge and the essential ingredients thereof were read to the applicant. The court only entered the plea of guilty after the statement of facts had been read out without, as noted, any opportunity having been given to the applicant to refute or explain the facts or add any relevant facts.

With due respect to the learned magistrate, this obviously was a wrong approach which, no doubt, occasioned miscarriage of justice against the applicant. A conviction based on such a procedure cannot be said to be safe.

The second limb of this aspect of whether the appellant was accorded a fair trial is the refusal by the trial court to allow him to change his plea. It is noted from the record that on more than one occasion the applicant asked the court to read to him the charges so that he could change plea. The court rejected his application and proceeded to sentence him.

In the case of **Kioko versus Republic (1983) KLR 289** the Court of Appeal (Madan, Kneller and Hancox JJA, as they then were), citing the decision in **S (an infant) versus Manchester City Recorder (1963) 3 ALL ER 1230(HL)** said that an accused person may change his plea at any time before sentence. It is left to the discretion of the court to decide whether justice requires that that should be permitted.

While rejecting the applicant's application to change plea, the learned magistrate gave the reason that the accused person had already pleaded guilty to the charges against him as the justification for the refusal. It is apparent that she misapprehended the law in this regard as a plea of guilty and indeed a conviction cannot be a bar to change of plea. In view of the decision in the **Kioko case** (supra), the learned magistrate had the discretion to allow the applicant change his plea, but the reason she put forth for refusal is contrary to the position of the law. Her refusal denied the applicant the right to a fair trial.

For the foregoing reasons the applicant's application for criminal revision is merited; and where such an application is so merited, this court can assume its appellate jurisdiction and exercise its powers under **sections 354, 357** and **358** of the **Criminal Procedure Code** which empowers this court to, among other things, reverse any finding or sentence by the magistrate's court and discharge or acquit the accused person. I will proceed accordingly and quash the applicant's conviction and set aside the sentences imposed upon him in the **Murang'a Chief Magistrates Court Criminal Case No 858 of 2013.**

For avoidance of doubt, the applicant will remain in custody pending his trial in the **Murang'a Chief Magistrates Court Criminal Cases Numbers 2691 of 2009 and 2690 of 2009** as ordered by the trial court.

Dated, signed and delivered in open court this 10th April, 2014

Ngaah Jairus

JUDGE