



IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. 62 OF 2014
(FORMERLY KISII HCCRA NO. 95 OF 2013)

BETWEEN

JOHN GISIRI MWANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 485 of 2013 at Principal Magistrates Court at Kehancha, Hon.A. P. Ndege, Ag PM dated on 3rd September 2013)

JUDGMENT

1. In the subordinate court **JOHN GISIRI MWANA** was charged with the offence of conducting an unregistered private school contrary to **section 50(1)** as read with **sub-section 4(a)** of the **Basic Education Act, 2013**. The particulars of the charge were as follows;

On 3rd day of September 2013 at Kehancha Juu in Kuria West District within Migori County was found conducting a Private School namely Bridge International Academy without a registration certificate.

2. He was arraigned in court on 3rd September 2013 and after the charge was read to him, he pleaded guilty. The facts as read by the prosecutor were as follows;

On 3rd September 2013, at Kenhancha Juu within Migori County, accused found conducting a private school namely Bridge International Academy without registration certificate. The Inspector of School was on a routine check with police officers from Kehancha Police Station. They confirmed the same and arrested the accused person and charged him with the offence.

3. The appellant admitted to the facts and the conviction was entered. In his mitigation the appellant stated as follows;

I was there to head the school. I have been employed there as a Kenyan looking for employment by the company – Bridge International Company under co-founder Jay Kelman. It is a countrywide institution. Most of our academies have commenced operation. We have no provisional certificate. We collect fees through the bank.

4. The learned magistrate imposed a fine of Kshs 750,000 in default a term of 6 months imprisonment. He now appeals against the conviction and sentence. Mr Wekhomba, counsel for the appellant, submitted that the charge was based on a non-existent offence and that the appellant's mitigation suggested a change in plea hence the guilty plea out to have been changed.
5. Ms Owenga, learned counsel for the State, conceded the appeal on the ground that the appellant's mitigation suggested a change of plea which the learned magistrate failed to consider. She however urged the court to order a re-trial.
6. The charge as framed refers to **section 50** as read with **sub-section 4(a)** of the **Basic Education Act, 2013**. **Section 50** of the **Act** states as follows;

50. (1) A person shall not establish or maintain a private school unless it is registered under this Act.

(2) No private school shall be registered if-

- a. *the proprietor is disqualified from being a proprietor by reason of Article 10 or Chapter Six of the Constitution;*
 - (b) a teacher employed in the school is not registered by the Teachers Service Commission;*
 - (c) the school premises, or any part of those premises, are unsuitable for a school; or*
 - (d) the proprietor or manager has been convicted of any crime against children under the Sexual Offences Act and Counter Trafficking in Persons Act. [Emphasis mine]*

7. The particulars of the charge were clear that in so far they alleged an offence prescribed under **section 50(1)** of the **Basic Education Act, 2013** which is establishing or maintaining a private school which has not been registered. However, "**sub-section 4(a)**" of the **Act** referred to in the charge does not exist hence the charge was defective in that respect.
8. Likewise the sentence of Kshs 750,000.00 imposed on the appellant was illegal as it is not provided for under the **Act**. **Section 92** of the **Act** dealing with general penalties states as follows;

92. Any person who commits an offence under this Act for which no other penalty is provided is liable: -

(a) in the case of a first conviction, to a fine not exceeding two hundred thousand shillings or a term of imprisonment not exceeding twelve months, or both; and

(b) in any other case, to a fine not exceeding three hundred thousand shillings or a term of imprisonment of not exceeding twelve months or both.

9. There is evidence that the appellant was maintaining a private school without registration hence a retrial would be appropriate. I allow the appeal, set aside the conviction and sentence and direct that the appellant appear before the court in Kehancha Senior Residents Magistrates Court on **22nd December 2014** to plead to fresh charges.

10. The appellant shall be refunded the fine paid to the extent of **Kshs. 700,000.00** while the balance of **Kshs. 50,000.00** shall be deemed to be the cash bail to secure his attendance in court.

DATED and DELIVERED at MIGORI this 9th day of December 2014

D.S. MAJANJA

JUDGE

Mr Wekhomba instructed by Murimi, Ndumia, Mbago & Muchela Advocates for the Appellant.

Ms Owenga instructed by the Office of the Director of Public Prosecutions, for the respondent.