



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL REVISION NO 21 OF 2013

(From Original Conviction and Sentence by Hon. Mr. P.N. ARERI, PM in BGM TRC. No.744 of 2013)

ABRAHAM WAFULA

.....

APPLICANT

Versus

REPUBLIC

.....

RESPONDENT

RULING

Convicted on own plea of guilty

[1] In the forenoon of 7th May, 2013, the Applicant was arraigned before Hon. Martha Agutu, RM in Bungoma charged with three (3) counts of traffic offences. He pleaded not guilty to all the charges and the case was fixed for hearing on 28th May, 2013. Later on the same day at 2.45 pm, the Applicant was produced before Hon. P.N. Areri, PM at Bungoma when the Applicant requested the charges to be read over to him afresh. From the record the trial court recorded:

“CRO & E in Kiswahili who replies”

“Ct I Ni kweli (true)”

“Ct II Ni kweli (it is true)”

“Ct III Ni kweli (it is true)”

[2] The trial court then entered a plea of guilty on behalf of the Applicant in all the three counts. It then recorded:

“Pros-Facts as the charge sheet”

[3] The trial court then recorded:

“Accused-The facts are true”

[4] Ultimately, the trial magistrate discharged the Applicant of the charge in count I for it was based on non-existent provisions of the law, but convicted the Applicant on count II and III. The sentence was then meted out on the Applicant; to pay a fine of Kshs. 20,000 in default to serve six

month's imprisonment in each count; the sentences were to run concurrently. The Applicant then applied for Revision under Article 50(2) (q) of the Constitution.

Revision jurisdiction

[5] The Court in the case of **BGM HCCR REVISION NO 27 OF 2013 MARTIN MARUTI KITUYI v REPUBLIC** rendered itself accordingly on the Revision jurisdiction of the High Court in the following manner:

[11] Under Article 50(2) (q) of the Constitution, Appeal and Revision are part of the right to fair trial in a criminal proceeding. Both are constitutional processes for enforcement of legal relief. Except, the court must consider an Appeal as a matter of right whilst Revision under Article 165 (6) and (7) of the Constitution is a matter for the discretion of the court. In the new constitutional structure, Revision is a constitutional relief only that sections 362 to 367 of the CPC are merely the statutory expression of, and the procedural prescriptions attending the remedy of Revision. Therefore, the very nature of Revision as a discretionary remedy explains the policy underpinnings of section 364 (5) of the CPC; that Revision should not be a substitute for an Appeal whatsoever or insisted upon by a party who has not filed an Appeal where one was provided for. Revision primarily serves to put right instances where a finding, sentence, order or proceedings of a lower court are tainted by incorrectness, impropriety, illegality or irregularity. Those words are key pillars that define the Revision jurisdiction. Broadly put, whenever the integrity of any proceeding is put to question, the Revision jurisdiction of the High Court comes into play and may disturb the decision of the lower court purely in the best interest of justice.

[12] Having said that, section 364(5) of the CPC is not intended to preclude the High Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of Appeal which he did not utilize, and is not intended at all to derogate from the wide powers conferred by Article 165 (6) and (7) of the Constitution, and section 362 and section 364 of the CPC. This should explain what the word "insistence" in section 364 (5) entails. It should be understood that the Revision jurisdiction of the court can be set in motion by the court suo motu, even on information provided by the aggrieved party who had the right of Appeal but did not Appeal. On this explication of those sections see the cases of R v Ajit Singh [1957] E.A 822 and Walome v R [1981] KLR 497.

[13] The exercise or not of the discretion of the court should, therefore, depend on the circumstances of each case, and the nature of the things the court is being asked to probe and put right. Those which are clearly illegal as to constitute a breach of fundamental rights or freedoms guaranteed by the Constitution should ordinarily attract the exercise of Revision jurisdiction of the court unless they are matters which the court feels should be left for a claim for damages. But where the aggrieved party is proposing an Appeal from his pleadings, then the court should hesitate to exercise the discretion under Revision jurisdiction. In making this proposition, I am well aware of section 364 (1) (a) of the CPC which allows the High Court in a Revision cause to exercise the powers conferred on it as an Appellate Court in sections 354, 357 and 358 of the CPC. Except, it must be understood that those powers will only come to bear after the court is satisfied that the case is fit for the exercise of discretion under Revision jurisdiction. On that basis, there should be no room to read a contradiction in what I have said.

[6] I am convinced that this case is one of those cases ...which... clearly...constitute a breach of fundamental rights or freedoms guaranteed by the Constitution and should ordinarily attract the exercise of Revision jurisdiction of the court... I will exercise my discretion and consider the merits of the application.

The question of taking plea

[7] I have perused the proceedings and the question of how the plea was taken eminently emerges. Taking of plea in a criminal trial is not an abstract concept or a mere technicality. It is a substantive requirement of the law and an integral component of fair trial. That is why it is done in a particular manner which adheres to defined prescriptions and principles in law in order for it to produce desired results; the plea. If the plea is taken properly in accordance with the law, then a plea of guilty is said to be unequivocal and cannot be impeached. A conviction on such plea is, therefore, safe. But, what are the essential steps that need be taken in plea taking?

[6] The start-line is when the trial court enquires as to the language the accused understands and which he wishes to be used in the proceeding. That fact must be specifically recorded by the court and the answer given thereto for it is a constitutional requirement under Article 50 and more specifically (2) (b) and (m) of the Constitution. There is legion authority from the Court of Appeal on this issue which I need not multiply. I have noted, however, with great trepidation that most trial courts just record the translation or the reply by the accused to the charge in some language, presumably, understood by the accused person. That practice is not intractable and could be avoided easily. It should be discouraged. Instead, trial courts should adopt the simple, clear and proper practice where an inquiry as to the language the accused understands is made and his preference recorded appropriately.

[7] The second phase in plea taking entails the reading over of the substance of the charge and explaining every essential element of the offence to the accused person in the language he understands. The importance of the preliminary enquiry as to the language the accused understands and wishes to be used in the proceedings then becomes absolutely necessary here and as it will clearly show the language he understood. Consider for a moment, if the following recording by the trial magistrate in a shortened, terse and abbreviated form conforms to the requirement of the law:

“CRO & E in Kiswahili who replies”

It does not.

[8] All essential phases in the process of plea taking were described with absolute simplicity and clarity in the case of **ADAN V. REPUBLIC [1973] EA 445** that:

“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 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.

The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, 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 the statement of facts to precede the conviction.

[9] In the instant case, were the facts stated by the prosecution as required by the law? I think not. The prosecutor just stated:

‘Facts as the charge sheet (sic)’

That was not sufficient in law for the accused person to be said to have understood the facts as stated by the prosecution. Remember the statement of facts serves vital purposes in the trial as enunciated in the **Adan case (supra)** that:

The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, 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 the statement of facts to precede the conviction.

[10] A conviction should only be entered on a plea of guilty; after the facts are rendered by the prosecution in full to the accused; the accused has been afforded an opportunity to dispute the facts; has replied to those facts; and the reply thereto has been duly recorded by the trial court. The trial magistrate herein did not satisfy himself that the plea of guilty was really unequivocal for the facts were never stated to the Appellant as by law required. See the case of **BGM HCCRA NO 162 OF 2011 MARY NASIMIYU WANYONYI v REPUBLIC**

[11] Accordingly, the regularity of the proceeding is in question, and as such, *the Revision jurisdiction of the High Court comes into play and may disturb the decision of the lower court purely in the best interest of justice.* I am inclined to exercise my discretion and revise the conviction and sentence meted out in this case. I hereby set aside the conviction and sentence imposed on the Applicant. He shall be set to liberty forthwith unless otherwise lawfully held in custody.

Dated, signed and delivered at Bungoma this 22nd day of July, 2013

F. GIKONYO

JUDGE

In the presence of:

Mr. Kamau for the State

Applicant in person present

COURT: Ruling read in open court.

F. GIKONYO

JUDGE