REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Criminal Appeal 104 of 2008

REUBEN MWASIA MAUNDU …… APPELLANT

VERSUS

REPUBLIC ……...…… RESPONDENT

(Being an appeal from the Judgment of Honourable Mr. R. Kariuki RM dated 17th February 2006

in Makindu PMCR.C No. 219 of 2006)

JUDGMENT

1. This Appeal is conceded by the learned Senior Principal State Counsel for reasons that although the Appellant was said to have pleaded guilty to the charge, the language used in taking the plea is not clear from the record.

2. I have read the record of 17/2/2006 and clearly the language used is indicated as Kiswahili and the record for avoidance of doubt reads as follows:-

"**Charge read over and explained to the accused and explained in Kiswahili who plead as herein (sic)"**

3. This is a verbatim record in the original file although the typed copy erroneously states that the language was "**Kisumu"!**

4. That point of concession cannot be sustained for the obvious reason that the learned trial magistrate fully complied with the law as relates to the language used in the taking of pleas. – See **Adan vs R (1973) E.A. 445.**

5. Learned Senior Principal State Counsel also raised another issue; that the facts did not disclose the offence for which the Appellant was charged. The offence according to the charge sheet was that of arson contrary to section 332 (a) of the Penal Code. The particulars were that "**on 9/2/06 at about 3.00 p.m. in Makueni District, Mtito Andei Division, Mtito Andei Location, Kikwasumi Village in Eastern Province, willfully and unlawfully set fire to a dwelling house belonging to KANINI NDAMBUKI."**

6. The facts as read out and admitted by the Appellant were as follows:-

"**Prosecutor: On 9/2/06 at around 3.00 p.m. at Kikwasuni village Mtito Andei Location, Makueni District of Eastern Province, the accused person had been given keys by complainant who they had**

met at Mtito Andei, the accused went direct to the house and entered, the accused left a daughter of complainant and took 5 minutes in the house and the daughter of complainant saw the house smoking and later saw fire burning the house for which house burned and nothing was salvaged. House hold items value at 467,150/= were destroyed. The complainant got information the house had been burned and went to report to the police station and found the accused had already reported he had burned the house and was in custody and was later charged with the offence." ***(emphasis added).***

7. I cannot understand why the facts do not disclose the offence when two facts are looked at properly;-

   i. the Appellant is the one who reported to the police that he had burnt the house;

   ii. the Appellant admitted before court that those facts were correct.

8. Again the point made in concession cannot be upheld.

9. Having so held however, a more serious anomaly appears from the proceedings of 17/2/2006 when the plea was taken. I have read the original record of court and clearly the Appellant never pleaded to the charge although he later admitted the facts. In **Adan** (supra) it was held inter-alia that once the charge and all essential ingredients have been read out to the accused person in a language he understands, "**the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded."** In the instant case all that is recorded after the charge was read was "**the accused … who pleads as herein"** and then the facts by the prosecutor are set out. The admission and guilty plea are completely missing and therefore in fact no proper plea was taken and the conviction and sentence were vitiated ab initio. I therefore agree with learned Senior Principal State Counsel, but for different reasons, that the Appeal must be allowed and the conviction quashed and sentence set aside.

10. No retrial has been sought but in my view, the offence was serious and was admitted. It would serve the interests of justice if the Appellant is retried as it is also not denied that the complainant and her daughter are well known to the Appellant and can be traced.

11. In the event, the Appeal is allowed but the Appellant shall be retried at Makueni PM's Court and in the meantime will be held in custody pending appearance before that court.

12. Orders accordingly.

Dated and delivered at Machakos this **13th** day of **May** 200**9**.

ISAAC LENAOLA

JUDGE

In presence of: **Mr O'Mirera for Republic**

Appellant: present

ISAAC LENAOLA

JUDGE