



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
CRIMINAL APPEAL 63 OF 2009

(From the original conviction in RM'S Court at Iten in Criminal Case no. 180/2009 by B.N.MOSIRIA (RM))

ALIO ALI SUGA:.....APPELLANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGEMENT

The appellant **ALIO ALI SUGA** was charged with and convicted of transporting four (4) tones of podo timber in motor vehicle registration number **KBA 800G ISUZU** lorry without a permit from the Director of Forest Service contrary to section 52(1) of the Forest Act No.7 of 2005: He was jointly charged with two others. He also faced a second count of failing to comply with the conditions of a license contrary to section 54 (1) (b) of the Forest Act No.7 of 2005. The Appellant's co-accused persons denied the commission of the offences in count II but the proceedings in respect of the Appellant who was the first accused show that he denied count I but admitted having committed the offence in count II. The said proceedings also show that the "charge read over and explained to the accused in a language he/she understands" but the language is not shown or stated. The Appellant was convicted on count II and sentenced to pay a fine of Kenya shillings one hundred thousand or to serve a term of twelve months imprisonment in default. No mention is made of what happened to proceedings in respect of count I that the Appellant denied.

The Appellant has now preferred this appeal and raised the grounds that the proceedings leading to the Appellant's conviction were defective in substance, that a person other than the presiding magistrate is not empowered in law to record any proceedings in a court file and particularly that a charge has been read out and/or explained to the accused person. The further grounds are that no lawful plea was read or taken before the Learned Magistrate and further the said magistrate erred in law and fact in allowing a court clerk to record proceedings particularly on such a substantive issue touching on the taking of plea; each of the two counts which the Appellant was charged with ought to have been read to him separately and his plea entered in respect of each of them separately; the Learned Magistrate erred in law and fact in allowing the facts relating to two counts to be read together contrary to the law. There are other grounds of appeal that the learned magistrate erred in law and fact in allowing facts relating to two separate and distinct charges relating to different accused persons to be read together which was not only unlawful but likely to incriminate the Appellant and prejudice his constitutional right to a fair hearing in any future proceedings. The proceedings were conducted in a language that the accused did not understand and the

purported proceedings leading upto the Appellant's conviction were unlawful, illegal null and void and breached the Appellant's constitutional right to a fair trial. The appellant then adds other grounds that the charge was not read and explained to the Appellant in the manner prescribed by law and there was no proper recording of this fact; the process of taking the plea leading upto the Appellant's conviction was defective in substance and finally that the sentence was manifestly excessive.

At the hearing of the Appeal before me learned counsel for the Republic Mr. Chirchir easily conceded the appeal submitting that the trial magistrate did not indicate the language spoken and secondly that the charge in count two was neither read to the accused person nor did the Appellant plead to it. He did not support the conviction saying that the same was wrongful.

In considering this appeal I will start at the point that the proceedings were conducted in a language not understood by the Appellant. The proceedings do indicate that the same were conducted in Kiswahili. The first issue that arises is that that part of the proceedings was written down not by the presiding magistrate but by someone else, most likely the court clerk. All the presiding magistrate did was to tick the language Kiswahili which was listed amongst three other languages being English, Keiyo and Marakwet. This part of the proceedings continues "CRO & E to the accused in a language he/she understands who in reply state:" That from the original handwritten proceedings is not in the handwriting of B.N. Mosiria the presiding magistrate. I take "C.R.O. &E" to mean Charge Read Over and Explained but I must state here that this is an integral/part of the proceedings as relates to plea taking and précis has no place here. What is pathetic is that it is done by the court clerk and not the magistrate. That omission by the magistrate to record that part of the proceedings and the commission by the clerk of recording that part of the proceedings must render such proceedings a nullity and I so find. There is no indication that the Appellant stated that he understood the language of Kiswahili used by the court or that he opted that the said language be used. The matter of taking plea and the manner of so doing has been discussed variously in the courts and suffice to quote here only three cases.

ADAN –VS. REPUBLIC (1973) E.A.445

BAYA –VS REPUBLIC (1984) KLR 657

LISITI VS REPUBLIC (1977) KLR 143

The procedure is set out to be that the charge and all the ingredients of the offence are read out and explained to the accused person in his language or in a language that he understands; that the accused's own words should be recorded and correctly translated into English and then carefully recorded; that the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts; that if the accused does not agree with the facts or raises any questions of his guilt his reply must be recorded and change of plea entered; If there is no change of plea a conviction should be recorded and a statement of facts relevant to the charge together with the accused's reply should be recorded and so that there is no doubt as to the plea the facts are explained so that the accused person admits or denies them in which latter case then the plea may be changed.

In the case under consideration it is clear that the above procedure was not adhered to. Not only was it not stated that the accused opted for Kiswahili to be used or that he stated that he understood the said language, it was further not shown that the second count was read to the accused person. That is fatal and on that ground the appeal must succeed. As concerns the sentence, even if the plea was properly taken, which I find and hold that it was not, the sentence meted out was excessive the Appellant being a first offender. This however becomes an academic point as once it has been found that the proceedings were a nullity nothing more moves. In the circumstances the court hereby allows this appeal quashes the conviction and sets aside the sentence. There will be orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF OCTOBER, 2009.

P.M.MWILU

JUDGE.

IN THE PRESENCE OF:-

Mr. Chemoyai H/B for Lagat for Applicant

Mr. Omutelema H/B for Chirchir for State

Appellant - Present.