REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 556, 557, 558 & 559 of 2006

YANG WEIMIN……..…….…….…….1ST APPELLANT

CHEN YI…….…..…….…….2ND APPELLANT

AGGREY NJANDI…….…….…….3RD APPELLANT

XIANG XIAOMIN…….....…….…….4TH APPELLANT

-AND-

REPUBLIC ……..……..…..…….…..RESPONDENT

(*Appeal from sentence imposed by Resident Magistrate Mrs. E.W. Mbugua on 22nd June, 2006 in Criminal Case No. 5773 of 2006 at Makadara law Courts*)

JUDGEMENT

The appellants herein were charged with the offence of dealing in scrap metal without a licence, contrary to s. 3(1) and (2) of the Scrap Metal Act (Cap. 503, Laws of Kenya

e particulars were that, on 19th June, 2006 along Road C in the Industrial Area, Nairobi they jointly, and unlawfully, dealt in scrap metal without licence.

The Court's record shows that "The substance of the charge and every element thereof [was] stated by the Court to the accused person in the language that he/she understands," and that each pleaded guilty. The record shows that the accused made mitigation address; it states:

"The accused are remorseful that it happened. They were foreigners. They did not know a licence was required. They genuinely bought the scrap metal".

After considering the mitigation address, the learned Magistrate fined each appellant in the sum of Ksh.10,000/=, and in default, sentenced them to a two-month term of imprisonment each.

In the grounds of appeal, it is asserted that the charge as laid, was fatally defective, and that the particulars as stated did not support the charge. It is stated that the plea as entered was not unequivocal, as the particulars were not enumerated, and these only emerged after the plea had been taken. It was stated that the trial Court had erred in visiting the *locus in quo* and in admitting hearsay evidence, and then on

that basis making orders of forfeiture.

It was urged that the order of forfeiture was wrongly made, since it had not been applied for by the prosecution; and due to the fact that the forfeiture order was made only as an afterthought after the sentence and right of appeal had been pronounced by the Court. It was stated that the sentence imposed by the trial Court had been "*manifestly excessive, oppressive…."*

At the very beginning of the hearing of this appeal, learned State Counsel ***Mr. Makura*** stated that the State would concede, but then seek a retrial.

Firstly, ***Mr. Makura*** urged, the appellants had not pleaded guilty unequivocally: they had only said. "*It is true*", and then the facts were not read out, but it was recorded: "*facts as per charge sheet*".

Mr. Makura quite properly, with respect, referred to the precedent-setting Court of Appeal decision, ***Adan v. Republic*** [1973] EA 445, and submitted that the trial Court had not complied with the recognized trial procedure. In that case the said procedure is clearly set out (p.445):

" ***(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language he understands;***

"***(ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;***

"***(iii) 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;***

" ***(iv) if the accused does not agree the facts or raises any question of his quilt his reply must be recorded and change of plea entered;***

" (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.''

Mr. Makura conceded that the foregoing principles, which coincide with the terms of s.207 of the Criminal Procedure Code (Cap.75), had not been complied with by the trial Court and, consequently, the proceedings were a nullity.

While conceding that the proceedings before the trial Court merited being declared null, ***Mr. Mukura*** asked for a retrial; and in aid, he submitted that the State would be able to provide all the necessary witnesses, and that no prejudice would be occasioned to the appellants.

Learned Counsel ***Mr. Kibunja*** too submitted that the trial Court proceedings were a nullity; but he went further and urged that the said proceedings also contravened s.77 of the Constitution as well as s.198 of the Criminal Procedure Code, for failing to demonstrate that the proceedings of the Court had taken place in a language understood by the appellants. Although three of the appellants were persons of Chinese origin, the charge sheet did not indicate this, and it was not recorded that the Court had taken plea in a language that was known to them. Counsel urged that, by virtue of s.77 of the Constitution, the said three appellants were entitled to the interpretation facility, during plea-taking before the trial Court, and during the conduct of proceedings in that Court. This was a case, counsel urged, in which the appellants' trial-rights had been infringed, and on this account, they should be acquitted.

Learned counsel urged that trial irregularities before the Court had been followed by an improper visit to the *locus in quo* by the learned Magistrate, in the course of which hearsay evidence had been taken, and that the Magistrate hereby became an investigator, wholly departing from the judicial posture; and it was urged that the proceedings doubly became a nullity, as a result. A retrial, in these circumstances, would expose the appellants to double jeopardy, and this would amount to an injustice ? learned counsel urged.

The principles to guide the taking of plea in a criminal trial are well laid out in ***Adan v. Republic*** [1973] E.A. 445; and it is quite clear that these were not complied with, as the facts were not stated at the time of plea-taking, nor were the appellants accorded an opportunity to react to any facts at all. The trial Court by visiting the Industrial Area to inspect scrap metal, was acting on "facts" which had not been set out and the appellants called upon to react to the same.

The Court's visit to the *locus in quo*, therefore, had no proper procedural bearing in the trial process – and I agree with learned counsel that any "facts" emanating therefrom was in the nature of hearsay.

Firstly, I will declare the proceedings before the trial Court a nullity; Secondly, as I find the procedural failings to be profound, and to have greatly compromised the appellants' trial rights, I am not inclined to order a retrial; and thirdly, and as a logical emanation from the irregularities in the proceedings, I will quash the forfeiture orders made by the trial Court. This appeal succeeds, and I hereby quash and set aside the sentence and orders of the trial Court in their entirety.

Orders accordingly.

DATED and **DELIVERED** at the Nairobi this 30th day of January, 2008.

J. B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the appellants: Mr. Kibunja

For the respondent: Mr. Makura