



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 388 of 2006**

MOHAMMED AMIN YUSUF.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 142 of 2006 of the Senior Residence Magistrate's court at Mandera – Richard Mibei SRM)

JUDGMENT

MOHAMED AMIN YUSUF, the appellant, was charged before the subordinate Court with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars of offence were that on 22nd May 2006 at about 10.00 a.m. at Bulla–Jahuria location of Mandera district within North Eastern Province unlawfully did grievous harm to Nasrano Ibrahim Noor. He was recorded as having pleaded guilty and was convicted and sentenced to serve 12 years imprisonment. He was dissatisfied with the decision of the learned Magistrate and appealed to this Court through his counsel M/s Kiage & Company Advocates. Before the appeal was heard, the appellant was released on bail pending appeal. The grounds of appeal are seven in number, as follows:-

1. The learned Magistrate erred in law in recording a plea of guilty against the appellant who has a clear unchanged **NOT GUILTY** plea on record.
2. The learned Magistrate fatally erred is not following and applying the mandatory/statutory steps in plea taking.
3. The learned Magistrate misdirected himself and erred in not ensuring that the appellant understood the nature of the proceedings.
4. The learned Magistrate fell into error in proceeding on a purported plea-taking without any indication or intimation of or request for a change of plea by the appellant.
5. The learned Magistrate fell into error and misdirected himself in recording a plea of guilty when in all the circumstances such plea was not unequivocal.
6. The learned Magistrate erred and misdirected himself in failing to be dispassionate thereby imposing a disproportionate, harsh and excessive sentence.
7. That in all circumstances of the case, the conviction and sentence was highly prejudicial to and the appellant and occasioned a failure of justice.

At the hearing of the appeal, Ms. Nyarango, appeared for the appellant. Counsel argued grounds 1,2,3,4

and 5 together. Counsel argued that the learned Magistrate erred in recording a change of plea because on 25/5/2006 the appellant had entered a plea of not guilty. Counsel submitted that under section 208 of the Criminal Procedure Code, what should have allowed was a trial. Instead, on 12/7/2006 the magistrate unilaterally changed the appellants plea to one of guilty without any record that the appellant requested for change of plea. Counsel also argued that the way the plea of guilty was recorded did not comply with the steps set in the case of **ADAN –vs– REPUBLIC [1973] EA 445** and **KARIUKI –vs- REPUBLIC [1984] KLR 809** – in that the Court did not record the words actually used by the appellant, as there was no word in Somali language for the term “guilty”. Also on 25/5/2006 the language of the Court was not stated. Counsel argued that the entire proceedings were a nullity. Counsel sought to rely on the case of **FRANCIS MACHARIA GICHANGI –vs- REPUBLIC [2007] KLR – Criminal Appeal No. 11 of 2004 (CA)**. Counsel also argued tht the sentence imposed was excessive, and the Magistrate erred in taking into account extraneous/irrelevant matters that the complainant was a female.

The learned State Counsel, Mr. Makura, conceded to the appeal. Counsel submitted that the proceedings were a nullity as the procedure adopted was not proper and sought to rely on the case of **KARIUKI –vs- REPUBLIC (supra)**. Counsel asked this Court to order a retrial in the interests of Justice.

In a short reply, Ms. Nyarango, submitted that, on the issue of a retrial she was leaving it to the Court.

I have considered the appeal and submission of both counsel for the parties. Indeed, on 25/5/2006 when the charge was first read to the appellant, the language used by the Court or by the appellant was not recorded that was an error. In **ALBANUS MWASIA MUTUA –vs- REPUBLIC** Criminal Appeal No.120 of 2004, the Court of Appeal, after citing the case of **SWAHIBU SIMBAUNI SIMIYU AND ANOTHER –vs- REPUBLIC** Criminal Appeal No.234 of 2005 stated-

“Since the record of the Magistrate did not know the language used by the two appellants, there was a violation of the appellant’s constitutional rights under [section 77(2) (b) of the Constitution] and the appeal was allowed. Once again, the nature and strength of the evidence brought by the prosecution in support of its charge did not really count.”

Therefore from the above,even the proceedings in which the plea of not guilty was taken by the learned magistratein our present case on 25/5/2006 were a nullity.

The other error that occurred in thee proceedings before the Magistrate was when the plea of guilty was purportedly taken on 12/7/2006. Counsel for the appellant has submitted that the appellant did not request for change of plea. I do not think that was an issue. There is no legal requirement, in my view, that an accused person must be recorded as requesting to change a plea before a plea of guilty can be recorded. The record sows that the charge was read and that the accused responded in a way which was recorded as having been a plea of guilty. In my view, once a charge is properly read to an accused person and he pleads unequivocally that he admits committing the offence, a plea of guilty can be entered. There was nothing irregular with the charge read to the appellant on 12/7/2006, therefore, a plea of guilty could be properly entered.

The error was to do with the way the plea was taken. In the celebrated case of **ADAN –vs- REPUBLIC [1973] EA 446**, which has been followed consistently in subsequent cases, it was held that the exact words of the accused have to be recorded, in properly taking a plea of guilty. The Magistrate recorded that after the charge was read, the appellant responded with the word “**guilty**”. Counsel for the appellant has submitted that there is no word “**guilty**” in Somali language. Though I am not sure about that contention, I am still of the view that the word “guilty” is a technical term used by legally trained minds. There is no evidence that the appellant is a lawyer or legally trained person. In my view, the more likely words to be used by him would be “it is true.” Therefore, in my view the Magistrate did not record the actual words used by the appellant in his response to the charge, which was a fatal error to the plea of guilty recorded. Therefore the conviction cannot stand, and the appeal has to be allowed.

Do I order a retrial? Learned State Counsel has asked me to order a retrial. Learned Counsel for the

appellant has left the issue of a retrial to the Court. There is no hard and fast rule on whether or not to order a retrial. However, the order must be in the interests of Justice and should not cause Prejudice to the appellant – see **AHMED SUMAR –vs- REPUBLIC [1964] EA 481**. In our present case the offence was a serious offence. The appellant was sentenced in June 2006, but was released on bail pending appeal in April 2007. Considering the facts and circumstances of this case, I find that it is in the interesting Justice to order a retrial. I also find that such an order will not prejudice the appellant.

Consequently, I allow the appeal quash the conviction and set aside the sentence. However, I order a retrial. To this effect I direct that the appellant be tried at Mandera or any other subordinate Court by any Magistrate with jurisdiction except Mr. Richard K. Mibei who convicted him. The appellant will appear for mention before the Senior Resident Magistrate at Mandera on 4th March 2008 for mention and other directions with regard to retrial.

Dated and delivered at Nairobi this 18th day of February 2008.

Gerorge Dulu

Judge

In the presence of –

Appellant

Ms. Nyarango for appellant

Ms. Makura for State - absent

Mwangi c/c