REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 178 of 2007

WESLEY CHERUIYOT……..……..APPELLANT

VERSUS

REPUBLIC……RESPONDENT

JUDGMENT

WESLEY CHERUIYOT (the Appellant) was charged before the Senior Principal Magistrate at Molo with unnatural offence contrary to Section 162(a) of the Penal Code. The particulars of the charge were that on the 3rd day of June, 2007 at [particulars withheld] Trading Centre in Nakuru District within Rift Valley Province he had carnal knowledge of LO against the order of nature. He pleaded not guilty to the charge but after three witnesses had testified he changed his mind and pleaded guilty to the charge whereupon he was convicted and sentenced to 20 years imprisonment. He has appealed against that sentence describing it as excessively harsh.

In his submissions before me, the Appellant, through a Kipsigis interpreter, tried to argue that he pleaded guilty to a charge he did not understand. He argued that he went to school upto Standard two and does not understand Kiswahili or English. That was clearly false because at one stage he nodded when I put a question to him in English. I find that the Appellant must have had some education as he understands English. In any case that argument could not have taken him far as his appeal is only against sentence.

When he rose to argue the appeal on behalf of the Republic, Mr. Mugambi, learned state counsel, conceded that the conviction of the Appellant was improper on the ground that the plea was not properly taken. The appellant was not asked to respond after the charged was read to him. He therefore urged me to allow the appeal but order a re-trial. He said there is overwhelming evidence against the Appellant and that the witnesses will be available to testify against him.

Having perused the record, I agree with Mr. Mugambi that the plea was not properly taken. After the charge was read to the Appellant he was not asked to respond and instead the learned trial magistrate went ahead to record the facts as stated by the prosecutor. In view of the seniority of the trial magistrate I am sure that this was a slip. She cannot have been unaware of the of Aden Vs Republic [1973] EA 445, wherein the Court of Appeal set out the procedure to be followed in taking pleas. In the circumstances I quash the conviction and set aside the sentence.

As I have said the learned state counsel has sought a re-trail. As was stated by the Court of Appeal in Amos Gituma Kinyua Vs Republic, Criminal Appeal NO. 265 of 2003 at Nyeri:-

“In general, a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court of which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be

ordered where it is likely to cause injustice to the accused person. All those are familiar guidelines and we repeat them from *Fatehali Manji Vs Republic [1983] EA 522* that:-

'We are aware that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result; *Braganza Vs. Republic [1957] EA 469, Pyarala Bassan v. Republic [1960] EA 854.*"

Given the seriousness of the offence in this case and the fact that the Appellant is not opposed to a retrial and since the witnesses will be available to testify once again the interest of justice demands that a retrial be ordered. I therefore order a retrial of the Appellant before any of the magistrates at Nakuru.

DATED and delivered this 4th day of July, 2008.

D. K. MARAGA

JUDGE