REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CRIMINAL APPEAL 225 OF 2008

KENNEDY KAGIMA MURIMA……..……….APPELLANT

-AND-

REPUBLIC ……………………………………RESPONDENT

***(An appeal from sentence imposed by Chief Magistrate Mr. G.C. Mutembei on 2nd July, 2008 in Criminal Case No. 1042 of 2008 at the Nairobi Law Courts*)**

JUDGEMENT

The appellant was charged with making a document without authority contrary to s. 357(a) of the Penal Code (Cap. 63, Laws of Kenya). The particulars were that the appellant, on or before 25th June, 2008 at an unknown place within Nairobi, with intent to deceive, and without lawful authority or excuse, made a certain document, namely a copy of identity card No. 3668991, purporting it to be a genuine copy of the identity card issued to ***John Murima Kagima*** by the National Registration Bureau.

In a second count, the appellant was charged with uttering a false document contrary to s.353 of the Penal Code. The particulars were that the appellant, on 1st July, 2008 at CID headquarters in Nairobi, with intent to deceive, knowingly uttered a certain document, namely a copy of identity card No. 3668991 which had been made without lawful authority to ***Chief Inspector Jervasio Njeru***, a finger-print officer.

The record shows that, on 2nd July, 2008, "the substance of the charge and every element thereof [was] stated by the Court to the accused person, in the language that he (understands) who, being asked whether he admits or denies the truth of the charge", replied in Kiswahili: "Count 1: it is true"; "count 2: it is true". The record thereafter reads: "Plea of guilty entered for accused".

The prosecutor then read out the facts, which ran as follows. On 18th June, 2008 the accused went to CID headquarters, and applied for a certificate of good conduct. He presented an identity card, No.3668991, which had typing discrepancies. The accused was asked to attach the said identity card with a print-out from the National Registration Bureau. The accused did not comply, but on 1st July, 2008 he returned to CID headquarters, still without the requested print-out. This time he presented to ***Chief Inspector Njeru*** a copy of the said identity card, and wanted to know why his application was not yet approved**.** ***Chief Inspector Njeru*** thereupon, conducted investigations, and communicated with the National Registration Bureau, which responded by giving the information that the identity card presented by the accused was not genuine. This led to the accused being charged.

Upon the accused admitting the foregoing facts as true, he was convicted on his own plea of guilty. The Court treated the accused as a first offender; took into account his plea in mitigation, and sentenced him to three years' imprisonment on each count, sentences to run concurrently.

In the grounds of appeal, the appellant contends as follows:

(1) that the plea before the Subordinate Court was not clear and unequivocal;

(2) that the charges were not founded on any facts or "proper grounds";

(3) that the plea was taken "before the facts founding the same could be furnished to the appellant and/or a copy of the charge sheet was given to him";

(4) that the sentence imposed on the appellant was harsh and excessive;

(5) that the appellant's mitigation statement was not taken into account.

Learned counsel ***Mr. Obuo*** and ***Mr. Njenga*** represented the appellant at the hearing of the appeal.

Mr. Obuo submitted that, in the plea-taking, the accused's own words in response, had not been recorded; and that after he responded to the charge, he was not immediately told the facts, and given a chance to explain the same. Counsel urged that the trial Court had not complied with plea-taking requirements as defined in a Court of Appeal decision, ***Adan v. Republic*** (1973) E.A. 445, the relevant part of which states:

> "***(i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a 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….."***

Mr. Obuo submitted that, in the instant case, after the charges were read, and the accused said, "it is true", the guilty-plea was entered, before the facts were read out; and the accused then admitted the facts, and he was convicted and sentenced.

Counsel submitted that it was not clear *what the facts related to,* since there were *two counts of the charge*; so each count should have been supplied with its own facts, and the accused allowed to admit or not admit each set; a reference to two charges in the same set of facts, would become confusing – and this made the plea *equivocal.* This principle, counsel urged, was to be found in the authority, ***Bukenya v. Uganda*** [1967] E.A. 341, which carries a relevant passage (*per* ***Sir Udo Udoma, C.J.*** at p. 343):

> "In ***R. v. Yonasani Egalu and Others*** **[(1942), 9 EACA 65], it was laid down as a matter of law that, in any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny every constituent of the offence, and that what he says should be recorded in a form which will satisfy an appeal court that he fully understood the charge and pleaded thereto unequivocally".**

As the shortened procedure of proof-by-admission was in the instant case being adopted, counsel urged, "every constituent of the offence" should have been availed to explanation by the accused. But that, it was submitted, was *not possible,* because "only one set of facts [was] read out, and then conviction followed on *two different counts"*. So, counsel urged, the offence could not be *clear* in the appellant's mind; and it could not be said the facts as read out, did disclose *both* offences. Indeed, counsel urged, the facts as read out "did not disclose the offence of *making a document without authority*"; for "there was nothing to suggest he made a document without lawful authority, the prosecution never said that, at any time".

Counsel, in respect of the first count, submitted that it was a defective charge – because he is said to have made a *copy;* "how could he be charged with making a copy, but not the original?" what the accused presented to CID was a copy of "the same identity card" – but he had not been charged with the making of the *original* identity card.

Mr. Obuo submitted that the plea as taken was defective, for it rested upon "*an omnibus statement of facts*". In the persuasive authority, ***Lusiti vs. The Republic*** [1977] KLR 145, ***Kneller*** and ***Sachdeva, JJ***. had thus remarked:

> "***We consider it pertinent to point out that where there is a composite charge, as the present one of burglary and theft in a dwelling-house, it is not sufficient to record: 'guilty on plea and convicted'. The Magistrate***

should record words such as: 'The accused is found guilty on his own plea on both limbs of the charge and convicted accordingly".

Mr. Obuo submitted that the errors in the plea-taking, before the trial Court, were fatal, and the conviction entered ought not to stand.

Further submission was made by learned counsel ***Mr. Njenga,*** who urged, quite rightly, that the trial Court is always under an obligation to *evaluate the facts*, and to see whether the charge based on the same is well-founded.

In the relevant facts, the accused was said to have presented an identity card bearing typing discrepancies; but this fact by itself, does not show the making of an unlawful document. So, it was submitted, such facts should have put the Court on inquiry, as to "which facts were being admitted". In a persuasive authority, ***Njuki v. Republic*** [1990] KLR 334 it had been held (***Tunoi, J.*** as he then was) that (p. 334):

"***Before convicting on a plea of guilty, it is highly desirable not only that every constituent of the charge should be explained to the accused, but that he should be required to admit or deny such constituent and what he says should be recorded in a form which will satisfy an appeal count that he fully understood the charge and pleaded guilty to every element of it unequivocally".***

On the trial Court's obligation to assess properly the congruence between a plea of guilty and the facts laid before it, counsel drew the Court's attention to the Court of Appeal decision in ***Ndede v. Republic*** [1991] KLR 567:

"***The Court is not bound to accept the accused's admission of the truth of the charge and convict him as there may, in the words of the statute: 'appear sufficient cause to the contrary'.***

"***Where…, at the time of the taking of plea there appears to be an unusual circumstance such as injury to the accused, or the accused is confused or there has been inordinate delay in bringing the accused to court from the date of arrest etc., then an explanation of the circumstances must form an integral part of the facts to be stated by the prosecution to the court".***

It was ***Mr. Njenga's*** contention, in this regard, that the appellant was in a state of *confusion,* as to the charge he was pleading guilty to; and therefore, this factor needed to be addressed by the learned Magistrate in determining if a proper plea was being recorded.

Learned counsel ***Mr. Obuo*** and ***Mr. Njenga*** have put up a meritorious case which speaks for itself, and would have to be upheld. The first count of the charge is duplex and does not necessary disclose an offence: if the document presented by the accused was just a *copy,* then it is perfectly possible *somebody else* made a defective original; once it is shown that the *first* count is defective, it *taints the second one,* since the two are related. But more seriously, the set of facts, the plea of guilty to which founds the conviction is inapplicable to two different situations as represented in two counts.

The principle that prohibits duplicity in criminal charges is embedded in s.77(2)(b) of the Constitution, which provides that

"***(2) Every person who is charged with a criminal offence –***

………….

(b) shall be informed as soon as reasonably practicable, in….detail, of the nature of the offence with which he is charged….."

Clarity, specificity and *detail* are essential in the information relating to the charge, to *enable the accused to defend himself or herself effectively.* And it is this very principle which precludes "omnibus sentences", or indeed, omnibus charges or statements of facts on the commission of offences.

This Court, on unfocused sentence not related to a particularized charge, had thus noted in ***Fredrick Mwangi Mwai v. Republic***, Nbi High Ct. Crim. Appeal No. 708 of 2006:

"***It is obvious, in my view, that the law stands against sustaining the conviction and sentence recorded by the Court of first instance…Sentence, as the authoritative, final determination of a criminal trial, must be correctly rendered; and that object is not attained where, as in the instant case, the trial Court has assigned penalty for several offences in a generic manner that makes no reference to specific charges, nor names the***

applicable sentence for each one of them".

Learned counsel ***Mrs. Oduor*** conceded to the appeal, on the ground that two different sets of facts should have been read out to the accused, before he made his pleas. Counsel agreed with the appellant's position that the allegation that the appellant had made a copy of a document without authority, could not mean that he also made the original document, and the facts as stated did not support any claim that the appellant made the original document.

The appellant's appeal is allowed; the conviction set aside; the sentences quashed. The appellant shall be set at liberty forthwith, unless otherwise lawfully held.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 18th day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Appellant: Mr. Obuo; Mr. Njenga

For the Respondent: Mrs. D. Oduor