REPUBLIC OF KENYA
IN TH E HIGH COURT OF KENYA
AT MOMBASA
Criminal Revision 17 of 2007

REPUBLIC …….……APPLICANT

VERSUS

ELIJA MWENDIA …….RESPONDENT

(From original sentence and conviction in Criminal case No. 30 of 2007 of The Resident Magistrate, Tononoka Court, Mombasa)

ORDER ON REVISION

This court was prompted to call for perusal the proceedings in Tononoka Criminal Case No. 30 of 2007 R =vs= Elijah Mwendia upon receipt of the letter dated 26th June 2007 written and signed by V. Monda on behalf of the Attorney General hereinafter referred to as the applicant. Pursuant to Section 362 of the Criminal Procedure Code, this court in exercise of its revisionary powers perused the aforesaid proceedings.

The record shows that on the 9th day of May 2007, one Elijah Mwendia, hereinafter referred to as the Respondent appeared before Mrs. J.B. Mdivo, the learned Resident Magistrate, for plea to a charge of being in possession of narcotic drugs contrary to Section 3(1) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. It is evident from the record that the charge was read and explained to the Respondent after which the court noted the words "It is true" and thereafter it entered a Plea of Guilty.

The record further reveals that the facts were read in Kiswahili and the respondent when called upon to admit or deny the facts, he gave a lengthy explanation as to how he came into possession of the narcotic drug. The record also shows that the learned trial Resident Magistrate inquired from the court prosecutor as to who arrested the Respondent and in response to that query the prosecutor indicated that the respondent's father had complained to the police about the respondent's behaviour. The learned Resident Magistrate straightaway requested for a report to be prepared and filed by the Community Service Order officers. On the 23rd day of May 2007, a Probation Officer by the name Nick Makuu appeared before the learned Resident Magistrate and presented a report in which he recommended for the Respondent to be committed to Gitathuru Rehabilitation Centre. There is no evidence of whether or not the learned

Resident Magistrate accepted the recommendations. It can only be inferred that she accepted in view of the fact that she appended her signature on the warrant of commitment of the Respondent to an Approved School.

This court's revisionary power is clearly defined under Section 362 of the Criminal Procedure Code. That Section enjoins this court to call for and examine the record of any Criminal Proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. This court has carefully perused the proceedings before the Resident Magistrate's court. It has been stated many times by this court that courts recording pleas of guilty must be very careful to ensure that the accused persons understand the nature of the charge they are about to plead to. The convicting court must indicate in its proceedings the kind of language the suspect understands and the language used by the court. The convicting court must state the exact or near exact words used by the accused when pleading to the charge. It is not enough to state the words "It is true" In this case it is clear that the proceedings does not disclose the language understood by the accused. The record does not also indicate whether the accused actually uttered the words "It is true". It is therefore clear that the entry of a plea of guilty was made in contravention of Section 207 (1) and (2) of the Criminal Procedure Code. Therefore on this ground alone, I find that the plea was equivocal.

I have already mentioned that the facts were read to the trial court in Kiswahili language. There is no evidence showing whether the Respondent understood Kiswahili language. For a while I will presume he actually understood and spoke that language because he managed to give an explanation as to how he came into possession of the alleged narcotic drugs. It is important to reproduce the contents of what the respondent said before the learned Resident Magistrate in order to appreciate what this court will state thereafter. When called upon to admit or deny the facts outlined by the prosecutor in support of the charge the respondent said:

"We left home and I was told my schooling was going to be looked into. Then he told me he wanted me to keep some money for him in my pocket. He put in Kshs.100/- and the rolls were inside it. I used to be in school upcountry but he brought me here saying he will take me to school."

It is clear from the above statement that the Respondent was not admitting the facts but instead was blaming his father for planting the narcotic drug in his pockets. I will assume for the moment that the learned Resident Magistrate found that the Respondent as having admitted the facts of the charge. If that was her holding then I must state that she fell into error because it is clear that the Respondent meant to deny the facts hence a plea of not guilty should have been returned.

The record reveals that the trial magistrate fell in error in that she did not convict neither did she pronounce a sentence. There was no basis for the Respondent's committal to the Gitathuru Rehabilitation Centre. There was no order committing the Respondent. What appears on record is the recommendation of Nick Makuu and nothing more. The entire proceedings therefore are marred by irregularities which can be corrected by this court in exercise of its revisionary powers. The whole process was flawed and in contravention of Section 207 of the Criminal Procedure Code.

There is a request by the Attorney General to have the case retried by another court of competent jurisdiction. The principles which must be satisfied before making an order for retrial are well settled. One of the conditions which must be taken into considerations is that the retrial should not prejudice the accused. The retrial process should not also be used by the prosecution to seal the gapping loopholes. I have already stated that there was no conviction nor sentence pronounced by the learned resident Magistrate. For now I will only assume the trial Resident must have thought that she had convicted and sentenced the Respondent. If that was what had happened I would still have set aside the sentence because the facts read did not establish the offence the Respondent purportedly pleaded to. It was incumbent for the prosecution to tender a report from the Government Chemist to prove that the rolls found in possession of the Respondent were narcotic drugs. In the absence of such crucial evidence it cannot be said that the facts proved any offence known in law. In the circumstances, if I order for a retrial, obviously the prosecution will seal this loophole by producing the report to the utter detriment of

the Respondent.

For the above reasons I quash the entire proceedings for being null and void. Any purported conviction and sentence is quashed and set aside respectively. The order committing the Respondent to Gitathuru Rehabilitation Centre is set aside. The Respondent is hereby set free unless lawfully held.

Dated and delivered at Mombasa this 12th day of July 2007.

J.K. SERGON

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