



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(CORAM: OJWANG J.)

MISC. CRIMINAL APPLICATION NO.247 OF 2006

BETWEEN

JOSEPH KIMANI KAMAU.....APPLICANT

-AND-

REPUBLIC.....RESPONDENT

(An appeal from the sentence imposed by Principal Magistrate Mrs. Wasilwa on 18th May, 2006 in Criminal Case No. 5349 of 2005 at the Kibera Law Courts)

JUDGEMENT

The appropriate orders in this appeal were made on 18th July, 2007 after I had heard the submissions made for the parties. The short decision rendered on that occasion read as follows:

“Upon hearing the appellant’s case and listening to the submissions of counsel, it has become clear to me that the lower Court’s decision....must be set aside for irregularity. I will make certain orders, but shall give a detailed Judgement with reasons on 19th September, 2007.

The orders are as follows:

- 1. The trial Court’s decision in Criminal Case No. 5349 of 2005 dated 18th May, 2006 is hereby set aside and vacated.***
- 2. The appellant shall be forthwith released from custody, unless otherwise lawfully held.***
- 3. Reasons for these orders shall be given in a Judgement to be delivered on 19th September, 2007.”***

The appellant had been charged with the offence of obtaining money by false pretences contrary to s.313 of the Penal Code (Cap.63). The particulars were that, on 14th October, 2004, through Papera Traders Company Limited at Commercial Bank of Africa, Wabera Street Branch in Nairobi, with intent to defraud, the appellant fraudulently obtained from **Zilphan Arende Abila** the sum of Kshs.1,637,800/75 by falsely pretending that he was in a position to import a Mercedes Benz car, a fact he knew to be false.

In a second count, the charge was issuance of a bad cheque contrary to section 316A (1) of the Penal Code (Cap.63). The particulars were that, on 5th July, 2005, at Commercial Bank of Africa Ltd along Mamlaka Road, in Nairobi, the appellant issued a cheque, serial No. 60086 for US\$23,496 dated 5th July, 2005 in favour of **Zilphan Arende Abila** knowing that his account No.8702060885800 held at Standard Chartered Bank Yaya Centre Branch did not have sufficient funds.

To both counts, the appellant pleaded not guilty. On 13th March, 2006 the trial began, with PW1 giving testimony. After several mentions, counsel for the accused, on 5th May, 2006 requested leave to have a change of plea recorded; and the charge was again read over to the accused who pleaded guilty. The prosecutor then remarked “facts as per the evidence of PW1”, and the accused acknowledged the facts to be correct. He was convicted, treated as a first offender, allowed to make a plea in mitigation, Probation Officer’s report received, and appellant sentenced to an 18-month term of imprisonment. In imposing sentence the learned Magistrate thus remarked:

“Considering the Probation Officer’s Report, I do not find this case a suitable one for probation, given the prevalence of [this kind of offence]...I will overlook the POR which is not binding on this Court. I sentence the accused to serve 18 months in jail.”

Learned counsel **Mr. Kariuki** submitted that the offence herein had arisen out of a contract between the appellant and the complainant, for the importation of a motor vehicle from Japan; and it was well agreed that all the monies exchanged, pursuant to the contract would be refunded, and indeed, all of it had already been refunded. This was the context in which a change of plea had been considered appropriate, and so counsel for the appellant had advised him to make a change of plea. The change of plea had been recorded by one Magistrate, but the matter then came up before a different Magistrate, together with a Probation Report.

The appeal herein was against sentence as imposed by the Magistrate who last handled the matter. It was urged that the jail term of 18 months imposed was irregular, as it did not specify *for which count* of the offence it was applicable. It was also contended that the said sentence was excessive. By the Penal Code, s.316A(4) the maximum penalty for issuance of a bad cheque is *12 months’* imprisonment; and so it was urged, quite properly, with respect, that the sentence imposed by the learned Magistrate was an illegal one.

Moreover, the said sentence was an *omnibus* one, applying to *two different counts at the same time*.

The appellant was also aggrieved because his *mitigation* address was not taken into account; as he was a *first offender*, it was urged that a custodial sentence was inappropriate.

The appellant questioned the *disregard of the Probation Officer’s report*, in sentencing; that report had strongly recommended a non-custodial sentence, pegged to the refund of the entire amount received by the appellant herein, from the complainant. Learned counsel drew the Court’s attention to s.176 of the Criminal Procedure Code (Cap.75), which seeks to promote *reconciliation*, in situations of criminal offence, and urged that only a non-custodial sentence would have promoted that cause.

Learned counsel also noted that if s.80 of the Criminal Procedure Code had been observed, then, in the *transfer of the matter from one Magistrate to another*, the trial Magistrate should have referred it to a Magistrate of the 1st class for *directions* on allocations.

Learned counsel urged that the convicting Magistrate had erred in law and fact, by imposing a sentence while being guided by the view that the offence in question is “prevalent” – because the appellant herein was a first offender; and “prevalence” should not have been thus elevated, when dealing with an offender in that category.

Counsel urged that the sentence be set aside, and substituted with a non-custodial sentence.

Learned State Counsel **Mr. Makura** conceded to the appeal, on account of the procedural and legal shortfalls. Firstly, counsel noted, even the plea taken on 5th May, 2006 was not *unequivocal*, in the context of legal principles laid down by the East African Court of Appeal in *Adan v. Republic* [1973] E.A. 445 (*per Spry, V.P.* at p.446):

“The Courts have always been concerned that an accused person should not be convicted on his plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education and does not speak the language of the Court. For this reason, it has long been a rule of practice that where a plea appears to be one of guilty, it must be recorded in the words of the accused...”

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The Magistrate should then explain to the accused person all the ingredients of the offence charged. If the accused then admits all those essential elements, the Magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The Magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add to any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the Magistrate should record a change of plea to ‘not guilty’ and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the Magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.”

The principles in the *Adan* case are in perfect accord with the terms of s.207(2) of the Criminal Procedure Code (Cap.75).

But the procedures so laid out, **Mr. Makura** submitted, were not followed by the trial Court in the instant case; and consequently, the trial was a nullity.

Learned counsel noted that the Court below, which imposed sentence, had also failed to comply with s.80 of the Criminal Procedure Code (Cap.75) which related to the transfer of part-heard cases. That section provides:

“If in the course of any trial before a Magistrate the evidence appears to warrant a presumption that the case is one which should be tried by some other Magistrate, he shall stay proceedings and submit the case with a brief report thereon to a Magistrate holding a subordinate Court of the first class empowered to direct the transfer of the case under section 79.”

Mr. Makura was in agreement with counsel for the appellant, that the 18-month jail term imposed in the sentence was not referable to the first **or** the second of the two counts of the charge as laid; it was, therefore, an *omnibus sentence* which could not be allowed to stand.

Learned counsel noted that it was the trial Magistrate who had called for a Probation Officer’s report, which was duly availed; but when it came to the exercise of the sentencing discretion, the Magistrate ignored the report and, in this manner, counsel urged, the learned Magistrate failed to exercise her discretion judicially, and instead she took into account extraneous matter. This made the trial a nullity.

Learned counsel then considered whether a retrial would be in order. In view of the fact that, out of the sum of Kshs.1.7 million due to the complainant only Kshs.300,000/= was still not made good, and considering that the appellant was actually in the course of paying-up, **Mr. Makura** urged that retrial would be inappropriate.

This Court allowed the appeal because of clear instances of non-compliance with established legal

principles, in the exercise by the learned Principal Magistrate of the sentencing discretion.

S.313 of the Penal Code (Cap.63) under which the appellant had been charged on *one count*, provides for a maximum term of imprisonment of *three years*. S.316A(1) under which the *second count* of the charge fell, provides for a maximum jail term of *one year*.

Now the sentence imposed by the Court below was *18 months' imprisonment*. If this sentence is attached to the *second count*, then it is an illegal sentence; and it is not clear the sentence was in respect of the *first count*: therefore, this Court must conclude that the sentence imposed was not a proper exercise of discretion, founded on facts relating to sentence which bore reality in the mind of the learned Magistrate. On that account alone, it was an illegal sentence, as it was not founded on *judicial discretion*. And on a more general plane the sentence was illegal because it purported to address *two counts of the charge at the same time*; it was an omnibus sentence. Just as the law requires criminal charges to be specifically and unambiguously framed, and the accused's trial-rights are therein lodged, the law also requires *precision in sentencing*, entailing a judicious exercise of discretion in relation to a specific, proven charge.

Learned counsel **Mr. Kariuki**, for the appellant, has drawn this Court's attention to the scope created for *reconciliation* in certain types of criminal case, and that the judicial discretion should, in principle, have given effect to the same. S.176 of the Criminal Procedure Code (Cap.75) thus provides:

"In all cases the Court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation, or other terms approved by the Court, and may thereupon order the proceedings to be stayed or terminated."

The offences charged in this case were *misdemeanours*, and related to *private contractual matters*, in respect of which the most practical course of action was to see to a process of *compensation and reconciliation* between the parties. Considering that the parties, by their own devices, were well agreed on a process of compensation, in my opinion, it was inappropriate for the lower Court to abstain from accommodating the principle of *reconciliation*. So on this account too, I would not sustain the sentence awarded by the lower Court.

Further reasons for nullity have been competently stated by learned counsel **Mr. Makura**, especially those relating to the mode of plea-taking.

This is the Judgement giving the detailed reasons for the orders made by this Court on 18th July, 2007; and those orders are part and parcel of the Judgement herein.

Orders accordingly.

DATED and DELIVERED at Nairobi this 19th day of September, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Tabitha Wanjiku

For the Appellant: Mr. Kariuki

For the Respondent: Mr. Makura