



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Rev Case 492 of 2007

MORAA ONDUSO.....APPLICANT/ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in criminal case No. 6664 of 2007 of the Chief Magistrate's Court at Kibera- Mr. Maundu SRM)

JUDGMENT

This is a request for revision by way of a letter. The letter dated 19th September 2007 from M/S Nyangito & Company advocates requests this court to invoke the provisions of section 362 of the Criminal Procedure Code (Cap. 75) to revise the conviction and sentence of the subordinate court, to wit, the magistrates court at Kibera in Criminal Case No. 6664 of 2007 Republic –vs- Moraa Onduso. The main complaint is that the accused in the subordinate court did not understand the language of the court, and consequently, the proceedings.

I have perused the proceedings. The accused was charged with the offence of fraudulent consumption of electric energy contrary to section 64(1) of the Energy Act No. 12 of 2006. The particulars of the charge were that on 10th September 2007 at Likoni slums in Nairobi within the Nairobi Area, without lawful right, fraudulently consumed electric energy knowing it to have been unlawfully abstracted without the consent of Kenya Power & Lighting Company Ltd.

On the date of plea, which was 12/9/2007, the accused (applicant herein), was unrepresented. The language of the court was recorded in the proceedings as being English/Swahili. It was also recorded that the charge was read the accused, Kiswahili and she responded in the same language – “it is true”. The prosecutor was then recorded as merely saying that the facts were as per charge sheet.

It is now alleged that the accused did not understand the language used. I do not agree. The record clearly shows that the charge was explained to her in Swahili, and she responded to the allegations in the same language. I dismiss that complaint.

Before the applicant was convicted however, the prosecutor merely stated that the facts were as per charge sheet. The Procedure to be followed with regard to taking pleas in the subordinate courts is enumerated under section 207 of the Criminal Procedure Code (Cap. 75 Laws of Kenya). The relevant parts of the section which relate to taking pleas of guilty provide as follows –

“207 (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.

(2) If the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him and the court shall convict him and pass sentence or make an order against him, unless there appears to be sufficient cause to the contrary.

Provided after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charges are founded.

3.

4.”

It is clear to me from the above provisions of the law, that

there is no mandatory statutory requirement that the facts supporting the charge have to be given by the complainant or prosecutor in the subordinate court, when an accused person admits the charge. It is also clear that it is the function of the court to permit or require the complainant or prosecutor to outline the facts upon which the charge is founded. However, in my view, because a plea of the guilty must be unequivocal, the facts upon which the charge is founded must be given for the accused to admit or deny the same. In my view, this is what the Court of Appeal for East Africa emphasized in the case of **ADAN –vs- REPUBLIC [1973] E A 447**, in which the court held –

(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 to any relevant facts

(iv) if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and change of plea entered

(v) if there is no change of a plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded”

The above procedure, clearly ensures that the plea of guilty is

unequivocal. The offence with which the applicant was charged, was not a simple offence. It was a technical offence. It was an offence in which technical terms such as “lawful right, fraudulent and unlawfull abstracted” were used. There was therefore definite need for the prosecutor to have given the facts, for the accused to be given an opportunity to admit or challenge the same. The court should have required the prosecutor to give the facts. It did not. That was an error. The plea of guilty was rendered unequivocal. On that basis I will have to review both the conviction and sentence of the learned magistrate.

For the above reasons, I exercise the revision powers of this court conferred under section 362 of the Criminal Procedure Code (Cap. 75) and order as follows –

1. I quash the conviction of the subordinate court.
2. I set aside the sentence of the subordinate court.
3. I order that if the accused is in prison, she should be released forthwith unless otherwise lawfully held. If she has paid the fine, the same should be refunded to her.

It is so ordered.

Dated and delivered at Nairobi this 31st day of October 2007.

George Dulu

Judge

In the presence –

Mr. Nyangito for the applicant – absent

Applicant - present

Ms. Gateru for the State - absent

Eric – court clerk