



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Criminal Revision 68 of 2007

(From original conviction and sentence in PCR.670.2007 Kilifi before C.Obulutsa (SRM))

REPUBLIC.....PROSECUTOR

VERSUS

JONATHAN KAHINDI THUVA.....ACCUSED

REVISION

By a letter dated 30th August 2007, M/s. Madzayo Mrima & Company advocates urged me to reverse the conviction and sentence and order that the accused, Jonathan Kahindi Thuva, be retried by a court of competent jurisdiction.

Counsel has attacked the conviction and sentence on three fronts:-

- (a) That even though the accused pleaded not guilty to the charge of “operating a Regulated Tours & Enterprises without a licence contrary to section 3(1) of the Tourist Industry Act, (Cap 381) Laws of Kenya the learned trial Magistrate nevertheless entered a plea of guilty and sentenced him to serve Community Service Order.***
- (b) That the accused at all material times had the requisite licence to operate Regulated Tourist Enterprises as per copy of the licence attached.***
- (c) That the accused was not informed of his right of appeal upon his conviction and sentence.***

The High Court is a court of record. I have carefully scanned through the record of the lower court. The evidence available is that he was arrested on 9th June 2007 without warrant and taken to court on 12th June 2007 and charged as aforesaid.

There is no evidence that plea was taken in accordance with the practice laid down in **ADAN V. REPUBLIC (1973) EA. 103**, where the court of appeal considered the manner in which pleas of guilty should be recorded and the steps which should be followed. It laid down the following guidelines:

- i) the charges and all the essential ingredients of the offence should be explained to the accused in his language, or in a language which 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 acts;***
- 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; and***
- v) ***if there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused reply should be recorded.***

In the present revision the language used is not indicated, the prosecutor did not outline the facts, the appellant was not asked to admit or deny the facts, it is true that by virtue of statute law (Miscellaneous Amendment) Act 1974, a new provision has been added to section 207(2) of the Criminal Procedure Code which reads as follows:

“Provided that after such conviction and before passing sentence or making an order the court may permit or require the complainant to outline to the court facts upon which the charge is founded.”

However, I subscribe to the view that this proviso does not lessen the need to ensure that an accused person who wishes to plead guilty does so unequivocally. On the contrary, it enhances the necessity of being certain that an accused person wishes to admit without any qualification each and every essential ingredient of the charge, especially if he is not asked to admit or deny the facts outlined by the prosecutor.

In all the circumstances of this case, I am fully satisfied that the appellant's plea was not unequivocal. Accordingly, I declare his conviction a nullity and set-aside the sentence imposed upon him. He will be taken before the Ag Senior Principal Magistrate Malindi so that he may be tried by the said Magistrate or any other Magistrate of competent jurisdiction within Malindi station. Mention shall be one on the 26th day of October 2007 before the Senior Principal Magistrate Malindi. In the meantime he will stay in remand.

DATED and delivered at Malindi this 26th day of October 2007.

N. R. O. OMBIJA

JUDGE