

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Revision 316 of 2006

Jackan Kioko.....APPLICANT

VERSUS

Republic.....RESPONDENT

RULING

This court was prompted to call for perusal of the proceedings before the learned District Magistrate vide Mombasa D M C r Case No 1962 of 2006 in exercise of its supervisory jurisdiction.

My perusal of the aforesaid proceedings showed that on the 31st day of July 2006 four people namely: Jackan Kioko, Muia Mutinda, Joseph Muthama and Mwanzia Kioko were convicted on their own plea of guilty to a charge of gambling in a public place without a licence contrary to Section 55(1) of the Betting, Lotteries and Gambling Act Chapter 131 Laws of Kenya. They were each sentenced to pay a fine of Kshs 5,000/- or in default to serve 2 months imprisonment.

The record shows that the charge was read to the accused persons. When the prosecutor was called upon to state the facts of the offence, the prosecutor simply said “facts as per charge sheet”. The record further shows that the accused persons were recorded to have said ‘yes’ before they were convicted.

When this court exercises its revisionary power under Section 362 of the Criminal Procedure Code, it does so in order to satisfy itself as to the correctness, legality or propriety of the decision. The matter before this court is in respect of a decision on conviction and sentence arising out of a plea of guilty. The law is well settled as to the manner in which pleas of guilty should be recorded and the steps which must be followed. The court of Appeal for East Africa set the following guidelines in the case of Adan =vs= R[1973] E A 445

- (i) The charge and all essential ingredients of the offence to 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 on 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.
- (iv) If the accused does not agree with the facts or raises any questions of his guilt his reply must be recorded and change of plea entered.
- (v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to the sentence together with the accused’s reply should be recorded.

It is clear from the recorded proceedings before this court that the facts were not outlined before the trial court. This is a mandatory requirement under the proviso to Section 207(2) of the Criminal Procedure Code. It was stated by this court in the case of Lusiti =vs= R [1977] K L R 143 that the proviso enhances the necessity of being certain that an accused person wishes to admit or deny the facts outlined by the

prosecutor. It is not enough for the prosecutor to state that the “facts are as per charge sheet’. In most cases the facts in the charge sheet are read by the court through the court clerk or by the trial magistrate. The law requires the prosecutor to lay out the facts even if it means repeating what is stated in the charge sheet after which each of the accused persons are asked to either dispute, agree with or add the facts. The record shows that the trial court did not record what each of the accused persons said. The end result is that the plea was equivocal hence a plea of guilty was irregularly entered.

Even if the plea was found to be unequivocal still the sentence pronounced is illegal. The law under Section 55(1) of the Betting, Lotteries and Gambling Act prescribes a maximum fine of Kshs 3,000/- and in default 3 months imprisonment or both. In this case the accused persons were each fined Kshs 5,000/- or in default to serve a 2 months imprisonment. The sentence is obviously illegal.

In the end I think this is a proper case to alter both the conviction and sentence on revision. Consequently the conviction is quashed and the sentences are set aside. Any fines that may have been paid should be refunded forthwith. For those serving a sentence they should be released forthwith unless lawfully held.

August 18, 2006

Sergon, J