Kipngeno v Republic (Criminal Revision E001 of 2023) [2023] KEHC 2220 (KLR) (20 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2220 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL REVISION E001 OF 2023

RL KORIR, J

MARCH 20, 2023

BETWEEN

WESLEY KIPNGENO .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. The Applicant was charged with the offence of transporting an alcoholic drink namely changaa without a licence contrary to Section 27 (1) (a) as read with Section 27 (4) of the *Alcoholic Drinks Control Act* No. 4 of 2010. The particulars of the charge were that on 15th December 2022 at Arroket Tea Estate in Sotik Sub County within Bomet County, the Applicant was found transporting 20 litres of Changaa on Motor Cycle Registration Number KMFL 582Y without a licence.
2. He was presented for plea taking on 19th December 2022 and when the substance of the charge was read out to the Applicant in a language he understood, he pleaded guilty. The prosecution then read the facts of the case to the Applicant and the court recorded a plea of guilty.
3. After the Applicant mitigated, the trial court convicted the Applicant on his own plea of guilty and sentenced him to pay a fine of Kshs 30,000/= or in default serve one year in prison. In addition, the Applicant's Motor Cycle Registration Number KMFL 582Y was forfeited to the state.
4. In an application dated 4th January 2023, the Applicant prayed that the Sentence be revised or set aside.

The Prosecution's Submissions

5. The Prosecution submitted that it was true that Section 27 (1) (a) of the *Alcoholic Drinks Control Act* did not use the word transport but instead used manufacture, import or distribute. That the said error did not avail the Applicant his right to a Revision. It was its further submission that by dint of Section

382 of the *Criminal Procedure Code*, no finding or sentence could be reversed on account of an error in a charge.

6. The Prosecution invited the court to presume that by transporting the liquor, the Applicant intended to distribute it. He urged the court to rely on Section 119 of the *Evidence Act*.

7. It was the Prosecution's submission that the charge was read to the Accused in a language that he understood and he replied "true" and was accordingly convicted on his own admission. That the plea was unequivocal. It was its further submission that if the plea was equivocal, the matter could be determined on appeal where the Applicant has a right under Section 364 (5) of the *Criminal Procedure Code*. That where an appeal lies, no proceedings by way of Revision ought to be entertained.

8. The Prosecution conceded that the order for forfeiture of the Applicant's motorcycle was irregular as the law did not provide for it. That under Section 362 of the *Criminal Procedure Code*, this court had the power to revise the forfeiture.

9. It was the Prosecution's submission that if it is found that the Applicant's Constitutional rights were breached, then the remedy would be damages and not an acquittal.

Analysis and Determination

10. This court's revisionary jurisdiction is exercised under the provisions of Section 362 of the *Criminal Procedure Code* which states:-

> "The High Court may 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."

11. For this revision, the powers of this court are provided for under Section 364 (1) (a) of the *Criminal Procedure Code*. It provides:

> "In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence."

12. In the case of *Joseph Nduvi Mbuvi v Republic* (2019) eKLR, Odunga J. (as he then was) persuasively held that:-

> " In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in *Public Prosecutor v. Muhari Bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735:-
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>> "The powers of the High Court in revision are amply provided under section 325 of the *Criminal Procedure Code* subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is

> whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case"."

13. The Applicant stated that he was not given an opportunity to respond to the truthfulness of the particulars of the offence. That means that the Applicant did take plea when the facts of the case were read out to him. The manner of recording a plea is provided for in Section 207(1) and (2) of the *Criminal Procedure Code* :-

> "(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;
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> (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:
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> Provided that 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 charge is founded."

14. In the case of *Ombena v Republic* (1981) eKLR, the Court of Appeal held that:-

> "In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —
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> "(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;
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> (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;
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> (iv) if the accused does not agree with 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 plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

15. I have read and considered the trial court proceedings and I have noted that the Applicant pleaded guilty when the substance of the charge was read to him. The trial court record shows that he uttered the words "True". The Prosecutor then read out the facts of the case and the trial court thereafter entered the plea of guilty. The Record does not indicate that the Applicant admitted the facts. This

fell foul of the aforementioned provisions of the law which provided that the Applicant ought to have pleaded again when the facts of the case were read to him.

16. It is my finding that the plea taken by the Applicant was ambiguous and equivocal. Accordingly, if the plea is equivocal, the court has a duty to step in. In *Alexander Lukoye Malika v Republic* (2015) eKLR the Court of Appeal stated as follows:-

> " A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty….."

17. The Record shows that the accused went ahead to offer mitigation in which he asked the court to forgive him as he was sick. Such mitigation however cannot be seen as bolstering the guilty plea and cannot therefore perfect an incomplete plea. I associate myself with the sentiments of Ngugi J. (as he then was) in *Simon Gitau Kinene v Republic* (2016) eKLR, where he stated:-

> " Mr. Kinyanjui is right that the fact that the Accused engaged in mitigation might be an indication that he understood what was going on but I do not think that a guilty plea should be left to any deductions or conjecture. It should be clear, unambiguous and unequivocal."

18. It is my finding therefore that the plea was not unequivocal and cannot stand.

19. In passing the Sentence, the trial court ordered for the forfeiture of the Applicant's Motor Cycle Registration Number KMFL 582Y to the state. The penal section under the *Alcoholic Drinks Control Act* does not provide the penalty of forfeiture. Section 27 (1) (a) of the *Alcoholic Drinks Control Act* provides that:-

> "A person who contravenes the provisions of this section commits an offence and shall be liable to a fine not exceeding two million shillings, or to imprisonment for a term not exceeding five years, or to both."

20. The law on forfeiture is provided under Section 389A of the *Criminal Procedure Code* to wit:-

> (1) "Where, by or under any written law (other than section 29 of the *Penal Code*), any goods or things may be (but are not obliged to be) forfeited by a court, and that law does not provide the procedure by which forfeiture is to be effected, then, if it appears to the court that the goods or things should be forfeited, it shall cause to be served on the person believed to be their owner notice that it will, at a specified time and place, order the goods or things to be forfeited unless good cause to the contrary is shown; and, at that time and place or on any adjournment, the court may order the goods or things to be forfeited unless cause is shown by the owner or some person interested in the goods or things:
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> Provided that, where the owner of the goods or things is not known or cannot be found, the notice shall be advertised in a suitable newspaper and in such other manner (if any) as the court thinks fit.
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> (2) If the court finds that the goods or things belong to some person who was innocent of the offence in connexion with which they may or are to be forfeited and who neither knew nor had reason to believe that the goods or things were being or were to be used in connexion with that offence and exercised all reasonable diligence to prevent their being so used, it shall not order their

forfeiture; and where it finds that such a person was partly interested in the goods and things it may order that they be forfeited and sold and that such person shall be paid a fair proportion of the proceeds of sale."

21. I am persuaded by Nyakundi J. in the case of *Peter Igiria Nyambura v Director of Public Prosecutions* (2018) eKLR, where he stated that:-

> "Section 389A provides for forfeiture determination. The elements of the section are that a court must not enter a judgment of forfeiture in a criminal proceeding unless the indictment or information contains notice to the owner of the vessel or vehicle. It is generally acceptable that the state will seek the forfeiture of the property as part of the sentence in accordance with the applicable *Act*.
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> What do I see as the key elements in an application by the state seeking forfeiture in a criminal proceeding?
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> (a) The state must establish the requisite nexus between the property and the offence.
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> (b) The courts determination may be based on evidence already on record including any plea and or adduced evidence accepted by the court as relevant.
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> (c) If the court seeks to forfeit a specific property a notice of the order must be sent to any person who reasonably might appear to be a potential claimant with standing to contest the forfeiture in the proceedings.
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> (d) This is more so when in practical terms the seized property would be in the hand of an agent, employee, or servant of the person with proprietary interest or right."

22. From the record, the trial court gave the forfeiture order promptly after convicting the Accused. It is evident from the record that there was no Notice issued to the Applicant as envisioned by the aforementioned section of the law.

23. I agree with the reasoning of Gikonyo J. in the case of *Letiyia Ole Maine v Republic* (2021) eKLR, where he held that:-

> "According to section 24(f) of the Penal Code, forfeiture is one of the punishments that a court may inflict. Of greater significance, is that, forfeiture divests a person's property without compensation, hence, need to ensure the process leading to forfeiture adheres to the requirements of due process to avert constitutional defences of violation of right to property, right to privacy, right to fair administrative action, and right to fair trial guaranteed in article 40, 31, 47 and 50 of *the Constitution*, respectively. The person who will lose the property must be afforded due process; the person may be a third party or the accused person.
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> Some of due process protections before forfeiture order is made include notice- replete with essential details and information inter alia on the time and place of, forfeiture proceeding and property to be forfeited- to the person who will be affected by the forfeiture to attend forfeiture hearing and determination. The trial court must conduct an inquiry or hearing for forfeiture. The person who will be affected by the forfeiture order is allowed to participate

in the forfeiture proceedings and tender evidence to show cause why the property should not be forfeited. He may also appear through legal counsel or in person. The trial court then considers all relevant evidence tendered in the trial and the forfeiture proceeding in making its determination."

24. I further associate myself with the finding of Nyakundi J. in the case of *Peter Igiria Nyambura* (*supra*), that:-

> "The National Police Service and other similar agencies have a right to seize property associated with certain crimes. As the agency takes possession one would expect administrative action be taken to establish ownership. If the appropriate agency has probable cause to apply to the court for forfeiture, the law requires notice to be served to the owner.
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> The trial court must hold an inquiry where the prosecution must satisfy and demonstrate that the chattel, vessel or motor vehicle ought to be forfeited to the state. It is at that stage the owner is allowed an opportunity to raise a defence to the forfeiture. This procedure in most cases is overlooked by trial magistrates and the consequence of it has been to burden the High Court with review applications."

25. In *Council of Civil Service Unions v Minister for the Civil Service* (1985) A.C., Lord Diplock held that:-

> "where a decision of an inferior Court can be reviewed on grounds of illegality, irrationality and procedural impropriety. Illegality means that the decision-maker must understand correctly the Law that regulates his decision making power and must give effect to it irrationality." Or what is often also referred to as Wednesbury unreasonableness applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. "Procedural impropriety." Covers failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision, as well as failure to observe procedural rules that are expressly laid down even where such failure does not involve denial of natural justice."

26. In this case and as already stated, the trial magistrate did not conduct any forfeiture proceedings. It is my finding that he erred firstly when he imposed a penalty not provided in law and further by not granting the Applicant a chance to present his defence to the forfeiture.

27. It is my further finding that the trial court proceedings were a nullity due to the equivocal plea that was taken by the Applicant. Additionally, the sentence passed was illegal as the law did not provide for the forfeiture of the Applicant's Motor Cycle.

28. In the end, I quash the Applicant's conviction and set aside the sentence. The Applicant is set free forthwith unless otherwise lawfully held. Should he have paid the fine imposed, the same shall be refunded to him. The Motorcycle Registration No. KMFL 582Y be released to the applicant forthwith upon proof of his ownership or identification and authority of the registered or beneficial owner.

    Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 20 TH DAY OF MARCH, 2023.

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Njeru for the State, N/A for the Applicant and Siele (Court Assistant)