



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL REVISION NO. E257 OF 2021

DENIS MWANGI.....APPLICANT

VS.

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(An application for Revision of the Record, Proceedings and order of the

Chief Magistrate's Court at Thika (Riany, SRM) in Criminal

case No. E2578 of 2021 on 27th September, 2021)

RULING

1. The applicant, **DENIS MWANGI (Denis)** was charged before the Chief Magistrate's court Thika as follows:-

“Charge:

Contravening liquor licence Act contrary to section 34(a) of the Alcoholic Drinks Act No. 4 of 2010.

Particulars of the offence:

Denis Mwangi on the 23rd day 2021 of September at Thika town, West sub-county within Kiambu, you were found having contravened (sic) liquor Licence by selling alcoholic drinks in halves bottles instead of selling in full bottles of 250ml.”

2. The record of the proceedings before the Thika Chief Magistrate's Court shows that on 24th September, 2021 Denis failed to attend court and the court issued warrant of his arrest and further ordered the cash bail of Kshs.5,000 be forfeited to the State. On 27th September, 2021 Denis was presented before court under arrest following the issuance of that warrant of arrest. The record of the proceedings on that day reflect as follows:-

“Charge read over to accused in Kiswahili.

True.

Plea of guilty entered.

Prosecutor

Facts as per charge sheet attached list – Pexh.1.

Accused

Facts are true

Court

Accused convicted on own plea of guilt.

Prosecutor

He is not 1st offender.”

3. Denis has filed Notice of Motion application dated 5th October, 2021. He seeks:-

“That the honourable court be pleased to vary and/or review the original conviction and sentence in Thika Chief Magistrate’s court criminal Case No. E2578 of 2021 by providing alternative of a fine.”

ANALYSIS

4. The High Court has supervisory jurisdiction over subordinate courts: See **Article 165(6) and (7)** of the Constitution, which provides:-

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

5. The High Court is also empowered to revise the subordinate court’s order by **Section 362** of the Criminal Procedure Code Cap. 75. That Section provides:-

“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 subordinate court.”

6. **Section 364 of Cap. 75** also empowers the court to exercise its revisionary power conferred to it as a Court of Appeal

7. It is by virtue of the above legal provisions that Denis approached this Court.

8. Going by the reproduced proceedings of the Magistrate’s court, hereinabove, it is clear that the plea of guilt by Denis was not unequivocal.

9. Section 207 of Cap 75 provides how a plea should be taken. That section is in the following terms:-

“207. Accused to be called upon to plead

(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.

(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:

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.

(3)...

10. Attention is drawn to the proceedings reproduced above. It is clear that the prosecution did not state the facts of the case. The magistrate’s court therefore erred to record guilty plea when facts of the case were not stated for Denis to confirm their accuracy. The manner in which plea should be taken was stated in the case ADAN V. REPUBLIC (1970) E.A. 24, thus:-

“(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 any relevant facts;

(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."

11. The purpose of stating facts of the case was discussed by the Court of Appeal in the case OMBENA VS. REPUBLIC (1981) eKLR as follows:-

"In the ADAN case the court said, at p 447:

'The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.'

12. It follows that the facts having not been stated the plea of guilt by Denis was equivocal.

13. This Court also finds that the trial court's order for cash bail to be forfeited did not accord with the provisions of section 131 of Cap 75. How the trial should have proceeded when Denis failed to attend court was considered in the case of PATRICK GITARI MWIANDU VS. REPUBLIC (2017) eKLR as follows:-

"It is only after the trial court had considered that cause shown by Mwiandu that the trial court could have ordered for forfeiture. This is what was stated in the case ISAAC KIPLANGAT MUTAI – V- REPUBLIC [2013] eKLR. Viz:

'On the second issue, the order of forfeiture of the cash bail, it is the requirement of Section 131 of the Criminal Procedure Code that the court will first make an inquiry of the accused or his surety to show cause why his recognizance should not be forfeited. The order forfeiting his cash bail cannot therefore be made simultaneously with the order cancelling bail/bond.

The accused as well as the surety is required to be granted opportunity, to a hearing, to show cause why his bail/bond should not be forfeited to the state. Failure to do so in a grave breach of the rules of natural justice.'

14. In view of the above discussion, the application succeeds and this Court issues the following orders:-

(a) The conviction of **DENIS MWANGI** in Thika Chief Magistrate's Court Criminal case No. E2578 of 2021 on 27th September, 2021 is hereby quashed and the sentence is hereby set aside.

(b) The orders of forfeiture of cash bail made on 24th September, 2021 in Thika Chief Magistrate's court Criminal case No. E2578 of 2021 is set aside and an order is made for release of Kshs.5,000/= to Denis Mwangi.

(c) Denis Mwangi shall henceforth be set free unless he is otherwise lawfully held.

RULING DATED AND DELIVERED AT KIAMBU THIS 9TH DAY OF DECEMBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Maurice

For the Applicant: Mr. Njoroge

For the Respondent: Ms. Kathambi/Kasyoka

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE