REPUBLIC OF KENYA

IN THE HIGH COUT OF KENYA AT KAJIADO

CRIMINAL REVISION NO. 4 OF 2019

BENARD SAIDIMU.....1ST APPLICANT

RUTH NASERIAN.....2ND APPLICANT

ROSELINE NASERIAN.....3RD APPLICANT

JACINTA BENARD.....4TH APPLICANT

GEOFFREY MAINKA.....5TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The Applicants herein brought this Application dated 6th February, 2019 in terms of section 364 and 367 of the Criminal Procedure Code Cap 75, Laws of Kenya, Article 159 of the Constitution and all other enabling Laws. They are seeking the following orders:

1. THAT *this Honourable court be pleased to exercise its powers under section 362 of criminal procedure code for purposes of satisfying itself with the corrections, legality or propriety of the sentence meted by the lower court.*

2. THAT *this Honourable court be pleased to issue an order for review of sentence made by the trial Magistrate against the Applicants on 6th February 2019.*

The Application is premised on five grounds couched on its face. The grounds are that: the Applicants were arrested on 6 th February 2019 and charged in Criminal Cases No. 174/2019, 165/2019, 170/2019 and 171/2019; they all pleaded guilty to the charges levelled against them and they were convicted and sentenced to a month imprisonment or a fine of Kenya Shillings Twenty Thousand (Kshs.20,000/=) for each count; the said fine is overly exaggerated, unfair and excessive as the Dairy Industry Regulation provides for a fine that is not exceeding Kshs. 10, 000/= for such offences; the applicants find that the sentence is unfair and ultra-vires and the same ought to be reversed and that the application herein is made in the interest of justice of justice, equity and good conscience.

THE FACTS OF THE CASE

The Applicants were arrested on the 6th of February 2019 and arraigned in court facing the charges of:

a) Handling milk without a producer's license contrary to section 19 (SALE BY PRODUCERS REGULATION OF THE DAIRY INDUSTRY) Cap 336 Laws of Kenya as read together with Legal Notice No. 102 paragraph 2(1) and 10 of 2010.

b) Selling milk under insanitary conditions contrary to section 3 as read with section 36 (1) of the food, drugs and chemical Substances Act Cap 254 Law of Kenya.

c) Handing milk in an adulterated state contrary to section 3 as read with section 36(1) of the food, drug and chemical substances Act Cap 254 laws of Kenya.

THE APPLICANTS' SUBMMISSIONS

The Applicants pleaded guilty as shown by the record, they stated that ***"it is true"*** in all counts. The prosecution only mentioned that "*fact*

were as per the charge sheet". The counsel for the Applicants contends that the plea was equivocal. In that regard, counsel cited section 207(2) of the Criminal Procedure Code Cap 75, Laws of Kenya which provide thus:-

> ***"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) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.***
>
> ***(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.***
>
> ***(5) If the accused pleads—***
>
> > ***(a) that he has been previously convicted or acquitted on the same facts of the same offence;or***
> >
> > ***(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.***

The counsel for Applicants placed reliance on the case of ***Samuel Wafula Ominde vs Republic (2017) eKLR*** where the Honourable Court cited locus classicus case of ***Adan v Republic(1973) EA 445* at 446:**

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."***

In light of the foregoing, Counsel for the Applicants therefore stated that the purpose of such an outline is to ensure with certainty whether the accused persons plea is unequivocal. This is done to provide material for assessing an appropriate sentence in case of a plea of guilty. In his view, an unequivocal plea of guilty must be incapable of any other interpretation other than that of guilty. Counsel therefore humbly submitted that the trial did not consider the principles captured in ***Adan v Republic (case)*** and inadvertently entered a plea of guilty and sentenced the Applicants herein on an equivocal plea.

It was also submitted that the failure by the trial court to ascertain the language best understood by the applicants was a fatal omission. Consequently, the Applicants did not therefore understand the charge. Further that the trial court did not take into account the measures laid down in ***Adan vs Republic (supra)*** after the plea had been taken**.** That includes stating the facts of the case to the Applicants herein as well as to give them an opportunity to dispute, explain or add any relevant case. Counsel dubbed the same as a glaring omission which is fatal and a violation of the Applicants' right to a fair trial.

On whether or not the charge was properly taken, the counsel for the Applicants defined a charge as a formal written accusation or complaint against the accused person for an offence known in law. It was stated that the golden rule is that the charge sheet should be able to inform the accused person in clear and unambiguous terms the allegations raised against him in order for the accused person to properly prepare for his/her defense, and that the same is a rule of fair trial enunciated under Articles 50 of the Constitution of Kenya. Counsel cited section 134 of the Criminal Procedure Code Cap 75 Laws of Kenya which stipulates that:-

> ***"134. Offence to be specified in charge or information with necessary particulars***
>
> ***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."***

The applicants also relied on the case of **Sigilani –vs- Republic (2004) 2 KLR, 480** where it was held that:-

"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

The particulars of the offence should not only contain the essential ingredients of the offence, but should also in as much as possible be framed simply and in the ordinary language without the use of technical words and phrases. In my view an ordinary and reasonable person would not be able to explain what the term carnal knowledge means, and/therefore find for this reason that the charge sheet was defective for reasons of not including the particulars of the offence or omitting essential ingredients of the offence."

The Counsel for the Applicants takes the view that from the face of the record the Applicants herein never understood the language of the Court and the particulars of the offence were never read to them. Counsel also relied on Article 50(2)(m) of the Constitution which provides that an accused person has a right to have the assistance of an interpreter without payment if the accused person does not understand the language used by the trial. Counsel holds the view that the said Article provides that before the accused takes plea, the court has to ascertain the language of the accused at the earliest stage of the trial.

It was submitted on behalf of the applicants that it is fundamental and imperative that the accused understand the charge before him. Further that the court is obliged to state the said facts in clear and unambiguous terms and failure to accord to the said outline will definitely prejudice the Accused's person right to a fair trial.

On whether the Applicants' were convicted of the offence they were charged with and if so were they allowed to mitigate? It was submitted that the Applicants were never convicted of the said offences. Consequently, counsel took the view that they were not given the chance to mitigate. Counsel for the Applicants offered a definition of conviction as a formal declaration by the verdict of jury or the decision of a judge in a court of law that a person is guilty of an offence. He then cited section 281 of the Penal Code, Cap 75 Laws of Kenya provides that if an accused person pleads guilty the plea shall be recorded and shall be conviction thereon.

Further that upon conviction the accused person should be accorded an opportunity to mitigate. And that is an opportunity for an accused person to inform court of extrinsic facts that it ought to take into consideration before imposing sentence.

On the legality of the sentence, the Applicants were charged with the offence of handling milk without a producer's license contrary to section 19 (SALE BY PRODUCERS REGULATION OF THE DAIRY INDUSTRY) Cap 336 Laws of Kenya as read with Legal Notice No. 102 paragraph 2(1) and 10 of 2010, on this count the Trial Court sentenced the accused to 14 days in prison or to pay a fine Kenya Shillings Twenty Thousand (Kshs.20,000/=). Counsel cited Section 2(1) of the Sale by Producers Regulation which provides that no person shall operate as a producer unless the person holds a license issued by the Board. He further cited section 10 of the said Act which provides that a person who contravenes regulation 2 (1) is guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both.

The counsel for the Applicants also cited Article 11 of the Universal Declaration of Human Rights which provides that:-

"No person shall be held of any penal offence on account of any act or omission which did not constitute a penal offence under National or International Laws at the time when it was committed nor shall heavier penalty be imposed than the one that was applicable at the time of the Penal Offence."

In light of the above provisions of law, Counsel is of the view that the fine was not only out-rightly excessive, but also the Applicants were charged with wrong provisions of Law. And for that reason the sentence is not only illegal but the charge sheet itself is defective.

In relation to the remaining two counts, Counsel takes the view that they do not measure up with the Sentencing Guideline Policy. He opined that the same aims at ensuring that the discretion of court is exercised in a manner that do not only inspire confidence in the criminal justice system but also to pass sentences that are fair, justifiable and commensurate to the offence committed.

In conclusion, Counsel for the Applicants contends that the entire process of charging the Applicants is fatally defective and the Applicants' rights were in the event seriously prejudiced. It is their humble prayer that the entire process be declared null and void *abinitio*.

THE RESPONDENT'S SUBMISSIONS

The Respondent opposed the application through state counsel; Mr. Meroka by way of written submissions dated and filed on the 15th February 2019. The Respondents argued that the filing of the Notice of Motion with the supporting affidavit of the 1st Applicant to purport to represent other applicants was in breach of criminal liability trial. He explains that this is because criminal offence attaches to an individual, hence not possible to apply as a representative of the rest of the applicants. In the counsel's view, the ideal process ought to have been separate ruling of Criminal Revision No. 160/2018, 165/2018, 170/2018, 171/2018 and 174/2018. Further that where an application for consolidation of the matters for they relate to similar issues could be made and hence have a running file as 160/2018. The State however, conceded that the constitutional dictate under article 159, requires that the proceedings cannot be hampered due to procedural technicalities.

Counsel also took the view that the prayers being sought hinge in prayers beyond the Revision jurisdiction. He cited section 364(5) Criminal Procedure Code which provides that where the aggrieved party has right of appeal, the issues are contested and not merely error on the Presiding Judge greater latitude.

As regards the proceedings of 6th February, 2019, the state conceded that the application for the process leading to the sentence was illegal and unprocedural and the resultant sentence not found in law. The Honourable Magistrate passed a sentence of Kshs. 20, 000/- fine or one

month imprisonment, on offences under Dairy Board Act Cap 336. Counsel cited section 19 of the said Act and section 2(1) of Dairy Industry (Sale Producers) Regulations 10. The said provisions provides a maximum fine of Kshs. 10, 000/-. The state is of the view that whereas the custodial period is lawful, the criminal practice interpretation when the fine is illegal the resultant custodial stay is equally illegal. Further, it does not aggregate the stay to be in tandem with the amount fined and on this ground we concede the review on cases No. 160, 165, 170, 171 and 174 Count II of 2018.

As regards Plea Taking, the State defined it as a proceeding which ought to safeguard the rights of an accused in all stages, from understanding the charge, pleading to it and pleading to the facts of the charge, conviction, mitigation and finally the sentence. Mr. Meroka cited the case of ***Adan vs R (1973) EA 445*** (supra) which stipulates all the steps which must be meticulously guarded, otherwise the plea will not be proper. He also cited the case of ***John Muendo Musau vs R (2013) eKLR*** in support of his position. It was therefore stated in light of the aforementioned cases that, the applicants did not plead to the facts, and a mere declaration as facts per charge sheet does not meet the legal threshold of pleading to. Further reliance was placed by the Counsel for the state in the cases of ***Hillary Muchangi –vs- R (2014) Criminal Revision 32/2017 and July Nkirote –vs- Republic Criminal Appeal 48/2010.***

Further, it was the State's position that failure to record the language the accused pleaded to is equally not recorded. Counsel cited section 198(1) of the Criminal Procedure Code:-

> *"Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open court in a language which he understands"*

Counsel also cited Article 50(2)(m) aforementioned. His view is that these provisions mandates a trial court to record the language to which the accused has pleaded and failure to record is fatal on the unequivocal nature of the plea. He placed reliance on the case of ***Denis Lusoli Atsanga vs R (2016) eKLR***. In the foregoing, the State conceded that the plea as recorded on both Chapter 336 and 254 relating to applicants herein is fatally defective.

ANALYSIS AND DETERMINATION.

This being an application for revision of the lower court's decision and despite the fact that the state conceded to the application, I am still under a duty to reconsider and re-evaluate the Evidence tendered before the lower court afresh with a view to reaching my own independent conclusion. See **Pandya vs Republic [1951] E.A 336**

In this appeal however, the applicant pleaded guilty to the charge and this means that a full trial was not conducted. I will therefore scrutinize the record in order to establish whether the plea was unequivocal or not. The law as regards taking of pleas is well settled in our jurisdiction. The relevant provision of the law in this regard is Section 207(1) and (2) of the Criminal Procedure Code which provides that;

> ***"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 upon or make an order against him, unless there appears to it sufficient cause to the contrary.***
>
> ***In Adan v Republic (supra), 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 was stipulated that —***
>
> ***(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."***

In the same aforementioned case, the court at p 447 further states that:

> ***"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."***

Further, by virtue of the Statute Law (Miscellaneous Amendments) Act 1974, a *proviso* was added to section 207(2) of the Criminal Procedure Code aforementioned. The same provides 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 the facts upon which the charge is founded.***

However, our Courts have taken the view that the said *proviso* does not lessen the need to ensure that an accused person wishes to plead guilty 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 light of the foregoing, the Applicants contends that the trial court did not consider the parameters set out in the case of ***Adan vs Republic (supra)*** and their view is that the failure by the court to ascertain the language of the accused persons was a fatal omission and as a result the Applicants did not therefore understand the charge. Further, the Applicants are of the view that the same amounted to a violation of their right to a fair trial. The Counsel for the state is in agreement with the Applicants that the plea was equivocal. Learned Counsel conceded that the Applicants did not plead to the facts. He is in agreement with the Applicants that a mere declaration that *"facts are as per the charge sheet"* does not meet the legal threshold of taking an unequivocal plea. It was also averred that the failure to record the language that the applicants used while taking the plea in question is equally irregular.

It is evident that the trial court did not follow the process of plea taking as laid down in ***Adan v Republic (supra).*** A court taking plea must establish the language of the accused. A perusal of the record of trial proceedings indicate as follows:

> ***"Interpretation……..***
>
> ***Accused – Present***
>
> ***Court- The substance of the charge and every element thereof has been stated by the court to the accused person in the language that he understands who being asked whether he admits or denies the truth of the charge replies:-"***

I have noted that the trial record does not indicate the language of interpretation as well as the applicants' own language. It is common knowledge that the language of the subordinate court is Kiswahili. Section 198(4) of the Criminal Procedure Code provides that the language of the High Court shall be English whereas that of subordinate courts shall be English or Kiswahili. The requirement of the law is that the charge must be explained to the accused in the language that he understands well. The same is done by the court interpreter after which the accused will be required to plead instantly. In that respect I'm guided by the East Africa court of Appeal decision of ***Kariuki Vs Republic [1954] KLR 809]*** where it was stated that the facts should be recorded together with the name of the interpreter and the languages used. I'm alive to the fact that not all Kenyans understand Kiswahili. In the instant case therefore, it was incumbent upon the honorable trial court to inquire into which language the accused is well conversant with.

Nowhere does the trial record indicate that the counsel for the state read and explained the particulars to the applicants. This was important because the particulars in the charge sheet sometimes are different from the facts in witness statements. I take the view that proper compliance with the requirements of the law would require that the prosecution give a summary of facts extracted from the recorded witness statements. The same should then be compared with the allegations and the particulars in the charge sheet to determine whether the particulars and facts are in tandem. In the premises, I'm unable to find that the applicants herein were properly apprised of the charge they were charged, convicted and sentenced with.

As regards the legality of the sentence, both the State and the Applicants are in agreement that the sentence passed by the Honorable Trial Magistrate was not only excessive but it was illegal as well. The Applicants were charged with the offence of handling milk without a producer's license contrary to section 19 (SALE BY PRODUCERS REGULATION OF THE DAIRY INDUSTRY) Cap 336 Laws of Kenya as read with Legal Notice No. 102 paragraph 2(1) and 10 of 2010. On this count the Trial Court sentenced the accused to 14 days in prison or to pay a fine Kenya Shillings Twenty Thousand (Kshs.20, 000/=).

However, Section 2(1) of the Sale by Producers Regulation which provides that no person shall operate as a producer unless the person holds a license issued by the Board and section 10 of the said Act provides that a person who contravenes regulation 2 (1) is guilty of an offence and shall, on conviction, be liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both.

In the foregoing, it is clear that the maximum fine as per the law is Kshs. 10, 000. I agree with the Prosecution Counsel as well as the Counsel for the Applicants that the sentence of fine imposed by the Learned Magistrate was harsh and excessive. Whereas the custodial period is lawful, the criminal interpretation when the fine is illegal, the resultant custodial stay is equally illegal and it does not aggregate the stay to be in tandem with the amount fined.

It is clear from the foregoing that the plea taking process was not done in full compliance of the law and the same was prejudicial to the applicants. It is for that reason and other reasons I have considered above, the conviction and sentence that followed was illegal. Having pleaded guilty, the applicant cannot be availed a right to appeal and for that reason, I will revise the order of the lower court, quash the conviction and set aside the sentence imposed. The fine paid be refunded to the applicants. The Applicants shall be set at liberty unless otherwise lawfully held.

Dated, signed and delivered in open court at Kajiado this 3rd day of May, 2019.

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R. NYAKUNDI

JUGDE

Representation:

Mr. Nairi for the applicant

Mr. Meroka for Respondent

The Applicants