REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 2 OF 2018

MIRIAM MWONGELI....................1st APPELLANT

PATRICIA MWANIKI...................2ND APPELLANT

VERSUS

REPUBLIC...RESPONDENT

Appeal arising from the conviction and sentence by Hon. L. Kassan (SPM) in Mavoko S.P.M's Court in Criminal Case No. 820 of 2016 delivered on 09/11/2016)

JUDGEMENT

1. The Appellants were charged with the offence of allowing use off unauthorized gaming machines in public place contrary to **Section 53(1)(b)** of the Betting, Lotteries Gambling Act Chapter 131 of the Laws of Kenya. They pleaded guilty to the charge and were each sentenced to a fine of Kshs.10,000/- in default to serve 2 months imprisonment. In addition the learned trial Magistrate made an order to have the gambling machines forfeited to the state.

2. Being aggrieved by the conviction, sentence and the said order on forfeiture, the appellants filed the instant appeal. The appeal was disposed of by way of written submissions. The Appellant submitted that by ordering forfeiture of the 3 single slot machines, that belonged to their employer, their rights to the said property were violated and the order on forfeiture was made without reference to the owner of the machines.

3. Mr. Cliff Machogu, prosecution Counsel, has not opposed the appeal. Counsel submits that Section 348 of the Criminal Procedure Code provides that no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea except as to the legality of the sentence. He cited the case of **Olel v R (1989) KLR 444**.

4. Counsel submitted that the case of **Adan v Republic (1973) EA 445** sets out the steps to be taken in recording a plea and argued that when the trial prosecutor was called upon to read the facts, she simply stated that the facts as per the charge sheet, and it follows that failure to follow the procedure means the plea was not unequivocal and must be set aside.

5. In addressing whether the forfeiture order was proper counsel cited Section 67 of the Betting, Lotteries Gambling Act chapter 131 of the Laws of Kenya which provides as follows:

> ***"the court by or before which any person is convicted of any offence under this Act may order anything produced to the court and shown to the satisfaction of the court to relate to the offence to be forfeited and either destroyed or dealt with in such other manner as the court may order"***

6. He submitted that the Betting, Lotteries and Gaming Act does not provide for a detailed procedure on criminal forfeiture. In this regard trial courts ought to be guided by the provisions of Section 389A of the Criminal Procedure Code.

7. He submitted that the trial court failed to follow the required procedure for taking plea and forfeiture. Hence the conviction, sentence and order for forfeiture ought not to be allowed to stand.

8. The issues for determination are whether the procedure that the trial court followed in respect of forfeiture was proper, whether the plea was unequivocal; whether the sentence was legal and what orders the court may grant.

9. It is my duty as the first appellate court to consider the relevant materials placed before me regarding a case of this nature.

10. The appellant has argued in his submissions that it was wrong for the Trial Court to have proceeded with the forfeiture without establishing the ownership of the machines. In response, I would state that the Trial Court record does not have any indication that there was an attempt to bring to its attention this fact. The record does not have any indication that the court followed the requisite procedure. The court is obligated under Section 67 of the Betting, Lotteries and Gaming Act as read together with the procedure set out in Section 389A of the Criminal Procedure Code. **(cap. 75 of the laws of Kenya**) to establish the ownership of the gaming machines and because the order by the trial court appeared to me to fall short of the legal requirements, the order is hereby set aside on grounds of being irregular, improper and incorrect as it has occasioned prejudice.

11. I shall now address the issue of whether the plea was unequivocal. The learned state counsel has attacked the procedure that the trial court took but the appellant has not raised this ground. The record of the trial Court shows no indication of what language the charge was read over to the appellant and if it was read out at all because instead of the prosecution having read out the facts to the appellants, they stated "facts as per charge sheet" and the appellants responded by stating that the facts were true. It is not clear if at all they understood what they were admitting to. The appellants were not convicted on their own guilty plea but instead a plea of guilty was entered and the appellants were sentenced.

12. The case of ***ADAN V REPUBLIC [1973] E.A. 445*** laid down the steps to be taken where there is a guilty plea as follows:

> ***(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 in 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) f the accused does not agree 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.***

The Court in that case at **pages 446-447** observed as follows:

> ***When a person is charged, the charge** <u>and the particulars</u> **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 guilt, 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 reply must, of course be recorded.***
>
> ***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.***

13. Section 207 of the Criminal Procedure Code (Cap 75) states as follows:

> ***(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 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 refused 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.

14. Article 50 (2) of the Constitution provides for the right of every accused person to a fair trial.

15. The circumstances of this case are that the appellants pleaded guilty to the charge. It is not clear if the appellants understood the allegations against them despite having opted to admit having committed the offence. From the record, it is not indicated what language was used to read out the facts to the Appellants and therefore I find that the plea was not unequivocal.

16. In addressing the third issue, Section 53 (1) of the Betting, Lotteries and Gaming Act, the penalty section provides as follows;

"***Shall be liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or both"***

17. The learned trial Magistrate imposed a fine of Kshs 10,000 and in default to serve 2 months imprisonment. The penalty range from section 53(1) of the Act is that a fine of Kshs five thousand as the upper limit in default to six months or both. This meant that the sentence was not backed by law and ought to be quashed.

18. With regard to the orders to be made, Article 165 (6) and (7) of the Constitution grant the court supervisory jurisdiction to call and examine the record of the inferior courts and tribunals to make any order or give any direction it considers appropriate to ensure the fair administration of justice. The appellant opted to appeal. However Section 362 as read with Section 364 of the Criminal Procedure Code (Cap 75 of the laws of Kenya) grant the court powers of review and Section 364 Cap 75 provides as follows:

"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."

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 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; in the case of any other order than an order of acquittal, alter or reverse the order.

No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence;

Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction;

When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

19. In view that in a criminal trial, the same is intended to ensure that a fair trial is accorded to a party without causing prejudice to the party against whom such an order is sought to be made and in exercise of powers of revision, one of the orders I shall make is that of re-trial.

20. As was stated in the case of **Ahmed Ali Dharmsi Sumar vs Republic 1964** **E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

"In general a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the Prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial Court for which the Prosecution is not to blame, it does not necessarily follow that a retrial should be ordered. Each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

21. In addressing the question of prejudice to be suffered by an appellant when a matter is to be referred for a re-trial, in the case of **Joseph Ndungu Kagiri v Republic [2016] eKLR**, Mativo J had the following to say:-

"As held above under no circumstances should prejudice be caused to an accused person. I therefore find that the entire trial

was conducted in total breach of the jealously safe guarded constitutional provisions which guarantee a fair trial, and therefore the entire proceedings in criminal case number Nyeri Criminal Case Number 254 of 2011, *Republic vs. Simon Murage Mutahi & Another* are hereby declared to be a nullity and are hereby quashed. I therefore find that this appeal is successful. Accordingly, I hereby allow the appeal, quash the entire proceedings and set aside the orders made in the said case."

22. In the present case, the Appellants have presumably served their sentence, and that they stand to suffer great prejudice if a retrial is ordered. The justice of the case demands that the conviction should be quashed and sentences as well as the order on forfeiture set aside.

23. In the end, the appeal herein has merit and is allowed. I make the following orders;

> ***a. The conviction by the trial court is hereby quashed and the sentence of a fine of Kshs 10,000/= in default to serve 2 months imprisonment as well as the order of forfeiture is set aside.***
>
> ***b. The imposed fines if already paid are ordered to be refunded to the Appellants.***
>
> ***c. The gaming machines that had been forfeited are ordered to be restored to the rightful owners upon proof of ownership.***

It is so ordered.

Dated and Delivered at Machakos this 13th day of May, 2019.

D. K. KEMEI

JUDGE