REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 134 OF 2018

REPUBLIC.....APPELLANT

VERSUS

JOSEPH MUTUKU MUIA.....RESPONDENT/CROSS-APPELLANT

(*Being an appeal against the legality of sentence meted by Hon Kibiru,*

Chief Magistrate on the 6th December, 2018 in ***Machakos CM's***

Criminal Case No. 507 of 2018)

JUDGEMENT

1. The respondent was on 3.10.2018 charged with two counts; one of implementing a project without an Environmental Impact Assessment Approval Contrary to Regulation 4(1) (b) of the Environmental Management and Coordination Act (Impact Assessment and Audit) Regulations 2003 as read with Section 144 of the Environmental Management and Coordination Act chapter 387 of the Laws of Kenya while the other was to do with failing to comply with a lawful order or requirement made by an environmental inspector contrary to Section 117(3) (b) as read with Section 173(b) of the Environment Management and Coordination Act chapter 387 of the Laws of Kenya.

2. It was alleged in respect of count one that the respondent on diverse dates between May, 2018 and 3rd September 2018 commenced construction of a commercial development (Godown) for which an environment impact assessment is required on LR No. Machakos Municipality Block 1/623 in Machakos Central Sub-county, Machakos County the Environment Impact Assessment not having been concluded and approved under the Environmental (Impact assessment and audit Regulations 2003.

3. It was alleged in respect of count two that the respondent on divers dates between May, 2018 and 3rd September, 2018 in Machakos Sub-county, Machakos County being the proponent of a project on LR No. Machakos Municipality Block 1/623 and others not before court failed to comply with a restoration order issued on the 7th May, 2017.

4. When the charge was read to the respondent, the trial court recorded the proceedings of the day as follows;

Interpretation: English/Kiswahili

Count 1- it is true.

Count 2- it is true

Court: Plea of guilty entered in both counts

Facts: Accused was found undertaking construction on the land Machakos Municipal Block/ 203 located within OCPD's official residential compound without an environmental impact assessment contrary to Section 58 of the Act. On 7/5/2018 the accused had been served with a statutory order requiring that he stops further construction but was later found on 2/9/2018 having defied the order. He was traced and charged

Accused: the facts are correct

Court: convicted on own plea of guilty.

Nthiwa in Mitigation: …….

5. When the case came up again for sentencing, the trial magistrate sentenced the respondent to a fine of Kshs 25,000/- in default 3 months imprisonment on each count.

6. The appellant and the cross appellant were dissatisfied with the conviction and sentence and have approached this court seeking to challenge the same.

7. The appellant assailed the trial magistrate for sentencing the respondent to a fine of Kshs 25,000/- in respect of count one and two yet the law provides for Kshs 1 million. The appellant also challenged the trial court for failing to appreciate the gravity of the offences that the respondent was charged with and for tampering with the minimum penalty under Section 137(1) (b) and 144 of the Environmental Management and Coordination Act and thus acted ultra vires. The appellant sought that the fine meted on the respondent be set aside and substituted with an appropriate sentence.

8. The cross-appellant challenged the trial court for allowing the prosecution to read facts that that were different from the charges preferred upon the respondent; for convicting and sentencing the respondent on an unequivocal plea; for convicting and sentencing the respondent in the absence of exhibits, on charges not supported by the facts read and on two counts when the facts were read in respect of only one count.

9. The respondent sought that the conviction be quashed and the sentence set aside and that he be acquitted.

10. Submitting in support of the appeal, counsel for the appellant submitted that the trial magistrate erred in treating the offences as petty and meted a fine that was not within the provisions of Section 137(b) and 144 of the EMCA. Counsel added that the court has powers to enhance a sentence under Section 354(b) of the Criminal Procedure Code. Counsel added that the respondent was facing two counts on facts that were the same hence there was no need to read the facts twice. Counsel added that the discrepancy of dates contained in the charge sheet and as contained in the facts that were read out to the respondent did not occasion a miscarriage of justice. Reliance was placed on the case of **Obedi Kilonzo Kevevo v R (2015) eKLR**.

11. In response, the counsel for the respondent opposed the appeal and argued that mandatory minimum sentences were declared unconstitutional in the case of **Raphael Mutunga Mutinda v R (2019) eKLR.** In support of the cross-appeal, learned counsel for the respondent submitted that no exhibits were produced in court; no restoration order was produced as an exhibit and as such the respondent was denied a chance to challenge the same. Reliance was placed on the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 Others (2015) eKLR.** Counsel added that the record showed that the facts were read in respect of the first count and yet the appellant was facing two counts.

12. The issues to be determined are the propriety of the conviction and the propriety of the sentence. According to section 348 of the Criminal Procedure Code no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the legality of the sentence. Having been convicted on his own plea of guilty, the appellant by challenging the manner in which the plea was recorded, is in essence appealing in regard to the legality of the plea.

13. The correct procedure of recording a plea of guilty and the steps to be followed by the court is now well established following the decision in **Adan v. Republic, [1973] EA 446** where Spry V.P. at page 446 stated it in the following terms:

> **"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 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's reply must of course be recorded".**

14. It is incumbent upon a trial court when recording a plea to be meticulous in ensuring that the charge is read and explained to the accused in the language he or she understands or is familiar with to enable him or her plead to the same properly and in unequivocal manner. In cases where an accused pleads guilty, to record the answer the accused gives as clearly as possible in the exact words used by the accused. Reading the facts of the case is meant to ensure that an accused's plea is taken in unequivocal manner and there should be no doubt as to whether the accused has understood the charges facing him in addition to the substance and every element of the charge.

15. The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence, otherwise the plea is not unequivocal. The facts as read to the accused must disclose the offence. The accused is only to be convicted when facts narrated are in unison with the offence charged (see ***R v Peter Muiruri & Another (2014) eKLR***).

16. For a charge under sections 4(1) (b) of the Environmental Management and Coordination Act (Impact Assessment and Audit) Regulations 2003 as read with Section 144 of the Environmental Management and Coordination Act Cap 387 of the Laws of Kenya, it is necessary that the facts of the offence should specify; - that the accused is a proponent implementing a project for which an environmental

impact assessment is required under the Act and no environmental impact assessment has been concluded and approved in accordance with these Regulations. Section 144 of the Act provides that "Any person who commits an offence against any provision of this Act or of regulations made thereunder for which no other penalty is specifically provided is liable, upon conviction, to imprisonment for a term of not more than eighteen months or to a fine of not more than three hundred and fifty thousand shillings or to both such fine and imprisonment"

17. For a charge of "Failing to comply with a lawful order or requirement made by an environmental inspector contrary to Section 117(3)(b) as read with Section 137(b) of the Environment Management and Coordination Act Cap 387 of the Laws of Kenya" it is necessary that the facts of the offence should specify that an environment inspector required the production of, inspected, examined and copied licences, registers, records and other documents relating to law relating to the environment and the management of natural resources from the respondent and that the respondent failed to comply with a lawful order or requirement made by an environmental inspector in accordance with the Act or Regulations made thereunder;

18. In the instant case the facts disclose that the respondent was found constructing in the absence of an Environment Impact Assessment and served with a lawful order to stop construction and he continued doing so. They were one set of facts that covered two offences. With all due respect the facts do not disclose that the respondent was attended to by an environment inspector and yet the second count required that element to be established. Further it is noted that exhibits were not produced so as to support the facts read and thus lead to an unequivocal plea of guilty. As the charges related to some conditions, orders and or written instructions allegedly addressed to the respondent it was incumbent upon the appellant to strive to produce them.

19. The gravamen of the first count is construction in the absence of an environment impact assessment while the second count is service of an order by an environment inspector that was not obeyed. For example in **Peter K. Waweru v R (2006) eKLR,** the court observed that failure to comply with the Act in issuing of notices would not sustain a charge. Hence in combining the facts in both counts amounted to a miscarriage of justice because the facts were not in unison with the second offence charged and this meant the plea was equivocal and cannot sustain the conviction. In this regard the cross appeal must succeed while the appeal fails. Because the facts as read were faulty, the court cannot cherry pick facts to suit the appellant's case and in this regard holds that the entire facts as read did not lead disclose an offence as the same did not result into an unequivocal plea of guilt. This leads me to find that the conviction ought to be quashed and sentence set aside.

20. Where a conviction is quashed and sentence set aside, the question that always comes to mind is whether or not there should be a re-trial.

21. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522** held as follows;

> ***"…several factors have therefore to be considered. These include:***
>
> ***1. A retrial will not be ordered if the conviction was set aside because of insufficient evidence.***
>
> ***2. A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.***
>
> ***3. A retrial should not be ordered where it is likely to cause an injustice to the accused person.***
>
> ***4. A retrial should be ordered where the interest of justice so demand.***
>
> ***Each case should be decided on its own merits."***

22. It is a basic principle of constitutional law, that no person may be twice placed in jeopardy or put on trial with the possibility of conviction and punishment for the same criminal offense. According to article 50(2) every accused person has the right to a fair trial which includes the right – (a) Not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted."

23. In cases where the appellate court forms the opinion that a defect in procedure resulted in a failure of justice, it is empowered to direct a retrial but from the nature of this power, it should be exercised with great care and caution. An order of a retrial should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence. In the instant case, having found that the facts as narrated by the prosecution are not in unison with the offence charged, a retrial cannot be ordered as to allow it would enable the appellant to fill in the gaps in its case. The respondent should not be made to suffer for mistakes caused by the appellant. The appellant's claim that the plea was taken midstream the proceedings and could not avail the exhibits is not convincing as nothing prevented it from seeking to adjourn the matter to a later date when they would be ready with the facts and exhibits.

24. Having considered that the conviction was improper I find there is no need to address the legality of the sentence that formed the basis of the appeal save to add that the sentence imposed by the offence in the first count attracts a sentence of not more than 18 months imprisonment or a fine not exceeding 350,000/ and which the trial court considered and came up with a fine of 25,000/ or 3 months imprisonment. The said sentence was within the range and took into consideration the respondent's mitigation. The respondent has thus served the sentence.

25. In the result I find the appellant's appeal lacks merit and is dismissed. The Respondent's cross appeal succeeds with the consequence that the conviction is hereby quashed and the sentence set aside. The respondent is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 9th day of December, 2019.

D. K. Kemei

Judge