



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CRIMINAL APPEAL NO.214 OF 2016**

**GEOFFREY KIBERENGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

1. The appeal arises from the judgement of Chief Magistrate John King'ori in Bungoma CM CR. Case No.2256 of 2016 which was delivered on 19<sup>th</sup> October, 2016.

The appellant was charged with an offence of improper use of electrical energy contrary to Section 64(4)(d) of the Energy Act No.12 of 2012. Particulars as per the charge sheet were that "on the 19<sup>th</sup> of October, 2012 at Kanduyi area within Bungoma County he was found with intent to interfere, connected a conduction with main supply line without the consent of the Kenya Power the Licensee."

2. The appellant pleaded guilty to the charge as read and the facts, was convicted and thereafter sentenced to a fine of Kshs.5,000,000.

3. Being dissatisfied with the judgement the appellant appealed to this Court on the grounds as follows;

- **The trial Court failed to enter a plea of guilty on the charge.**
- **The trial Court convicted and sentenced the appellant without warning him of the charges of pleading guilty.**
- **The Court did not determine the language understood by the appellant.**
- **Plea taking was against Article 50(1), 2(b) of the Constitution.**
- **Plea was equivocal.**

4. In his submissions Counsel for the appellant Mr. Musumba submitted that the language used by the Court was not indicated. The facts as read out were at variance with particulars of the offence and the charge in that the charge refers to intent and the facts refer to connection.

As regards the plea the mere fact that the words 'it is true' are used this alone cannot constitute a plea of guilty.

That sufficient details ought to have been given to the appellant in line with Article 50 of the Constitution.

5. The State opposed the appeal on grounds that; the language of the Court was clearly indicated to have been English and Kiswahili; the accused pleaded guilty, and plea of guilt was entered after reading of facts. Even if entered at a wrong time this was not fatal and neither prejudicial to the accused; there was no conflict between the particulars in the charge sheet and facts read, any defect in the charge sheet is curable, it is clear from the facts that the appellant had connected electricity and had no document. As for the sentence it is proper and in accordance with the Law.

6. In his rebuttal Mr. Musumba argued that the accused suffered prejudice due to the sentence meted out and this cannot be said to be a mere technicality but an issue of Law.

7. Having considered the grounds of appeal and submissions by Counsel the issues are (a). ***Whether the plea as taken by Court and recorded was proper.***

**(b). Whether the language of the Court was indicated and one understood by the appellant.**

**(c). Whether the conduct of the Court was contrary to Article 50 of the Constitution.**

8. The record of the Court is clear that the proceedings were conducted in English and translated into Kiswahili. Although this was raised as a ground not much was canvassed by way of submissions. I take it therefore that the language used was understood and I find that this ground has no merit.

9. As for the charge sheet, the particulars of the offence were crafted in poor English as the sentence construction is not very clear, though read alongside the facts of the case one may not be able to deduce particulars clearly. The procedure of plea taking is clear an accused first pleads to the charge and particulars. In this instance, it is not clear whether the accused pleaded to intent to interfere with main electricity supply or to connecting electricity from the main which therefore leads to the conclusion that the plea cannot with certainty be said to have been unequivocal.

10. The much quoted Case of **Adan Vs Republic (1973) E.A.** by the Court of Appeal set out the procedure to be adopted in plea taking as follows;

***i) the charge and all 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 entitled.***

***iii) the Prosecution should then 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 to the facts or raises any question of his guilt his reply of the facts 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 reply should be recorded."***

11. The record indicates that though the appellant agreed to the charge and particulars thereof a plea of guilty was not recorded. This fact and the uncertainty of the plea, guided but the Case of **Adan V R (Supra)** cannot stand the test set out in the said Case.

12. The other factor is that the uncertainty in the particulars creates a doubt whether the facts indeed do support the charge.

13. The next question is whether in the circumstances of the case, there should be an outright acquittal or a retrial be ordered.

In **Lilimo Ekimat Vs R CR A. No.5 of 2014** the Court stated as follows;

***"The principle that has been acceptable to Courts is that each case must depend on particular facts and circumstances of that case but an order for retrial should be made where the interest of justice requires."***

14. In the circumstances of this case as set above it is clear that the plea taking failed to adhere to known principles and the charge sheet created uncertainty. This is a case where Justice points towards a retrial which I so order with the following directions;

**1. That the charge sheet be amended and made clearer in language.**

**2. That a fresh plea be taken before a different Magistrate.**

**DATED and DELIVERED at BUNGOMA this 1<sup>st</sup> day of February, 2018**

**ALI-ARONI**

**JUDGE**