REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 3 of 2017

NYABUONY WIYUAL NGUNER...…….…….1ST APPELLANT

GATWECH CHUOL……..……....…2ND APPELLANT

VERSUS

REPUBLIC ……..……..……..…….RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 1654 of 2016 delivered by Ho. H. Onkwani, SRM on 25th October 2016.)

JUDGMENT

Background

Both Appellants were arraigned before the Chief Magistrate's Court at Milimani in criminal case 1654 of 2016. They faced two identical counts. Counts I and IV were of possession of forged travel documents contrary to **Section 54(1)(b)** as read with **Section 54(2) of the Kenya Citizenship and Immigration Act,2012**. The particulars of the counts were that on the 21st of October, 2016 at Becon Estate off Mirema Drive in Zimmerman area within Nairobi County, being Ethiopian nationals, were found possessing forged Kenya Temporary Permit numbers EP4283744 and EP4283744 respectively.

In counts II and III they were charged with being unlawfully present in Kenya contrary to **Section 53(1)(j)** as read with **Section 53(2) of the Kenya Citizenship and Immigration Act**. The particulars were that on 21st October, 2016 at Becon Estate off Mirema Drive in Zimmerman area within Nairobi County being Ethiopian nationals, were found to be unlawfully present in Kenya in that they did not have a valid pass or permit allowing them to be in Kenya.

The Appellants were convicted on their own plea of guilty. In counts I and III, each of them was sentenced to pay a fine of Kshs. 500,000/= in default serve one year imprisonment. I Counts II and IV, each was sentenced to a fine of Kshs. 100,000/ in default serve 8 months imprisonment. The court ordered that the sentences run concurrently. In addition, the court ordered that upon payment of the fines or serving the sentences, the Appellants be repatriated back to their country of origin.

Before the appeal was set for hearing, the Appellants had filed a Notice of Motion dated 2nd February, 2017 seeking bail pending appeal. With the direction of this court, the Appellants abandoned the application and chose to proceed with the appeal itself. This was mainly informed by the fact that the main ground on which the application would have been canvassed also constituted the main ground of

appeal. Furthermore, the Appellants being foreigners it was prudent that the appeal be heard and be disposed of once and for all. After all, the proceedings were ready. Accordingly, the court ordered for the original trial file for purposes of the appeal.

The main ground of appeal was that the plea was not unequivocal. Counsel for the Appellant, Mr. Manyara submitted that the manner in which the plea was taken was not in accordance with the laid down procedure. In addition, it was apparent from the proceedings that the Appellants did not understand the language the plea was taken in. Therefore, it could not be concluded that the Appellants understood the language of the court. The court was referred to the cases of **Adan vs Republic [1973] EA 445** and **Titus Okumu Tito vs Republic [2015] eKLR.**

With respect to how the plea was taken, learned counsel submitted that it is a requirement in plea taking that the charge and essential ingredients of it must be explained to the accused person in a language that he understands. This procedure unfortunately was not adhered to. His contention was that plea taking is not a mechanical process but an integral part of the trial process. The same not having been followed, the court had no choice but to set the Appellants free. He therefore urged that the appeal be allowed.

Learned State Counsel Ms. Kimiri did not oppose the appeal mainly on ground that the Appellants were not accorded a fair trial pursuant to Article 50(2)(m) of the Constitution. In this regard, she conceded that the plea was not taken in a manner that would be concluded that the Appellants understood the language of the court. She submitted that although a language interpreter was provided, the proceedings were recorded in a manner that demonstrated that the both Appellants did not understand the language of the court. She stated that this was apparent because after the interpreter was provided, the charges were not read to the Appellants afresh which ultimately occasioned a miscarriage of justice and rendered the trial a nullity. In this respect, M/S Kimiri was of the view that a retrial should be conducted. This was because the Appellants had pleaded guilty to the offences they were charged with. Furthermore, the government of Kenya would not legalize their stay in Kenya because they gained entry into the country using forged documents. She also stated that the proceedings were short and even if the Appellants would not plead guilty again, prosecution witnesses would be available. Finally, she submitted that a retrial would not in any way prejudice the Appellants.

Learned Counsel Mr. Manyara opposed a retrial on grounds that it would be prejudicial to the Appellants. This was in light of the fact that they had so far served five months out of a possible 12 months jail term. His view was that in the interest of justice, the most prudent thing to do was to repatriate the Appellants back to their home country, to which they were not opposed. The submission was made without prejudice, having regard to the assertion that the Appellants obtained the travel/permit documents at the point of entry into the country through an agent and they were not therefore in a position to confirm their legality.

Having considered the respective submissions, it is needless to say that the onerous duty of this court is to determine whether the plea as taken adhered to the proper procedure and was therefore unequivocal. Section 207(1) and (2) of the Criminal Procedure Code briefly outlines how a plea should be taken. The same reads 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, 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:**

Both the Appellants and the Respondent agree on the main issue for determination which is that the plea was taken in a language that the Appellants did not understand. The above provisions must then be read together with Article 50(2)(m) of the Constitution which provides that:

"**every accused person has the right to a fair trial which includes –**

(m) to have the assistance of the interpreter without payment if the accused person cannot understand the language used at the trial."

Article 50 generally provides for the rights of an accused person to a fair trial. It is gainsaid that under Article 25 of the Constitution, the right to a fair trial cannot be derogated. It is therefore mandatory that an entire trial must be conducted in a language that the accused person understands. This cardinal rationale to this adherence is that failure to do so blatantly violates an accused's right to a fair trial. And as rightly submitted by counsel for the Appellants, plea taking is an integral part of the trial process. It must never be taken casually or wished away. An improperly taken plea would ultimately vitiate the entire proceedings which is not only expensive to the administration of justice but is also prejudicial to an accused. That is why, over the years courts have given emphasis to the process of plea taking in rich jurisprudence. One of the case law in this area is the well re-known case of **Adan vs R [1973] EA, 443**. At page 446, the Court of Appeal sitting in Nairobi summarized the procedure of taking a plea as follows:

"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 word, and then formally enter a plea of guilt. 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 statements 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."

The above procedure was adopted in the case of **Kariuki vs Republic [1984] KLR, 809** as follows;

" (1) The word "do" recorded by the trial court as the accused persons answer to the facts of the offence meant nothing and was neither an admission nor a denial of the facts

(2) The manner in which a plea of guilty should be recorded is:

(a) the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understand;

(b) He should then record the accused's own words and if they are an admission, a plea of guilty should be recorded.

It behooves this court to revisit the record of proceedings so as to satisfy itself as to whether the plea was taken in a proper manner. Both Appellants were first presented in court on 24th October, 2016. The court recorded its languages as English and Kiswahili. The court noted that the substance of the charges and all elements thereof had been read to the accused persons in a language they understood. But before they could plead to the statements of the charges, the prosecutor made an application that a Nuer interpreter be provided. The court then deferred the plea to the next day. For avoidance of doubt, the proceedings of that day were recorded as follows:

"24/10/16

Daniel Ogembo (Mr) CM

C/Pros. fMr. Onyango for Immigration

C.C – Faith

Interpretation –English/Kiswahili

Accused person –present/absent

The substance of the charges(s) and all elements thereof has been stated by the court to the accused person, in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies :-

Prosecutor:

I ask for plea to be differed to tomorrow to get a Nuer interpreter.

Court:

Plea differed to tomorrow. Nuer Interpreter to be availed. Remanded at Milimani Police Station. Mention on 25/10/16"

Come 25th October, 2016, the court proceedings were recorded in the following manner:

"25/10/16

H. Onkwani SRM

Prosec. – Mr. Kavoi

C.C. – Aruro

Accused 1 present

Accused 2 present

Mr. Kavoi for Immigration:

I have an interpreter for Nuel language a dialect of Sudan and Ethiopian language.

The interpreter Mr. Manal Chuol Sworn and Interprets to the accused person of Passport No. (R0016814)

He interprets for accused persons who responds thus:-

Count I:

1st Accused – Its true

Count II:

1st Accused – Its true

Count III

2nd Accused – its true

Count IV:

2nd Accused – Its true

Plea of guilty entered in all counts for both accused persons.

Prosecutor:

The facts are that the 2 accused persons are Ethiopian nationals on 21/10/2016 – Immigration Officers and AIP's conducted a said at Becon Estate off Mirema Drive in Zimmerman area. The two accused person were found in their house of residence and were told to identify themselves. First accused produced a temporary passport of Kenya No. EP42867444 while 2nd accused produced temporary passport EP. 42837744. Officers perused the temporary passport and discovered that the two were forged. They were taken to immigration Nyayo House where it was discovered that both temporary passport did not originate from immigration and stamps found on them were fake. Accused persons were also found to be unlawfully present in the country and no valid pass or present allowing them to be in Kenya. They were charged before court.

1st Accused – its true

2nd Accused – it's true.

Plea of guilty entered in all counts for both accused persons.

Prosecutor

Accused persons are 1s offenders.

Accused persons in Mitigation:

1s Accused – nil

2nd Accused – nil

Court

Sentencing at 2.30 p.m"

From the foregoing, it is clear that after a Nuer interpreter was provided, the court did not read the charges afresh to the Appellants. This omission was done notwithstanding that, although the charges had been read to the Appellants on 24th October, 2016 the Appellants had not understood the language of the court. This is what informed the court to provide the Nuer interpreter who spoke the language of both Appellants. With the glaring omissions, the trial court nevertheless went ahead and asked the Appellants to plead to the charges. It proceeded to enter a plea of guilty for both of them. The prosecutor was thereafter invited to read the facts of the offences to the Appellants. Thereafter, the court recorded that the Appellants had conceded to the facts and accordingly entered an unequivocal plea of guilty.

It is clear then that the plea was not taken in a proper manner. Both Appellants did not understand the language of the court and ultimately the plea was not unequivocal. This vitiated the entire trial which rendered it a nullity. The illegality would only be corrected by ordering a retrial. But again, certain parameters must be satisfied before a retrial can be ordered. See the case of **Alexander Lukoye Malika vs Republic[2015] eKLR** where court enunciated circumstances under which a court may interfere with a verdict premised on a plea of guilty, thus;

"A court may only interfere with a situation where an accused person has pleaded guilty to a

charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged."

Also in the case of **Opicho vs Republic [2009] KLR 369**, the court of Appeal sitting in Nakuru highlighted circumstances under which a retrial may be ordered as follows;

"In general a retrial would be ordered only when the original trial was illegal or defective. It would not be ordered where the conviction was set aside because of insufficiency of evidence or for purpose of enabling the prosecution to fill gaps in its evidence at first trial. Even where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame, it does not necessary follow that a retrial should be ordered. Each case must depend of its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it".

In the present case, the conviction was on a plea of guilty. But again, the court must warn itself that it has already found and held that the plea taking process was a nullity for want of following the proper procedure; it is a case whose conviction was premised on the assumption that plea had been properly taken. Therefore, the only way by which the court can ascertain the guilty or otherwise of the Appellants is by ordering a retrial. This would serve the interests of doing justice by ensuring that that the Appellants are tried in a process they not only understand but fully take part in. But again, would this be prejudicial to them?

They were convicted on 26th October, 2016. They have therefore been in prison for a period of five months and ten days. This period is served against the imposed jail term of 12 months. It is trite to note that currently prisons are according a third jail term to remission. In that case, each of the Appellants is entitled to 4 months remission. This leaves them to each serve eight months in jail. Accordingly, they each have a balance of about 3 months to go. They have then served more than half the sentence. A retrial would definitely be prejudicial to them. Since an order of their repatriation was issued to which they are not opposed, I find and hold that they have served sufficient sentence.

In the result, this appeal partially succeeds. I quash the conviction and set aside the sentence. I order that the Appellants be and are hereby forthwith set free. Upon their release, they shall be repatriated back to Ethiopia. They shall be released to Industrial Area Police Station, Immigration Department for purposes of the repatriation.

DATED AND DELIVERED THIS 6TH DAY OF APRIL, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. . …… for the Appellants.

2.. ……for the Respondent.