REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 54 OF 2017

MARGARET NAKUSOLYA……..…..……...APPELLANT

VERSUS

REPUBLIC……..……. RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Milimani Cr. Case No. 693 of 2017 delivered by Hon. Njagi, CM on 11th of April 2017).

JUDGEMENT

Background

The appellant was charged with **possessing a passport with a forged endorsement** contrary to **Section 54 (1)(c)** as read with **Section 54 (2)** of the **Kenya Citizenship and Immigration Act, 2012**. The particulars were that on the 10th of April 2017 at Jomo Kenyatta International Airport, within Nairobi County, being a Uganda National, holder of Republic of Uganda passport number B1462019, was found possessing the said passport which had a forged Kenya security stamp endorsed on page 3 while departing Kenya to Oman via Sharja in the United Arab Emirates aboard Air Arabia flight G9735.

The appellant was convicted on her own plea of guilty and sentenced to pay a fine of Ksh 300,000 in default serve 12 months' imprisonment. The court added that on completion of the sentence, the appellant be repatriated back to her country of origin by the Immigration Department.

The appellant filed an application for revision of the sentence on the 20th of April,2017. However, with the direction of the court, the appellants abandoned the application and chose to lodge a Petition of Appeal because the matters addressed would only have remedies on appeal and not revision.

The only ground of appeal was that the plea taken by the Appellant was equivocal. That the learned magistrate erred in law and fact by accepting the plea of guilty by the appellant yet she did not understand the language of the court, namely English. The defence counsel added that the High Commissioner of Uganda had also sent a letter urging the court to allow the Appellant be repatriated back to her home country, Uganda as there had been a rampant human trafficking scheme that would have plausibly explained the situation of the appellant.

The learned State Counsel, M/s Kimiri did not oppose the appeal citing that the trial court orchestrated an injustice on the appellant who had since served while on a plea of guilty on the 11th of April, 2017. She however urged the court to order a retrial as all the exhibits and witnesses were available.

Determination.

Section 207(1) and (2) of the Criminal Procedure Code briefly outline how a plea should be taken. The same read 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, then 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**

The Court of Appeal in the case of **Adan vs. R [1973] EA., 443**, at Page 446 also enunciated the procedure of taking a plea in the following words;

> ***"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."***

Back to the proceedings, the plea was recorded as follows;

> ***"Mr. Onyango for immigration:***
>
> ***True the charge. Plea of guilty entered."***

The above does not show that it was the appellant who pleaded guilty. The same was replicated after the facts were read. The court entered its records as follows;

> ***"Facts:***
>
> ***The facts are true.***
>
> ***Plea of guilty entered.***
>
> ***She is convicted."***

From the excerpt, I deduce two things; first, that it was not recorded the language in which the appellant responded to the charges. The word ''English'' which purports to represent the language she used is written off her reply. Second, it was not recorded who was answering the question in pleading. Ultimately, this implies that the appellant did not understand the language of the court and that is why she asked for a Luganda interpreter in this appeal. Accordingly, the plea was not unequivocal. It violated her right to fair trial as envisaged under **Article 50 (2) (m)** of the Constitution 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."

I accordingly find that the entire plea taking process amounted to a mistrial which would only be corrected by a retrial.

The Court of Appeal in the case of **Opicho vs. Republic [2009] KLR 369** set out the factors to be considered before a retrial is ordered. It observed that**;**

> *"**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".***

My view is that the only way to ascertain the guilt or otherwise of the appellant is through a retrial. This would serve the larger interests of justice. But would it be prejudicial to the appellant?

The appellant was convicted on the 11th of April, 2017 and she has spent approximately 2 months 4 days of her 12 month sentence. If she were financially able, she would have paid the fine imposed. She is foreigner and her continued stay in the country only eats deeper into the tax payers' pockets. I find the best option is to have her repatriated.

In the result, I hold that the appellant has served sufficient sentence. I order that she be set free forthwith. She shall be repatriated to her home country, Uganda. She shall be released to Industrial Area Police Station to facilitate the repatriation. It is so ordered.

Dated and Delivered at Nairobi This 15th Day of June, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

Mr. Weru for the Appellant.

Ms. Kimiri for the Respondent.