REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.10 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. Kuto – SRM delivered on 30th December 2016 in Kibera CM. CR. Case No.4676 of 2016)

VICTOR MUGAITSI MUHESO..…… APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

RULING

The application before this court is for bail pending appeal. The Appellant was charged with the offence of **tampering with telecommunication plant** contrary to **Section 32(c)** of the **Kenya Communication Amendment Act 2012**. The particulars of the offence were that on 27th December 2016 along Ngong Road in Nairobi County, with the intent to commit mischief, the Appellant tampered with telecommunication plant namely copper cables belonging to Telkom Kenya Limited by cutting it. When the Appellant was arraigned before the trial magistrate's court, he pleaded guilty to the charge. He was sentenced to serve ten (10) years imprisonment. Aggrieved by this decision, the Appellant filed an appeal to this court. Contemporaneous with filing the appeal, the Appellant filed an application for bail pending appeal.

During the hearing of the appeal, it became apparent to this court that there were certain procedural errors that were committed by the trial court that vitiated the conviction and sentence imposed on the Appellant. From the proceedings, it was clear that the Appellant was not given an opportunity to mitigate before he was sentenced. At the time of his conviction, he informed the court that he was not feeling well. In this court's considered opinion, the Appellant was not, at the time, in a position to follow and comprehend the proceedings. In the premises therefore, despite the fact that what is before this court was an application for bail pending appeal, this court will invoke its jurisdiction under **Sections 362** and **364** of the **Criminal Procedure Code** and bring the proceedings of the said magistrate's court to this court for the purposes of examining its legality and satisfying itself as to the propriety of the proceedings.

It was clear to this court that the conviction of the Appellant was vitiated by the fact that he was not given an opportunity to mitigate before he was sentenced taking into consideration the serious nature of the offence that he was facing. The fact that the Appellant informed the court that he was not feeling well at the time is a clear indication that the Appellant was not in a state of mind to comprehend the serious nature of the charge facing him. Further, being unrepresented, it was more probable than not that the Appellant did not appreciate the nature of the proceedings that he was facing.

Mr. Aiyabei, learned counsel for the Appellant submitted that taking into consideration the entire proceedings, it was clear that there were procedural irregularities that vitiated the plea of guilty that was recorded by the trial court. On her part, Ms. Nyauncho for the State conceded that there were indeed procedural irregularities, including the fact that the convicting magistrate took over the proceedings from a magistrate who took plea without explaining to the Appellant his rights as provided under **Section 200(3)** of the **Criminal Procedure Code**. Taking all these into consideration, it is evident that the

procedural irregularities evident in the proceedings mandates this court to invoke its jurisdiction under **Section 362** of the **Criminal Procedure Code** that entitles the court to quash the conviction and set aside the custodial sentence that was imposed upon the Appellant.

The issue that remains for determination is whether the Appellant should be discharged or should be retried. The principles to be considered by this court in deciding whether or not to order a retrial are well settled. In **Sinaraha & another –vs- Republic [2004] 2KLR 328 at page 330**, the court held thus:

> "***The principles governing whether or not a retrial should be ordered was enunciated in Fatehali Manji –versus- Republic [1966] EA 343 Sir Clement De Lestang, the then acting President of the Court of Appeal stated at page 344 that:***
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> ***"In general, a retrial 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 for the purposes 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 interests of justice require it and should be ordered where it is likely to cause injustice to the accused person."***
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> ***In M'Kanake –versus- Republic [1973] EA 67, it was held that a retrial should not be asked for to fill gaps in the evidence or to rectify faults of the prosecution's case. In Mwangi –versus- Republic [1983] KLR 522, the Court of Appeal held at page 538 that:***
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> ***"We are aware that a retrial should not be ordered unless the appellate court is of the opinion that a proper consideration of the admissible or potentially admissible evidence, a conviction might result; Braganza versus R [1957] EA 469, Pyarala Bassan versus Republic [1960] EA 854.""***

In the present application, the Appellant was convicted on 29th December 2016. He has been in prison for about six months. He was charged with an offence that attracts a minimum custodial sentence of ten (10) years imprisonment. Due to the short length of time that has passed, it will not be difficult for the prosecution to avail the witnesses before court. Weighing all the circumstances of this case, the Appellant will not be prejudiced if he is retried because he will have an opportunity to present his defence now that he is represented by an advocate. For the above reasons, the conviction of the Appellant having been quashed, and the custodial sentence having been set aside, the Appellant shall be presented before the Chief Magistrate's Court Kibera on 21st June 2017 so that he shall take plea in the retried case. Meanwhile, he shall remain in custody pending his appearance before court. The trial court shall be at liberty to consider the Appellant's application for bail pending trial. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF JUNE 2017

L. KIMARU

JUDGE