REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 82 OF 2015

PIUS ODUOR …..... APPELLANT

VERSUS

REPUBLIC …..... RESPONDENT

[Being an appeal from the conviction and sentence of the Principal Magistrate's Court at Maseno

(Hon. B. Ochieng Ag. SPM) dated the 11th December 2014 in Maseno PMCCRC No. 1442 of 2014]

JUDGMENT

The appellant was charged with Manslaughter Contrary to Section 202(1) as read with Section 205 of the Penal Code, the particulars being that on 9th November 2014 at Kogony sub-location within Kisumu West Sub-County of Kisumu County unlawfully act, did stab one Daniel Peter Okeyo an act which caused the death of the said Daniel Peter Okeyo.

On his first appearance before the Maseno Acting Senior Principal Magistrate he pleaded guilty by stating "It is true". However upon the facts being narrated to him his response was "Partly it is true partly not." This prompted the Magistrate to adjourn the matter to the next day because according to him the accused appeared to be confused and needed time to think what he wanted to plead. When he appeared in Court the next day the charge was read to him again and once again he stated it was true. The facts were narrated and he stated the facts were true whereupon the trial magistrate recorded a plea of guilty and proceeded to convict him. He then reserved the mitigation and sentence to the next day. After hearing the appellant's plea in mitigation the trial magistrate ordered for a Probation Officer's report which when presented he considered before sentencing the appellant to serve thirty years imprisonment. Being aggrieved he has filed this appeal.

The grounds for his appeal are that:-

"1. That the decision of the learned magistrate was made without jurisdiction.

2. That the learned magistrate erred in law and facts in failing to find that the respondent should have filed a formal application for the interpretation of section 77 of the constitution.

3. That the learned magistrate erred in law in making the order without giving him an opportunity to be heard.

4. That the decision of the magistrate violates his constitutional rights to protection of the law under section 77 of the constitution.

5. That the learned trial magistrate having found there are no legal provisions in favour of the respondent similar to those in favour of him, for a fair hearing during criminal trial, erred in law and misdirected himself in proceeding to make the impugned order.

6. That he be supplied with a certified copy of the charge sheet and proceedings to help him explore more grounds for the case."

At the hearing of the appeal the appellant relied on his brief written submissions in which he seems to state that this being a delicate and sensitive case it required a full trial. He also states that his fundamental rights were violated.

The appeal is opposed. Miss Wakio, Learned Prosecution Counsel urged the Court to dismiss the appeal. She submitted that as the appellant pleaded guilty he could only raise issue on the legality of the sentence; that the trial magistrate had jurisdiction to hear the matter and further that the state and the court ensured Article 50 of the Constitution was adhered to. She contended that the appellant does not raise any issue of which he is aggrieved but is merely sending the court on a fishing expedition. She further contended that he was afforded an opportunity to mitigate before the sentence and that the charge and sentence were lawful. In reply the appellant urged this court to assist him and stated that he did not commit the offence.

Section 348 of the Criminal Procedure Code provides that no appeal shall be allowed where an accused has pleaded guilty and been convicted on that plea except as to the extent or legality of the sentence. However it has long been recognized that the bar to an appeal against a conviction based on a guilty plea is not absolute. In **Ndede V. Republic [1995] KLR 570**, for instance, the Court of Appeal stated:-

"It has been held that the principle underlying the provision is that a plea of guilty by the accused person operates as a waiver of his right to question the legality of the conviction based on such a plea. It has been further held that before a bar of this section can apply against a convicted person, it must be clear that the plea of guilty is really such a plea and that the appellant is not prevented or debarred from showing that the plea was not really a plea of guilty or did not amount to a plea of guilty....."

The decisions I have come across seem to suggest that the only time that an appellant would be prevented or debarred from showing that the plea was not really a plea of guilty or did not amount to a plea of guilty is where he was convicted on an unequivocal plea of guilty and has been sentenced.

In **Kioko V. Republic [1983]KLR page 289** the Court of Appeal held

"1. An accused person may apply to change his plea after the prosecution has opened its case and at any time before sentencing. It is within the discretion of the Court to decide whether to allow or disallow the application."

In **Korir V. Republic [2006] 1 KLR 52** the Court stated at page 55:-

"As regards feeble attempt by the appellant to change his plea at this late stage, he must be reminded that once sentence has been passed upon a person who has unequivocally pleaded guilty, he cannot afterwards be allowed to retract that plea unless he pleaded guilty to a charge which in fact disclosed no offence – see Republic V. F. J. Patel 15 EACA 179."

The question for determination therefore is whether the appellant's plea of guilty in this case was unequivocal?

Having perused the entire record of the proceedings in the lower court my finding is that it was not and that indeed the plea taking in this case was not satisfactory. I say so bearing in mind the steps spelt out in **Adan V. Republic [1973] E.A. 445** where at page **446-447** it was stated:-

"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. It 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 assets 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, if course, be recorded.

The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not frequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction."

The record here shows that when the charge was first put t the appellant he stated it was true. However when the facts were narrated to him he stated they were partly true and partly not. Given the steps spelt out in **Adan V. Republic (Suppra)** the Trial Magistrate should have immediately entered a plea of not guilty. Instead of inquiring from the appellant why he stated only some of the facts were correct he instead sent him home to go and think what he intended to plead. When he came back the next day he again pleaded guilty but a closer look at the record shows that when he was asked to mitigate he denied that he had stabbed the deceased meaning he was pleading his innocence. One wonders why the trial magistrate sent the appellant away to think what he wanted to plead when in actual fact the appellant had pleaded not guilty. It was in **Lebiringin V. Republic [1974] E.A. 103** where the Court at page **105** described the Magistrate:

"so to speak, a trustee to ensure that the accused person wishes to admit his guilt, and to satisfy himself on this point …....."

In ground 3 of his petition of appeal the appellant avers that he was not given an opportunity to be heard. It appears that much as the plea was taken in a span of two days the appellant was indeed not given ample opportunity to dispute or explain the facts or to add any relevant facts and perhaps that is why he sought to make this explanation in his mitigation. Had this been done the Trial Magistrate would have realized that the appellant did not intend to plead guilty. The appeal has merit and is allowed, the conviction is quashed and sentence set aside and as this is in my view a proper case for retrial, the matter is hereby remitted to the Maseno Senior Principal Magistrate's Court for retrial by another magistrate other than B. Ochieng. The appellant shall pending his being escorted t that Court on 16th May 2016 continue to be held at the Kisumu Main Prison.

It is so ordered.

Signed, dated and delivered at Kisumu this …12th.. day of ….....May..... 2016

E. N. MAINA

JUDGE

<u>In the presence of</u>:-

N/A for the state

Appellant in person

CC: Felix Magutu.