REPUBLIC OF KENNYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.13 OF 2016

(An appeal from original conviction and sentence of Kisii CMC Criminal Case No. 170 of 2016 by Hon. V.M. NYAGA RM dated 31ST March, 2016))

JARED MOENGA NYAENDE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein, **JARED MOENGA NYAENDE** was arraigned before the Chief Magistrate's court at Kisii on the charge of careless driving contrary to **Section 49 (1) of the Traffic Act Cap 403 Laws of Kenya**. The particulars of the charge were that on 9th day of March, 2016 at about 1800 Hours along Kisii-Migori Road near Suneka area within Kisii County being a driver of a motor vehicle Reg. No. KBB 785T make Isuzu Pick Up did drive the said motor vehicle without due care attention and consideration to other road users, and as a result caused an accident seriously injuring the rider one namely Benson Ratemo Oyaro aged 20 years and a pillion passenger Tiberius Nyabuto aged 16 years old.

2. The appellant pleaded guilty to the charge and was consequently convicted on his own plea of guilty after which he was sentenced to pay Kshs. 10,000/= fine in default, to serve 2 months imprisonment.

3. The appellant now appealed to this court against both the conviction and sentence through his petition of appeal dated 8th April 2016 in which he has put forth the following grounds of appeal.

a) The plea of guilt herein was not an unequivocal

b) That the conviction of the Appellant was therefore illegal.

c) That the sentence imposed upon the Appellant is illegal and/or manifestly harsh and excessive.

4. When the appeal came up for hearing before me on 21st July, 2016, Mr. Soire for the appellant submitted that appellant's plea of guilty was not unequivocal as the facts upon which the charge was founded were not stated before the court so as to enable the appellant confirm of challenge them. Mr. Soire argued that the elements of the charge were not clearly set out and further that during mitigation, the appellant qualified his plea of guilty by explaining the unavoidable and unforeseeable circumstances that led to the accident in question. He urged the court to quash the conviction and set aside the sentence.

5. In response to Mr. Soire's submissions, Miss Mbelete, counsel for the state conceded to the appeal on

the grounds that the facts of the charge were not properly spelt out so as to enable the appellant know what he was pleading to. It was Miss Mbelete's submission therefore, that the plea of guilty was not unequivocal.

6. This being a first appeal, and despite the concession to the appeal by the state, this court is still under a duty to peruse the lower court record with a view to reaching its own conclusion on whether or not this appeal is merited **(Okeno Vs Republic [1972] E.A. 32).**

7. I have perused the proceedings before the trial court and I note that after the plea of guilty was entered, the facts were not read to the appellant so that he could confirm whether or not they were correct. When the prosecutor was called upon to state the facts, he simply said:

> **"The facts as per the charge sheet."**

8. From the lower court record, when the appellant was called upon to tender his mitigation before sentence, he stated as follows:

> **"When the accident took place it was raining. I hit the victims as I tried to avoid hitting a matatu that overtook me carelessly."**

9. From the above foregoing, it is quite clear to me that the appellant's plea of guilty was not unequivocal as not only were the facts not read out to him, but he also qualified his plea of guilty by blaming the accident on the bad weather and another motorist.

10. In the case of **Adan Vs Republic (1973) E.A 445- 447** the steps to be followed by the court in recording a guilty plea were set out as follows:-

> **"When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the 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 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."**

11. In the instant case, not only did the prosecutor not set out the facts so that the appellant could confirm or deny them, but the appellant also retracted his guilty plea during mitigation by attributing the accident to other external forces upon qualifying the guilty plea, the trial court should have changed the guilty plea to a plea of not guilty and set down the case for a full hearing.

12. It is therefore clear to me that the trial court did not adhere to the laid down steps for taking the plea. The conviction and sentence that followed a plea of guilty that was not unequivocal was therefore illegal.

13. It is for the above reasons that I allow the appeal, quash the conviction and set aside the sentence.

14. Having quashed the conviction, should this court then order for a retrial. I am aware that an appellate court can only order for a retrial where the following factors exist: that the prosecution will be able to trace and produce witnesses when retrial is ordered, that the order of retrial should not be used as an opportunity by the prosecution to plug the gaps in its case; that taking into consideration all the circumstances of the case, it would be just and fair for the court to order the appellant to be tried.

15. In **M Kanake Vs Republic [1973] EA 67** at page 68 the court of Appeal held:

> **"A retrial was not sought by the prosecution to fill up gaps in the evidence adduced at the first trial or to enable the prosecution correct mistakes for which it was to blame,…"**

16. In the instant case the state did not seek for a retrial and moreover part of the reason why the conviction has been quashed is due to the failure by the prosecution to present the full facts of the case before the court. Under the above circumstances, I find that an order for a retrial will prejudice the appellant by assisting the prosecution to restructure/remodel their case and fill the gaps by presenting the facts. The court also takes note of the fact that the alleged accident took place in March 2016, 6 months ago and therefore, securing the attendance of witnesses to the case for the trial may present a challenge. I am therefore of the view that a retrial will not serve the ends of justice.

17. In the premises therefore, having already quashed the conviction and set aside the sentence, I order that the appellant be refunded the Kshs. 10,000 that the paid as a fine following the impugned conviction.

Dated, signed and delivered in open court this 8th day of September, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Miss Mbelete for the State

Mr. Soire for the Appellant

Omwoyo court clerk