



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL REVISION 335 OF 2016

REPUBLICAPPLICANT

VERSUS

ALBERT OCHENGO KERERIRESPONDENT

R U L I N G

1. This is a ruling in respect of an application for revision brought by way of a letter from the Office of the Director of public prosecution dated 9th May, 2016 pursuant to the provision of Section 362 of the Criminal Procedure code and Article 165 (6) of the Constitution.

2. In this letter, the applicant is seeking for this court to satisfy itself as to the correctness, legality and propriety of the finding, sentence and the order passed by the trial magistrate in EACC NO. of 2016, Republic versus Albert Ochengo Kereri, and ;

(a) declare the proceedings therein improper and illegal;

(b) Order for a retrial to ensue;

3. The grounds upon which the said application is premised are as follows;

(a) Upon the charges being read afresh to accused/respondent there was no indication of how he pleaded. It simply means there was no plea.

(b) After the facts were read and the accused/respondent accepted the same as true, the court did not convict him contrary to section 215 of the Criminal Procedure code.

(c) following the above errors, the subsequent sentence is illegal and not tenable in law.

4. The Respondent was charged with three (3) counts of corruptly soliciting and receiving a benefit contrary to Section 39 (30 (a) as read with Section 48 (1) of the Anti- Corruption and Economic crimes Act.

5. The Respondent pleaded not guilty to the charge on 26th January, 2016, before the Senior Principal magistrate, Hon. R. Ondenyo.

6. On the 3rd May, 2016 the respondent informed court that he wanted to change plea and the charges were read to him afresh. The facts were also read to him and he indicated that they were true.

7. The prosecution indicated that the Respondent was a first offender and the court proceeded to sentence him to a fine of Ksh 30,000/= or he serves 6 months imprisonment in default in count 1. He was however discharged under Section 35 (1) of the penal code on condition he does not repeat the offences in respect of counts 2 and 3 respectively.

8. This court is vested with supervisory jurisdiction over the subordinate courts and make any order or give any directions it considers appropriate to ensure the fair administration of justice under Article 165 (6) and (7) of the Constitution.

9. Under Section 362 of the Criminal Procedure Code, the High Court is granted powers of revision in the following manner;

“The high Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of such finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

10. To determine whether the proceedings by Hon R Odeny, the Senior Principal Magistrate on 3rd - 4th May, 2016 were correct, legal regular or proper, I have perused both original and typed record of the proceedings.

11. It is confirmed that on 3rd May 2016, the Respondent, through his advocate, Mr Nabwana indicated that he wanted to change plea since he was due to travel out of the country before 16.5.2016.

12. The case was then fixed for mention on 4th May 2016 for plea to be taken afresh. And on this day, the charge was read over and explained to the Respondent in English. However, there is no indication in the record as to what happened or what the Respondent/accused person replied when this was done.

13. The prosecution proceeded to read out to the respondent the facts of the case and he confirmed that they were true. The prosecution then gave records of the Respondent and the respondent gave his mitigation statement.

14. The trial magistrate proceeded to pass sentence against the Respondent, whereby he fined him Ksh 30,000 or serve 6 months imprisonment in default for count 1. He discharged him under section 35 (1) of the penal code on condition that the accused/respondent does not repeat the offence.

15. I wish to point out that clearly the manner or procedure in which the plea was recorded or taken is irregular.

16. Section 207 of the Criminal Procedure Code provides for the procedure relating to the calling upon the accused person to plead. It states at sub-section (1) that:

Section 207 (1) of the Criminal procedure Code provides that:

“ 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”

Section 207 (2) of the Criminal Procedure Code goes on to state that:

“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”.

17. These provisions are properly explained in the Court of Appeal in Kisumu Criminal Appeal No 134 of 2001, Robert Araka Mose vrs Republic, by Justice of Appeal Chunga, AA Lakha and E.O Okubasu, (as

they then were) that ;

“The law in recording of pleas requires that each and every ingredient of the charge be explained to an accused person clearly and in a language that he or she understands well. The law further requires that the accused’s response be recorded as clearly as possible to each ingredient of the charge. It must be manifestly clear from the record that the applicant understood each and every ingredient of the charge and intended to and, did admit them fully and freely. That is what is meant by an unequivocal plea of guilt to the charge. A magistrate recording a plea from an accused is under a duty to ensure due compliance with these requirements as a trustee of justice.”

18. In the present case, the response of the respondent to each of the three (3) counts was not indicated when the charge was read to him again on 3rd may 2016, when he changed his plea. His plea was not properly recorded, hence a violation of the procedure laid out in section 207 of the Criminal Procedure Code.

19. Having taken into account the records in the case before me, I am satisfied that there was a mistrial in the same, since the proceedings are improper and sentence passed therein, illegal and untenable.

20. I therefore, by the powers conferred upon me by Section 362 of the Criminal Procedure Code and Articles 165 of the Constitution, order for a retrial of the said case.

21. The case to be placed before the Chief Magistrate, Mombasa Law courts for mention and allocation before another magistrate of competent jurisdiction.

RULING, DELIVERED DATED AND SIGNED AT MOMBASA THIS 8TH DAY OF SEPTEMBER 2016.

D. CHEPKWONY

JUDGE

In the presence of:

M/ Mutua for the Applicant

No appearance for Respondent

C/clerk – Kiarie