REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.1 OF 2015

(An Appeal arising out of the conviction and sentence of H.W. KAGURU ((Ms.) - RM delivered on 2nd January 2015 in Nairobi CM. CR. Case No.1 of 2015)

ALAN WADI OKENGO…….……
APPELLANT

VERSUS

REPUBLIC…….....RESPONDENT

JUDGMENT

The Appellant, Alan Wadi Okengo was charged with the offence of **hate speech** contrary to **Section 13(1)(a)(b)** and **(2)** of the **National Cohesion and Integration Act.** The particulars of the offence were that on 18th December 2014 at unknown place within Kenya, the Appellant published on his Facebook page a message which amounted to incitement of hate between members of various ethnic groups in Kenya. He was further charged with undermining authority of a public officer contrary to **Section 132** of the **Penal Code**. The particulars of the offence were that on 19th December 2014 at unknown place within Kenya, the Appellant published on his Facebook page a message which denigrated the person of the President of the Republic of Kenya, which message was calculated to bring into contempt the lawful authority of the President of the Republic of Kenya. When the Appellant was arraigned before the trial magistrate's court, he pleaded guilty to the charge. He was convicted on his own plea of guilty on both counts. In respect of the 1st count, he was sentenced to pay a fine of Kshs.200,000/- or in default, he was to serve one year imprisonment. In respect of the 2nd count, he was sentenced to serve one year imprisonment. The sentences were ordered to run consecutively. The Appellant was aggrieved by his conviction and sentence and filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He faulted the trial magistrate for convicting him on a plea of guilty that was equivocal. He took issue with the fact that he had been convicted on the basis of particulars in the charge sheet that did not support the charge. He was aggrieved that the trial magistrate had not taken into account the fact that,

in his mitigation, he had stated that he was not mentally fit and thereafter proceeded to convict him. In essence, the Appellant is saying that he was not of sound mind at the time of his conviction to enable him plead to the charge. He was finally aggrieved that he had been sentenced to serve a sentence that was harsh and excessive in the circumstances.

During the hearing of the appeal, this court heard oral rival submission made by Mr. Oonge for the Appellant and Mr. Mureithi for the State. Mr. Oonge submitted that the trial magistrate did not investigate the claim made by the Appellant that he had mental disorder before convicting him. He stated that in view of the fact that the mental status of the Appellant had not been verified, the plea of guilty that was recorded was equivocal. He further submitted that the facts read in support of the 2nd count did not support the charge. It was not indicated which public authority's office had been undermined. He urged the court to consider the fact that when the Appellant said that it was the devil who had a hand in his mind, the trial court should have investigated whether the Appellant had the requisite mental status to plead guilty to the charges. He further submitted that the trial magistrate took into consideration an irrelevant factor in sentencing the Appellant to a custodial sentence which in his view was not proportional to the offences that were committed. He urged the court to allow the appeal.

Mr. Mureithi for the State opposed the appeal. He submitted that the Appellant had been properly convicted on his own plea of guilty. Under **Section 348** of the **Criminal Procedure Code**, the Appellant was barred from challenging the conviction. His only recourse was to question the legality of the sentence. He reiterated that the plea of guilty that was taken was unequivocal: the Appellant understood the language of the court and further admitted posting the offensive messages on his Facebook account. He urged the court not to be persuaded by the claim made by the Appellant that he lacked mental capacity to plead to the charge. The issue of the Appellant's mental status was raised by the Appellant in mitigation. This was after the Appellant had been convicted by the trial court. He insisted that if this court was minded to investigate the mental capacity of the Appellant, it had jurisdiction to do so at this appellate stage. Otherwise he was of the view that the Appellant had the requisite mental capacity to plead to the charge. As regard the sentence, he submitted that the same was lenient and was within the law. In the circumstances therefore, he urged the court to dismiss the appeal.

As the first appellate court, this court is mandated to look afresh at the evidence presented before the court so as to determine whether or not the Appellant was properly convicted. In the present appeal, the issue for determination by this court is whether the plea of guilty that was entered by the trial court was unequivocal. Having carefully perused the proceedings before the trial court, this court is not satisfied that the plea of guilty that was taken was in accordance with the directions given by the Court of Appeal in **Adan -vs- Republic [1973] EA 445.** In that case, it was held that for there to be a valid plea of guilty, the charge and all the essential ingredients of the offence must be read and explained to the Appellant in a language that he understands; the trial court must record the words the Appellant used in answering to the charge; the facts supporting the charges must be read to the Appellant, those facts must be the correct particulars that support the charge; the Appellant must confirm the facts supporting the charge to be correct, and finally, after the Appellant has been convicted on his own plea of guilty, the Appellant must be given an opportunity to mitigate before he is sentenced. When a plea is being taken in a criminal charge, the presumption is that the accused person has the requisite mental capacity to plead to the charge. In criminal cases, what is sought to be punished is the deliberate conduct or negligence of an accused who has a sound mind. Where it is brought to the attention of the court by the accused person or by any other person or where the court observes the behaviour of the accused person to be indicative that there may be issues regarding his mental status, the court is required to investigate such allegation or such claim of lack of mental capacity before it can either convict or sentence the accused person. The court will do this by referring the accused for medical examination to determine his mental status.

In the present appeal, when the Appellant was called upon to mitigate before he was sentenced, he stated as follows:

> ***"Since last year I have been having mental problems. I have came of my problems (sic). I have an ailing grandmother. My mother left. I have one cousin. I am traumatized, in a way I expected for school fees to be paid. Those things have been disturbing my mind. I missed 2***

graduations. I am waiting to do exams. I do not know if my sanity is on trial. I have mental disorder. I apologies for the same (sic). I would wish to meet the concerned party and apologies(sic). The devil had time to my mind."

From the above statement, it was clear that the Appellant had mental issues which the court ought to have investigated to establish if indeed the Appellant had the requisite mental capacity to plead guilty to the charges that were brought against him. The trial court was required, in the circumstances, to refer the Appellant for medical assessment to determine his mental status. It did not matter that this issue was brought to the attention of the court after the Appellant had been convicted on his own plea of guilty. Mr. Mureithi for the State was not convinced that the Appellant lacked the requisite mental capacity to plead to the charge. He was of the view that if the court was minded to make such inquiry, then, it could do so at this appellate stage. With the greatest respect to Mr. Mureithi, this court cannot do so at this appellate stage. It is not the duty of this court to fill in the gaps that are apparent from the proceedings of the trial magistrate with a view to maintaining the conviction or otherwise of the Appellant. The trial court therefore erred when it failed to make necessary the inquiry as to whether the Appellant had the requisite mental capacity to plead to the charge. That error renders the plea of guilty that was recorded by the trial court equivocal thereby vitiating the conviction of the Appellant on the plea of guilty. The appeal shall be allowed as a result of which the conviction of the Appellant on the plea of guilty is quashed. The sentences imposed are set aside.

The issue that remains for this court to determine is whether a retrial can be ordered in the circumstances at this case. This court is aware that an appellate court can only order a re-trial where the following factors apply: 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 plunge the gaps in its case; that taking into consideration the entire circumstances of the case, that it would be just and fair for the court to order the Appellant to be retried. In **M'Kanake –vs- Republic [1973] EA 67** at page 68, the Court of Appeal held as follows:

"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, and he referred to Fatehali Manji –vs- Republic [1966] EA 343. We agree with Mr. Kibuchi on this point."

In the present appeal, after his conviction on 2nd January 2015, the Appellant has been in prison. He has served half of the custodial sentence of one year imprisonment that he was ordered to serve. It is the view of this court that it would be prejudicial to the Appellant if he is retried taking into consideration the time that he has served in prison. It will not serve the ends of justice if he is retried. In the period that the Appellant has been in prison, he has learnt his lesson. The court has also taken into consideration that the Appellant, at the time of his arrest was a fourth year student in a public university. He should be given an opportunity to complete his university education. The justice of this case demands that the Appellant be forthwith discharged.

In the premises therefore, the Appellant is ordered set at liberty forthwith and released from prison unless otherwise lawfully held. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF JULY 2015

L. KIMARU

JUDGE