



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 1 OF 2012

JOHN KIARIE NDUNG'U.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence in Gatundu Senior Resident Magistrate's Court Criminal Case No. 943 of 2012 (Hon. B. Nyangena) on 10th October, 20112)

JUDGMENT

The appellant in the appeal herein was charged in two separate cases whose charges were apparently derived from the same set of facts or transaction; in the first case which was criminal case no. 942 of 2012, the appellant was charged with being in possession of a distilled alcoholic drink for selling in a plastic container contrary to **section 27(1)b(4)** of the **Alcoholic Drinks Control Act, No, 4 of 2010**. The appellant is recorded to have been convicted on his own plea of guilty and was fined Kshs. 10,000/= or three months imprisonment in default thereof.

In the second case, being criminal case no. 943 of 2012, the appellant was charged with the offence of being a member of an organised criminal group contrary to **section 7(b)** as read with **section 14 of the Organised Crimes Act, No. 5 of 2010**. Again on this particular charge the appellant was convicted on his own plea of guilty and sentenced to seven years imprisonment.

The appellant appealed against conviction and sentence in criminal case no. 943 of 2012 stating in his petition that, among other things, his trial and conviction was unfair, unreasonable and contrary to the provisions of the Constitution; that the plea was not unequivocal since he could neither appreciate the facts nor the proceedings of the case against him. The learned magistrate was faulted for convicting the appellant yet the prosecution had not proved its case beyond reasonable doubt and, in any event, the sentence meted out against him was harsh.

When the appellant's appeal came up for hearing, the main issue that arose was whether the appellant's plea at the trial was unequivocal. According to the trial court record, the taking of this plea is recorded as follows:

The substance of the charge and every element hereof has been stated by the court to the accused person to (sic) the language he understands who being asked whether he admits or denies the charge replies: true.

Court: plea of guilty is entered. The seriousness of the offence explained to the accused.

The prosecutor is then recorded to have stated the facts. What is recorded afterwards is as follows:

Court:

Facts are true

Court:

The accused is convicted on plea of guilty.

Based on these facts counsel for the appellant argued that the appellant's conviction was not safe because the appellant did not comprehend the charges against him and that he did not plead to the facts. Further, the exhibits that were produced in support of the charge were not subjected to any scientific analysis to confirm whether they were substances that the prosecution claimed them to be.

Mr Njeru for the state opposed the appeal and stated that the plea was unequivocal. He contended that there was no need for analysing the substances the appellant was found with since he had pleaded guilty to the charge.

Mr Njeru's arguments appeared to be in contradiction to his learned colleague's position when he conceded to the application for bail pending the hearing and determination of the appeal. In that application Mr Kaigai, who was then on record for the state agreed with the appellant's counsel that the appellant had not been accorded a fair trial and implied, chances of the his appeal succeeding were overwhelming.

Section 207 of the Criminal Procedure Code, Chapter 75 Laws of Kenya addresses the procedure in taking of pleas in the subordinate courts; more pertinent to the appeal herein are **subsections (1) and (2)** thereof; they provide as follows:

207.(1) 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;

(2) 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, unless there appears to it sufficient cause to the contrary;

Provided that after conviction and before passing sentence or making an order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

The application of these provisions where a plea of guilty is entered was explained in the case of **Adan versus Republic (1973) E.A.445**; in that case the Court of Appeal set out the procedure for taking plea where the accused pleads guilty. The court said at page 446:

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. If 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 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 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.

The court's statement is, in my view, self-explanatory and needs no further expounding. The court proceeded to explain the importance of the statement of facts; it said that firstly, it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and secondly, it gives the magistrate the basic material on which to assess the sentence. The court noted that it is not unusual that an accused person, 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 statement of facts to precede the conviction.

In the case against the appellant, the trial court convicted the appellant twice; he was convicted for the first time after he pleaded to the charge. The appellant was convicted again after the statement of facts was read out by the prosecution. And even in this case, it is not apparent that the appellant was given the opportunity to dispute or explain the facts or to add any relevant facts. The record shows that the court itself responded to the facts though there is a correction on the original record to the effect that the word "court" has been crossed and replaced with the word "accused". It is not clear at what stage this correction was made and who it is that made it as the correction is not countersigned.

It is apparent that the procedure adopted by the learned magistrate in the taking the plea from the appellant was inconsistent with **section 207(1)** as read with **section 207(2)** of the **Criminal Procedure Code** and the decision of the Court of Appeal in the case of **Adan versus Republic (supra)** as far entry of guilty pleas is concerned. For this reason the conviction cannot be said to be safe; it is hereby quashed and the sentence set aside. Pursuant to the powers given to this court under **section 354(3) (a) (i)** of the Criminal Procedure Code, I order that the appellant be tried afresh by a court of competent jurisdiction as long his trial will not be presided over by the same magistrate who convicted and sentenced him. It is so ordered.

Dated signed and delivered in open court this 5th day of May 2014

Ngaah Jairus

JUDGE