

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Appeal 324 of 2010

ZIPPORAH WAMBUIAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in Criminal Case Number 1054 of 2006 in the Chief Magistrate's court at Nairobi - Mr. Ole Tanchu (SRM))

JUDGMENT

The appellant was first charged with two offences. In count one she was charged with the offence of obtaining money by false pretence contrary to Section 313 of the Penal Code. In count II she was charged with the offence of making a document without authority contrary to Section 357 (a) of the Penal Code.

The record shows that the charges were read to her and she entered a plea of not guilty and a hearing date set. Subsequently however, the prosecution presented a substituted charge sheet. It is necessary to set out what transpired on the date the substituted charge was presented. This was on 30th November, 2006. The appellant was represented by gone Mr. Oundu who was present in court on that date. After the charge was presented the learned counsel for the appellant told the court that he needed time to consult. The record then reads as follows,

“Court – Amended charge read to the accused in English which accused understands. All count I, II, III, IV, V, VI, VII,VIII,IX & X all not true. Plea of not guilty entered. Accused to remain in the initial bond terms. Matter referred to court one for reallocation”

It is clear from the above cited record that the learned trial magistrate did not comply with the mandatory provisions of Section 207 (1) of the Criminal Procedure Code.

Thereafter the trial proceeded and at the end the learned trial magistrate wrote his judgment and convicted the appellant on counts III, IV and V. As at the date of delivery of the judgment the learned trial magistrate was not present to deliver the judgment, for reasons that are not on record, but presumably he had gone on transfer. Another magistrate was therefore seized of the duty to deliver the judgment and so there was an order that judgment be typed. It was thereafter read in open court, mitigation received and the appellant sentenced to serve two years imprisonment in count III, two years imprisonment in count IV and three years imprisonment in count V the sentences were ordered to run concurrently.

Although the judgment by the presiding magistrate had been signed, the succeeding magistrate did not indicate under what provisions of law he took over the judgment for delivery. This was a fatal omission because jurisdiction is an issue and failure to under- pin the same by citing the relevant provisions of law, makes it a nullity. The learned succeeding magistrate should have cited Section 200 (1) (a) of the Criminal Procedure Code. As if that was not enough ,the note on sentence was never dated. Again this was a grievous omission. More significantly however is that, as observed earlier, the amended and or substituted charge was not read over to the appellant.

The learned counsel for the Republic concedes this appeal and, with respect, I agree. It is not necessary for me to go into the evidential value of the evidence adduced because if the trial was a nullity then everything else recorded therein is also a nullity.

I have considered whether or not to order a retrial in this matter but decided against such a step because the ends of justice shall not be served thereby. Accordingly, this appeal is allowed, conviction quashed and sentence set aside. I am informed the appellant is out on bail pending the determination of this appeal. The terms of her release are hereby vacated.

Orders accordingly.

Dated and delivered at Nairobi this 7th Day of March, 2013.

A. MBOGHOLI MSAGHA
JUDGE