



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Criminal Appeal 184 of 2010**

**BOAZ WANYONYI WANJALA.....APPELLANT**

**VERSUS**

**REPUBLIC.....PROSECUTION**

**JUDGMENT**

The appeal arises from the decision delivered on the 23rd November, 2010 in Eldoret Criminal Case No. 5666 of 2010 by the Honourable Principal Magistrate, Eldoret.

**FACTS.**

The Appellant was charged with the offence of being in possession of infringing copies of musical works otherwise than for private or domestic use contrary to Section 38 (1) (F) as read with Section 38 (5) of the copyrights Act No. 12 of 2001.

That on the 18th day of November, 2010 at Nangibi Township the Appellant was found in possession of 9 CDs of Bongo Mix and Kidum CDs and other local artists and the Appellant had no permission from the Times Square Entertainment and was in contravention of the said Copyrights Act.

The Appellant was convicted on his own plea of guilty and was ordered to pay a fine of Kshs 100,000/= or serve two (2) years imprisonment.

The Appellant being aggrieved with the said decision preferred this Appeal and listed eight (8) grounds of Appeal in his Petition of Appeal as are set down hereunder;

- 1) The learned trial magistrate erred in law and fact in convicting the Appellant on facts that did not support the charge.
- 2) The learned trial magistrate erred in law and fact in failing to ascertain the language understood by the Appellant.
- 3) The learned trial magistrate erred in law and fact in convicting and sentencing the Appellant when the court was not properly constituted.
- 4) The learned trial magistrate erred in law and fact in failing to warn the Appellant on the consequence of pleading guilty to the charge.
- 5) The learned trial magistrate erred in law and fact in disregarding procedure as to conviction, mitigation and sentence.

- 6) The learned trial magistrate erred in law and fact in meting out a sentence that was excessive in the circumstances.
- 7) The learned trial magistrate erred in law and fact in relying on facts raised by prosecution that required collaboration.
- 8) The learned trial magistrate erred in law and fact in failing to find that the charge sheet was defective.

At the hearing of the Appeal the Appellant was represented by learned Counsel Mr. Buluma and learned State Counsel Mr. Kabaka represented the State.

The Appellants Counsel chose to rely only on Ground of Appeal Number (1) that the trial magistrate erred in law in convicting the Appellant on facts that did not support the charged.

That the Section 38 (F) relates to making or being in possession of equipment used in making infringing copies, whereas the charge reads that the Appellant was found in possession of 9 CDs of Bongo Mix.

On that ground of appeal Counsel urged the court to find that the Appeal had merit and allow the same as the conviction was not proper the same ought to be quashed and sentence set aside.

Counsel for the state conceded the Appeal on that sole grounds of appeal that facts in the charge did not support the facts. That the scenario would have been different if the Appellant had been found with computers for making the infringing copies.

Copies conceded that the Appeal be allowed and conviction be quashed and sentence set aside.

Upon hearing the oral submissions of both Counsel for the Appellant and Counsel for the State and upon perusal of the Record of Appeal, the court finds that the Appellant pleaded guilty to the charge. Therefore the appeal can only relate to the sentence only.

The State has nevertheless conceded and is not opposing the Appeal.

This court having perused the record finds that the facts do not support the particulars of the charge and therefore the conviction is not safe or proper making the sentence irregular and wrongful.

For the reasons aforesaid, the court finds that the Appeal has merit and also allows the same.

Accordingly the conviction is hereby quashed and sentence is hereby set aside. The Appellant be released forthwith, unless otherwise lawfully held.

It is so ordered.

**Dated and delivered at Eldoret this 4th day of October 2012.**

**A.MSHILA  
JUDGE**

**Coram:**

Before Hon. A Mshila

CC: Andrew

Counsel for the Appellant: Buluma – present.

Appellant present.

**A.MSHILA  
JUDGE**