



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 421 of 2008

JOHN NJOROGE NGANGA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

**(From the original conviction and sentence in Criminal Case No. 3706 of 2008 of the Chief Magistrate's Court at Kibera by Mrs. Kasera – Senior Resident Magistrate)**

JUDGEMENT

The appellant John Njoroge Nganga was charged with dumping of toxic waste in the forest contrary to section 54(8) (b) of the Forest Act No. 7 of 2005. The particulars are that on 30<sup>th</sup> day of November 2008 at St. Francis in Ngong forest within Nairobi area province was found in the said forest with motor vehicle registration No.KAE 422D exhauster dumping toxic sewer waste without authority from the Chief Forest Conservative. He was taken to court on 1<sup>st</sup> December 2008 and according to the record the substance of the charge and every element of it was read and explained to the appellant. The appellant then replied that it is true. The trial court thereafter entered a plea of guilty and set down the matter for record and sentencing on 2<sup>nd</sup> December 2008.

On 2<sup>nd</sup> December, 2008 the prosecutor informed the court that the appellant is a first offender and the appellant prayed for leniency. The trial court then held;

***“Accused to pay a fine of 3 million in default to serve 10 years in jail.”***

The appellant has now appealed against the conviction and sentence. This is a first appeal and it is my duty to consider whether the appellant was properly convicted or not. Section 207 of the Criminal Procedure Code is very clear that the substance of the charge shall be stated to the accused person by the trial court and he shall be asked whether he admits or denies the truth of the charge. If the accused person admits the truth of the charge his admissions should be recorded as nearly as possible in the words used by the accused. After that the facts are read by the prosecution and accused is asked whether he admits or whether the facts are a true representation of the offence he allegedly committed. The answer is again recorded as nearly as possible to the words used by the accused person. After recording the answer of the accused person the court shall convict and ask the accused person to state any mitigating factors before sentence is passed out. Section 281 of the Criminal Procedure Code again states;

***“If the accused person pleads guilty the plea shall be recorded and he may be convicted thereon.”***

In this case it is not clear whether the trial court convicted the appellant on his own plea of guilty. It is also clear that the facts that gave rise to the charge were not read to the appellant to confirm the truth or otherwise of the charge he was pleading guilty. It is also not clear which language the court used and whether the appellant understood the language.

It is therefore my humble view that the trial court did not comply with the provisions of section 207 and 281 of the Criminal Procedure Code before the conviction and sentence was passed. That is a fundamental error which goes to the root and jurisdiction of the trial court to mete out a competent and proper sentence. In my humble view the conviction was not proper and the trial court had no jurisdiction

to mete out a sentence when it was a fundamental omission which resulted in miscarriage of justice. I therefore quash the conviction and set aside the sentence and order for immediate release of the appellant unless lawfully held.

Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of July 2009.

**M. WARSAME**

**JUDGE**