REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 417 OF 1987

BETWEEN

ODHIAMBO OLEL..... APPELLANT

AND

REPUBLIC.....RESPONDENT

RULING

(Appeal from the original conviction and sentence of the Chief Magistrate's Court at Nairobi (H. H. Buch, Esq.)

in

Criminal Case No 1536 of 1987)

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February 16 , 1989, the following Ruling of the Court was delivered.

On 6th April, 1987 the appellant Odhiambo Olel, who is a qualified medical practitioner, and was then the medical officer in charge of Kisumu Municipality appeared before the Chief Magistrate (H.H. Buch) charged with the offence of "being a member of unlawful society contrary to section 6(a) of the Societies Act." The particulars of the offence alleged that he Dr Odhiambo Olel, between 1977 and 20th March, 1987 at Kisumu Township, Kisumu District of Nyanza Province was a member of unlawful society, to with Mwakenya knowing or having reasonable cause to believe that the said Mwakenya was unlawful society.

When called upon to plead, after the substance of the charge and every element thereof had been explained to him the appellant replied:-

"It is true, I was a member of the unlawful society. I admit the charge."

Whereupon the learned Chief Magistrate entered a plea of guilty against the appellant.

The prosecutor, M.B. Chunga, who then was the Assistant Deputy Public Prosecutor outlined the facts in fairly great detail. He gave particulars of the appellant's education up to his qualification as a doctor and subsequent employment by the Kisumu Municipality his involvement in politics and how he joined the

society known as Mwakenya and his activities in the society. The nature and objectives of the society was then explained, Mr Chunga stressing its clandestine character and the fact that it was not registered. Finally Mr Chunga told the court that the appellant had confirmed all these facts in an extra–judicial statement made by the appellant to the police and which he gave to the court for perusal.At the conclusion of Mr Chunga's outline of the facts the appellant then said:-

> "I agree all the facts."

He was then convicted of the offence and later sentenced to 5 years imprisonment. In passing sentence the learned Chief Magistrate stated that he had taken into consideration what the appellant had stated in mitigation as well as the contents of the appellant's statement made to the police.

Seventeen days after his conviction and sentence the appellant filed a petition of Appeal against the said conviction and sentence on the grounds that his plea of guilty was not "invontrovertible" meaning according to his explanation, that it was not unequivocal or voluntary and was obtained through torture and threats by the police. In addition, the appellant in his petition of appeal, complained that the court below:-

i. perpetrated a miscarriage of justice by ignoring the illegal circumstances which surrounded the trial;
ii. participated in the miscarriage of justice by violating s 77(2) of the constitution; and
iii. erred in law in allowing the learned Assistant Deputy Public Prosecutor to introduce into the proceedings matters which were irrelevant and prejudicial to the appellant;

and because of the above complaints his conviction was in effect unconstitutional, illegal and defective.

When the appeal came for hearing before us, Mr Chunga the Deputy Public Prosecutor, raised a preliminary objection under section 348 of the Criminal Procedure Code to the effect that the intended appeal by the appellant against conviction was incompetent, invalid and could not lie and must therefore be struck out.

The basis of Mr Chunga's preliminary objection was that the appellant, having been convicted after he had unequivocably pleaded guilty to the offence as charged, was barred by virtue of the provisions of section 348 of the Criminal Procedure Code, from challenging the conviction. The section reads as follows:-

> "No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence."

The marginal note to the section which became the subject of comment by learned counsel for the appellant reads as follows:-

> "No appeal on plea of guilty nor in petty offences."

In support of his submission Mr Chunga observed that the appellant had appeared before the learned Chief Magistrate on 6th April, 1987 charged with an offence which was clear and simple namely being a member of an unlawful society and that being fully conversant with the language of the court, English, he had no difficulty in understanding and fully appreciating what was being alleged against him. Further, the charge and all the ingredients of the offence having been read and explained to him without any complicated legal terminology being used, the appellant unequivocably pleaded guilty to the offence. Mr Chunga further submitted that the procedure laid down in the case of *Adan vs Republic* [1973] E.A. 445 having been followed strictly to the letter, during which the appellant had been given at least three chances to speak to the court and either admit, deny or qualify the facts given by the prosecution, there could be no doubt that the appellant knew very well what he was pleading to when he did so. In those circumstances, Mr Chunga argued, there was no basis for the appellant's attack of his conviction. These

submissions were supported by the citation of the following authorities: *Searle v R* (1955) 22 EACA 443, *Wakelin v R* (1951) 18 EACA 185, *Wanderi Muthigani v R* (H.C. Cr Appeal No 669 of 1986 and *David Mbewa Ndere v R* (H.C Cr Appeal No 12145 of 1987).

In our view, the line of authorities cited by the learned Deputy Public Prosecutor fully establish that where the plea of guilty is clearly unequivocal, an appeal against conviction does not lie. Although Mr Khaminwa, learned counsel for the appellant, could not bring himself to expressly accepting the above position as the law, he was not able to cite any authority to the contrary.

On our part we accepted the above as a correct statement of the law and reject any view to the contrary as not having any legal basis.

Mr Khaminwa also argued that section 348 of the Criminal Procedure Code cannot be invoked in every case: neither was it safe to give the application of the section a broad generalisation, he said. Each case, he submitted, had to be judged on its own particular circumstances. Where, for example, the plea was not voluntary or was obtained through force or threats or torture, such a plea could not be said to be unequivocal: it wouldbe null and void. Regarding section 348 of the Criminal Procedure Code, Mr Khaminwa submitted it was vague, ambiguous and incapable of reasonable interpretation.

Having considered the submissions by both learned counsel on the interpretation of section 348 and particularly the authorities on the matter cited by Mr Chunga, which we observe span a period from 1951 up to date, we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact what the marginal note also states.

Mr Khaminwa attempted to show that the inclusion of the words “nor in petty cases” in the marginal note, when nothing about “petty cases” was mentioned in the section, rendered the section incapable of reasonable interpretation but having regard to the fact that on its enactment, the section had included a subsection dealing specifically with petty offences, which subsection was later repealed without the marginal note being appropriately amended, we thought the point taken by Mr Khaminwa was probably intended to be no more than a red herring. We would, in the circumstances, not wish to take the matter beyond that.

Returning to section 348, we reiterate that although Mr Khaminwa refused to accept the interpretation consistently given to the section by the courts over the years, he was not able to cite any authority to support a different interpretation. That being the position, we agree with Mr Chunga that where a person has pleaded guilty in a clear and unequivocal manner, he cannot on appeal challenge a conviction based on such a plea. In fact, the section does not allow appeals to be made in such cases.

Having disposed of the issue of the interpretation of section 348, we now turn to consider whether the plea of the appellant was clear and unequivocal, this being the only issue remaining to be determined before we can dispose of Mr Chunga’s preliminary point. We accept Mr. Khaminwa’s proposal that if a plea of guilty is not voluntary or is obtained by force or threats or torture or even deception, it cannot be said to be unequivocal for it would in those circumstances be a nullity to which section 348 of the Criminal Procedure Code would have no application.

The question that arises is how, as an appellate court, shall we proceed to determine the question and whether we are entitled to go beyond the record of the proceedings of the court below.

Mr Chunga submitted that as appellate court (as opposed to a court of first instance), we were bound by the record of the court below and consequently precluded from taking into consideration new matters not before the lower court. Mr Chunga said that, the procedure set out for the taking of pleas in the celebrated case of *Adan v R* (supra) having been followed to the letter, there could be no basis for challenging the conviction.

Mr Khaminwa, on the other hand, argued that in investigating whether or not the plea was voluntary, the court should not confine itself to the record of the proceedings only but had to consider all the circumstances surrounding the matter. By surrounding circumstances Mr Khaminwa meant, for example, the fact that the appellant had been in custody for 17 days before being brought to court as well as the allegations of torture and threats while in police custody.

Save that the learned Chief Magistrate must be taken to have observed from the charge sheet that the appellant had been in police custody for 17 days before being brought to court, those complaints, were not raised in the court below and are accordingly not to be found anywhere in the record of the proceedings. They appear, for the first time, in applellant's grounds of appeal. Are they therefore to be taken as part of the surrounding circumstances in our consideration of the issue whether the plea was voluntary? Having given the matter careful thought we do not think we are entitled to take into consideration the complaints made by the appellant in his petition of appeal. (They are neither facts nor new evidence) As they stand they are no more than mere allegations unsupported by evidence.

The appellant who is a qualified medical doctor did not raise them at the court below although he had ample opportunity thereat to say anything he wished to tell the court. Instead, he accepted all the facts as stated by the prosecution and went on to praise the police and apologise to the state for what he had done. Before the Chief Magistrate, the appellant could not have been under any of the dire forces that had allegedly been directed at him by the police while in their custody. He knew exactly what he was doing and did it voluntarily. There is therefore no basis for saying that the plea was not voluntary on account of the alleged threats and torture and we reject Mr Khaminwa's argument on that point.

As regards the period of 17 days the appellant was in police custody, we accept that section 36 of the Criminal Procedure Code requires police to bring persons arrested without warrant to court as soon as practicable. Section 72(2) and (3) of the Constitution is to the same effect. What is practicable or reasonable in one case may not necessarily be so in another – each case must be judged in accordance with its particular circumstances.

The charge the appellant faced covered a period of about 10 years and no doubt the police required time to investigate the matter fully before bringing the matter to court. The question whether 17 days was reasonable or too long was not raised by anyone at the court below and was therefore not considered. It is suggested that the period of detention in police custody should have alerted the Chief Magistrate's mind to the possibility that in pleading guilty, the appellant may not have meant what he was saying and might have been acting under the threats and torture allegedly meted to him while in the custody of the police. With due respect we cannot subscribe to such a view. Mere detention, long or short in itself cannot be a factor in determining whether or not a plea is unequivocal. It is what may be done to the appellant while in detention that may affect the character of his plea. Since there is no material, except the record of the proceedings, on which we can judiciously determine the question, we must go by the record and accept as true the position stated therein. In our view, to do otherwise would be tantamount to substituting the known and admitted facts of this case with unjustifiable speculation. That, we cannot do. After all, justice does not entail fairness to only one side, as it must, of necessity, mean a balanced and judicious (as opposed to arbitrary) consideration of the case for both sides, i.e. the case for the appellant and for the prosecution.

Before leaving the subject of the voluntariness or otherwise of the plea, we wish to comment on a point raised by Mr Khaminwa during submissions before us. The record of the proceedings of the court below reveals that, at the conclusion of his outline of the facts to the Chief Magistrate and before the appellant had been formally convicted, the learned Deputy Public Prosecutor handed over to the Chief Magistrate a document which was said to be the appellant's statement to police. The record further reveals that the document was received by the learned Chief Magistrate but not made part of the receord either as an exhibit or by reproduction of its contents. It is however clear that its contents were taken into consideration by the learned Chief Magistrate in convicting and sentencing the appellant.

In our view the procedure adopted by the learned Chief magistrate was wholly improper. He should not have taken into consideration a matter which he had declined to include in the record. This wrong

procedure did not however, in our view, affect the conviction of the appellant since all the ingredients of the offence charged are fully established in the facts stated by Mr Chunga to the Chief Magistrate. Consequently, since the statement was not made part of the record, this was not a case of a missing part of the record, as the learned counsel for the appellant suggested. The record as compiled by the Chief Magistrate was intact and accordingly the case of *Bukenya v Uganda* [1967] EA 341 has no application to the instant case. Having said so, we must in fairness to the appellant, observe that we consider that the contents of the document may have influenced the learned Chief Magistrate with respect to the sentence he imposed. As to that aspect of the appeal we shalt revert later after hearing both counsel on the matter.

For now we find that Mr Chunga's preliminary point has been sustained and we hold that the appellant is barred from appealing against his conviction by the Chief Magistrate.

The appeal against conviction is struck out and dismissed.

Dated and delivered at Nairobi this 16th day of February 1 , 1989.

T MBALUTO **B. K TANUI** **A. M AKIWUMI**

JUDGE **JUDGE** **JUDGE**