REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO 1253 OF 1988

BETWEEN

GIBSON KIMANI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(Appeal from original conviction and sentence in Crimnal Case No 2966 of 1988 of the Chief Magistrate's Court at Nairobi)

June 14, 1989, the following Judgment of the Court was delivered.

The appellant was convicted in the court below of being in possession of a seditious publication contrary to section 57 (2) of the Penal Code. He was sentenced to 7 years imprisonment and now appeals against sentence only, appeal against conviction having been abandoned, no doubt in view of the decision in *Olel's* case.

The complaint made in respect of sentence involves the question of additional matter being put before the lower court which refers to other charges with which the appellant was not charged.

In the court below the learned DPP described the document concerned and handed it to the court. He pointed out various passages in it, and also described to the court the nature of the of the movements which published the document. All of this was quite proper.

He then turned to the relationship of the appellant with one Koigi, said to be the head of the organization involved, correspondence with him, meetings with him outside the country, assistance the appellant gave in receiving funds for the organization, recruitment for the organization, and activities within it, and further associations with one Raila Odinga who headed, it was said another movement with similar aims. Some photographs were put before the court of people who it was said, actually went to Libya for training as guerillas.

It seems to us that if all those matters were to be taken into account, then there was a danger that the learned trial magistrate was in danger of being influenced by extraneous matter, and we question the wisdom of going so far into the matter without a supporting charge for other and more serious charges than this one could have been brought to cover the allegations made before the lower court.

It is worth once again setting out the argument which this court considered in HCCA 875/86.

S 72 (1) of the Constitution says:-

> "No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases-
>
> (a) In execution of the sentence or order of a court ... in respect of a criminal offence of which he has been convicted."

S 207 of the CPC says as to guilty pleas:

> "(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
>
> (2) If the accused person admits the truth of the charge 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 order against him, unless there appears to it sufficient cause to the contrary. Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded."

Reading S 72 of the Constitution and S 207 of the Criminal Procedure Code together, we continue in the view that the court is to sentence the accused only for the offence with which he is charged, and that the facts to be given are the facts relating to that charge.

If the prosecution wish to have the accused dealt with for other offences which are not charged, then the accused can be charged with those offences, or, semble in the High Court but not in the subordinate court, the accused may ask to take other offences into consideration (see *R v Gulam Hussein* 13 EACA 167).

This is a basic principle to which S 216 is subordinate and subsequent in our view:

S 216 reads:-

> "The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made."

In *R v Gulam Hussein* (1946) 13 EACA 167, the appellant was convicted of possession of a large quantity of methylated spirit. After conviction, but before sentence the prosecutor, a Police Officer told the court that the appellant had told him that he had bought all the spirit ... and that he was going to sell it at shs 4 a bottle. The Court of Appeal found that such a large quantity of methylated spirit, accompanied by other circumstances was sufficient to justify the sentence appealed against.

But the court went on to say that on a controversy as to the facts upon which sentence was to be based the same rules as to legal proof in the substantive trial must apply. It was improper for a prosecutor after conviction and before sentence to make any statement to the court against the convict which-if challenged- he would be unable to prove by legally admissible evidence.

And further we say that the prosecutor is restricted to the facts upon which the charge is founded by S 207 of the CPC. In *Adan v Rep* [1973] EA 446 the Court referred to the prosecutor stating "the facts of the alleged offence" which further confirms us in our opinion.

Now it is argued before us that it is correct for the prosecutor in giving the facts of the alleged offence to include reference to other offences which are in some way connected with the alleged offence, which go to increase the seriousness of the offence alleged, in respect of which the learned trial magistrate is

considering sentence. It is said that S 57 (1) of the Evidence Act allows evidence to be admitted that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged or is of bad character if such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue.

It is therefore important to understand what fact is in issue at the time the prosecutor is giving the facts of the alleged offence.

Under the universally followed procedure in *Adan's* case (which procedure is slightly different to the procedure referred to in S 207 of the CPC), the facts are given after plea of guilty and before conviction. The matter in issue at that time is the question of conviction, and is the procedure, or part of the procedure, by which the learned trial magistrate establishes that the plea is unequivocal. It is after conviction that the learned trial magistrate can turn to the matters referred to in S 216 of the CPC.

Since the matter in issue is the question of conviction, and it is the State's case before us that the plea is unequivocal, with which we have to agree in view of recent decisions, it follows that other offences alleged to have been committed are not relevant to the matter in issue, that is, conviction.

In consideration of conviction, the allegation without more that other offences have been committed, even if admissible under the Evidence Act, would be more prejudicial to the accused than probative, and should be excluded by the learned trial magistrate on that basis. The same argument applies whether one is referring to S 57 (1) (aa) or S 57 (1) (a) of the Evident Act.

Under ss (1) (a) the purpose for which the evidence must be required is to show that the accused is guilty of the offence with which he is then charged. Where dealing with an unequivocal plea of guilty, such evidence is not necessary for such purpose, and would, and should rightly be excluded for that purpose.

Therefore we hold that in the facts given to the court under the procedure outlined in *Adan v Rep*, it would be most unusual for it to be right for the prosecutor to relate the alleged commission of any offence other that that charged.

Now under the *Adan* procedure, having been satisfied that to convict is proper, and having entered the conviction, the mind of the learned trial magistrate turns to sentence. It is our view that the two processes are separate, and are these days in danger of becoming blurred so as to lead to the sort of arguments we have heard here.

It the facts have been given properly as we set out above, the learned trial magistrate will not have heard any of the facts surrounding the offence. It may be in the mind of the prosecutor that the learned trial magistrate ought to know more about the circumstances than he was able to put forward while giving the facts.

The question to ask is whether he is entitled to do so. At this stage the fact in issue most often is the accused's involvement in the offence charged, and the seriousness of the offence vis-a-vis society.

In *Shiani v Rep* [1972] EA 557 it was held by the Court of Appeal that it was not for the prosecutor to tell the court of his views as to the seriousness of the offence. He is required simply to put the facts before the court.

In any offence there may be a breach of the law which is minor, and, at the other end of the scale, one which requires the full sentence allowed by the law. There are a number of factors which determine where in the scale of sentencing an offence lies.

In the case of *R v Malakwen arap Kogo* (1933) 15 KLR 115, these considerations were said to be (at least where theft was concerned)

1. Intrinsic value of the subject matter

2. Antecedents of the accused

3. Youth of the accused

4. Conduct of accused at the Trial, in particular whether he pleaded guilty or not guilty

5. Prevalence of the particular crime in the neighbourhood

The learned trial magistrate can usually tell from the facts which he has been given, mitigation, and his local knowledge as to prevalence of offences where in the scale the offence comes.

This is why it is said in *Shiani* that the Procecutor should not concern himself with the seriousness of the offence. Contra if he is asked for assistance by the court, as in *R v Seguja* (1935) EACA 85.

We do accept, however, that where the charge involves association with an organization with which the State is rightly, and, we hope, successfully, trying to deal, and acts on behalf of or in the furtherance of the aims of, that organization, association with that organisation may be a factor which determines where on the scale of sentencing that particular offence comes, since the danger to the State is relevant.

It is argued before us that by the operation of SS 5 to 16 of the Evidence Act, the other alleged offences are facts which are admissible and relevant to the offence which was before the lower court. They do indeed tend to bear on the matter which we have mentioned above, and may be relevant after conviction. It can be said that, if the prosecutor wants to make them facts in issue or relevant facts, then he might be right to do so.

There is however no procedure by which he can do such a thing in Kenya, and mere relevance or admissibility is not the end of the matter. The same, test must be applied as we mentioned above, that is whether the admission of these facts is more prejudicial than probative.

Of course the danger here is that the learned trial magistrate when considering sentence, may deal with the accused not only for the offence before him, but also for the other offences, and on the basis of the sentence passed, which was the maximum, and other comparable matters, we think that this is what happened in this case.

There is a further hidden danger, and that is whether the alleged other offences are in issue or not. It is only too easy to say that the accused admitted the facts, and therefore there is no controversy about the other offences.

But we have already held that at the time the appellant was asked to admit or deny the facts, there was matter before the court, these very alleged other offences, which should not have been before the court at that time, and did not form part of the facts of the offence charged.

It could not then be said that the appellant did indeed admit these other offences, and if they were in controversy, then they should have been proved by evidence if at all admissible.

R v Hussein (ibid) shows that such statements are to be expected, if at all, after conviction and before sentence, not during the facts, and that the rules of evidence apply. We do not think that *Seguja's* case, in which the prosecutor was asked for information as to the prevalence of the offence in the area, and in which it was said that such information could come from a responsible officer of the court even though not given on oath affects the position where the information concerns other offences.

The problem received much consideration in the English Courts during 1979 / 1980. One such case was *R v Robinson* (1969) CLR 207, in which a man was arrested in possession of a small amount of cannabis. After conviction police officers giving evidence about him said that at the time of the offence in 1966 one thousand pounds was found in his home and he was believed to be one of the main distributors of drugs in the Midlands.

It was held that the evidence should not have been given. Since it was necessary in drug cases (as we say it may be in this offence to establish matter extraneous but relevant to the actual offence) to distinguish between those who possess for consumption and those who possess for trafficking, it is the duty of the courts to receive admissible evidence on the issue. But such evidence should not be admitted unless the witness can speak from first-hand knowledge, and it is sufficiently particularised to make it possible for the defence to challenge it.

Further where the prosecution is in possession of evidence of trafficking (and the evidence is not to be led at the trial) notice of it should be given to the defence, so that they have an opportunity to consider it and prepare to meet it. If no notice is given the judge would have a discretion whether or not to admit the evidence.

Such a decision is only persuasive here in Kenya, but it is interesting to see the approach taken. The principle we think to be behind this sort of stricture on this manner of presenting information as to the offence or the accused is that the accused is entitled to know what is alleged against him, and that principle applies with equal force in Kenya.

We do not wish to enter the lists as to whether such a procedure is necessary or suitable here, for we do not consider it necessary in this case to do so. The point is that in whatever jurisdiction, the court needs to know if the information it is given is right before it proceeds to sentence on the basis of it: and so the accused must accept it in terms, or it is to be proved by evidence. Much the same approach was taken in *Hussein's* case by the Court of Appeal.

As we have shown, it cannot be said in this case that the accused accepted the allegations to be true. He was asked if he accepted the facts of the case and he did. He was not asked if he accepted the additional material.

Going a little further than that, if it be so that evidence was to be given of the matters mentioned, under S 207 of the Evidence Act, what better manner of dealing with it than by charging the accused with it in the first place? It has been done in countless other cases and the allegations here are in the main specific and chargeable, and we see no reason why charges have not been brought.

There is a very real danger that if other offences are mentioned to the court in this informal way, the learned trial magistrate, unless by his record he has shown that he was disabused himself of the possible error of sentencing for the other charges in a kind of general way, as distinct from considering them to see where in the scale of sentencing such charges should be found to lie, then the sentence may include a sentence for a charge in respect of which the accused can be arrested and further proceedings taken, and that would be contrary to the Constitution in S 72 (1). That is why the distinction we seek to make is not a distinction without a difference.

There have been decisions of this court in which the contrary to the above appears to have been decided, but we are of the view that the matter has not been gone into to the extent to which we have considered it above, as the arguments for the contrary view have not been put forward for the consideration of the court. That is why although we find these decisions persuasive, nevertheless we must respectfully and regretfully disagree.

And having considered the record in this matter, and having noted that the learned trial magistrate sentenced to, the maximum in respect of a first offender, we cannot disabuse ourselves of the idea that the learned trial magistrate sentenced very much on the basis of the additional information, as distinct from the charge before the court.

The principles of sentencing are well known and have been judicially considered on a number of occasions.

In *Ogalo s/o Owoura v R* (1954) 21 EACA 270 the principle was stated that the Court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might

have passed a somewhat different sentence. The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower court has acted upon some wrong principle or overlooked some material factor, or the sentence is manifestly excessive in view of the circumstances of the case. These principles are adopted by the High Court in its appellate jurisdiction. It was further pointed out that courts were not bound by precedent in sentencing, but that the appellate court was afforded some sort of yardstick by precedent when considering whether the sentence was manifestly excessive or not.

In *Nilsson v R* [1970] EA 599 Harris J pointed out that the fact that the appellant pleaded guilty to the charge, and that he had no previous conviction should be considered.

In *Shiani v Rep* [1972] EA 557 it was held by the Court of Appeal that it was not for the prosecutor to tell the court of his views as to the seriousness of the offence. He is required simply to put the facts before the court.

In this case it is quite clear that the appellant was a first offender, and had pleaded guilty. He had further co-operated with the Police in their enquiries, and we would add that to the matters Harris J mentions as matters to be taken into account.

Those matters were obvious at the time the learned trial magistrate was sentencing the appellant.

We accept the proposition by Harris J in *Nilsson's* case that a plea of guilty from a first offender requires recognition as a matter of principle, although we would not necessarily subscribe to the reasons Harris J gave for adopting such a principle, which were administrative only.

In our view the reason for recognizing such factors is that they show that the accused has accepted his offence, and that is the first step to rehabilitation, which is the main object of sentencing in the first place.

It is clear to us that at the time of sentence such factors applied, and it is also clear to us that the learned trial magistrate did not in fact give effect to such principles, although he said that he had such matters in mind, for he sentenced the appellant to the maximum in respect of the offence with which he was charged, without giving credit for the matters we have outlined above. We are interested to see that the learned DPP quite properly gave the cue as to the proper course to take by pointing out that he was elaborating on the facts to identify the document to establish its publishers and the intention of its publishers.

There is a line of authority which indicates that if the Magistrate is of the view that the section concerned does not provide sufficiently for the mischief involved he may sentence to the maximum despite the above argument, but, without commenting on such a line of argument, we note that this is not what happened here, as the learned trial magistrate as he then was did not refer to such matters.

For those reasons we consider that the record shows that the learned trial magistrate as he then was in fact overlooked a material factor, or at least did not give a material factor due weight in coming to his sentence, and we are of the view that it would be right to interfere with it.

Accordingly we act to set aside the sentence passed and turn ourselves to consider a proper sentence. In doing so we bear in mind that there are matters on the record which are prejudicial to the appellant in that other offences with which he is not charged appear to be revealed, and we specifically disabuse our minds of those matters in so far as they suggest such other offences.

But we are of the view that even when we have so disabused our minds, the period of time during which the appellant retained the publication concerned without destroying it or notifying the authorities was so long, and his connection with the publishers of the document and with its expressed aims were so marked that the proper sentence to pass is one at the top end, rather than at the lower end, of the scale in respect of the offence with which the appellant was charged.

We therefore sentence the appellant, taking into account all that has been said by him and on his behalf, to 5 years imprisonment.

Dated and delivered at Nairobi this 14th day of June , 1989

PORTER

JUDGE

TANK

JUDGE