REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO 60 OF 1989

BETWEEN

DAVID MAINA..... APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

(From original conviction and sentence of the Resident Magistrate's Court at Voi N. O. Masara Esq Ag RM)

in

Criminal Case No 141 of 1989)

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October 24, 1989, **Bosire J** delivered the following Judgment.

This is an appeal by David Maina against his conviction and the sentence which was imposed on him. The appellant was convicted on 2nd February, 1989, upon his own plea of guilty and was thereafter fined Kshs 18,000/ - for the offence of being in possession of uncustomed goods contrary to section 185(d) (iii) as read with section 196(c) of the Customs and Excise Act, No 10 of 1978 (Cap 472 Laws of Kenya).

By dint of section 348 of the Criminal Procedure Code no appeal lies against conviction where an accused has been convicted upon his own plea of guilty. However, it is trite law that in every appeal a point of law as to the propriety of the conviction is always alive and which an appellate court must address its collective mind to.

In the instant appeal the appellant contends through his advocate, Mr Gakuhi, that his plea of guilty was equivocal and therefore a conviction was improperly had.

The charge was read to him and every element of it was explained to him. He admitted it. The prosecutor adopted the particulars of the charge as the summary of facts in support of the charge. Those particulars were reread to the appellant.

He understood them and confirmed that they were true. He then admitted them. The trial magistrate thereupon entered a conviction for the offence charged, and called upon the appellant to make statements in mitigation of sentence. The appellant stated.

" I plead for mercy. I bought them in the open market at Taita – Taveta."

The legal point raised by this appeal is whether a statement made by an accused in mitigation which tends to or does negate a plea of guilty which is otherwise unequivocal does render the plea equivocal and thereby entitle the court to change the plea to one of not guilty.

There is a plethora of authority on this question in East Africa, many of them conflicting, but in the case of *Kamundi v R* [1973] EA 540, the Court of Appeal for East Africa set the matter at rest. Sir William Duffus, P delivering the judgment of the Court after reviewing several authorities on the matter, said, at P 545 G:

> "The Magistrates' Courts are created by Statute and we have set out the short provisions of the Criminal Procedure Code which in S 207 provide for the taking of the plea and the passing of sentence. There are no provisions providing for a plea to be changed, but there are equally no provisions to prevent a plea being changed before the court becomes *functus officio*. The whole purpose and intention of the Criminal Procedure Code is to lay down Provisions and Procedure to see that justice is done, and justice cannot be affected if a plea of guilty is entered as a result of ignorance or misunderstanding. The Court must have judicial discretion to allow a change of plea before it has finally disposed of the case. It is common practice to allow the accused person during the course of a trial to change his plea to one of guilty and we can see no reason why the Court should not have similar powers to change a plea of guilty. A further question arises, when does a magistrate's court become *functus officio* and we agree with the resoning in *Manchester City Recorder Case* [1969] All ER 1230) that this can only be when the court disposes of a case by verdict of not guilty or by passing sentence or making some order finally disposing of the case."

I endorse the views expressed above, and in any case the decision binds this court. It then follows that if the words of the appellant did in fact amount to a negation of his plea of guilty the trial magistrate could not validly proceed to sentence.

However, the words of the appellant that he bought the shoes, the subject matter of the prosecution, from a market at Taita-Taveta, did not *per se* show the shoes were not uncustomed to his knowledge, and that he was an innocent purchaser.

The appellant had been arrested being in possession of 92 pairs of rubber shoes. The date was 2nd February, 1989 at 1 am. He was in a lodge called Dawida, situated in Taita Taveta District. The circumstances under which he was arrested with them, and the fact that he admitted he was arrested as the prosecution alleged, clearly showed he had full knowledge of the offence he was charged with and knew what he was pleading to. The plea was clearly unequivocal, and the appellant did not try to negate the plea by his statement that he bought the shoes at an open air market.

The trial magistrate properly proceeded to sentence the appellant. Appeal against conviction has no merit.

The appellant has attacked the appropriateness of the sentence which was imposed on him. It was a lawful sentence, but learned Principal State Counsel, Mr Metho concedes, properly so, that it is manifestly excessive regard being had of the fact that the shoes were forfeited. The value of the shoes is not given on the particulars of the charge, so we do not know nor shall we ever know its value. Consequently the loss the appellant suffered by their forfeiture may not now be assessed. The doubt as to their value will be resolved in favour of the appellant with the result that I hold that the appellant lost his goods and that fact should have militated in favour of a more lenient sentence than was meted out to him. I am compelled to reduce the sentence of fine from Kshs 18,000/- to Kshs 10,000/-. The appeal succeeds to that extent.

The appellant has been on bail pending the result of this appeal. Should he not raise the fine he will serve the default sentence which the trial court imposed. Order accordingly.

Dated and delivered at Mombasa this 24th October, 1989

S.E.O BOSIRE

JUDGE