REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 669 OF 1986

JOHN GUPTA NGANGA THIONGO……..……..APPELLANT

VERSUS

REPUBLIC…….……..……RESPONDENT

RULING

On May 15, 1986, the appellant, John Gupta Nganga Thiong'o appeared before J A Mango, Esq, SRM sitting in the Chief Magistrate's court in Nairobi.

The appellant was there charged with neglect to prevent a felony contrary to section 392 of the Penal Code. The particulars of offence were that on divers dates between the year 1983 and May 8, 1986, in Nairobi within Nairobi area the appellant, knowing that some persons were designing to commit a felony, namely publishing a seditious document entitled *Pambana*, failed to use all reasonable means to prevent the commission thereof. To this charge the appellant apparently pleaded guilty, and was convicted on his own plea of guilty. Mr Mango sentenced the appellant to serve fifteen months imprisonment.

A petition of appeal was filed in court on May 2, 1986. On December 1, 1986 notice was filed of amendment of petition of appeal. The effect of the notice of amendment was that the appellant amended his earlier petition of appeal by abandoning the grounds of appeal contained in it and replacing them with the grounds of appeal contained in the amended petition. By notice of motion of the same date the appellant applied for leave to call additional evidence on the hearing of the appeal. The Notice of Motion was supported by the affidavit of Kiraitu Murungi sworn on December 1, 1986.

By a notice of objection dated December 2, 1986, Mr Chunga, Assistant Deputy Public Prosecutor, on behalf of the Attorney-General gave notice that the Republic would raise a preliminary objection under section 348 of the Criminal Procedure Code. Section 348 categorically prohibits an appeal against conviction where the appellant has pleaded guilty in the court below. After a plea of guilty only an appeal against sentence can be brought.

On December 11, 1986, Mr Kiraitu, acting for the applicant in the Notice of Motion and Mr Harwood acting for the respondent to the notice of motion appeared before Mr Justice Tanui. By consent, it was ordered that the appellant's application to call additional evidence should be stood over to the hearing of the appeal itself when the application would be heard as a preliminary issue.

At the hearing of the appeal, Mr Kiraitu appeared for the appellant and Mr Chunga appeared for the respondent. It was at once evident that there were two preliminary issues viz.

> (a) whether or not, in view of the appellant's plea of guilty the court below and the provisions of section 348 of the Criminal Procedure Code, the appeal, in so far as it was on appeal against

conviction, was competent and

(b) whether or not the appellant should have known to call additional evidence.

The two issues could not be considered separately since the very point on which the appellant wanted to adduce additional evidence was the very point relied on by Mr Chunga as the basis of his preliminary objection viz the plea of guilty in the court below. Since Mr Kiraitu and Mr Chunga could not be allowed to address the court simultaneously, it was ruled, after considerable argument, that Mr Chunga's point was fundamental and that he should begin. Mr Chunga submitted a list of eighteen authorities and Mr Kiraitu submitted a list of ten authorities. Mr Chunga stressed the unequivocal nature of the plea offered in the court below which Mr Chunga insisted, entirely complied with the requirements or guidelines of the leading case of *Adan v Republic* [1973] EA p 445. Mr Kiraitu conceded that, on the face of the record, the plea of guilty did indeed appear to be an unequivocal plea but he contended that however unequivocal it might appear to be, it was in fact an invalid plea since it was not made voluntarily. Mr Kiraitu relied upon the contents of the affidavit sworn in support of his Notice of Motion to argue that the appellant's plea of guilty, for being a voluntary plea; was the result of extreme ill treatment meted out to the appellant by the police. In paragraph 13 of his affidavit, Mr Kiraitu set out in detail what the appellant had said about that ill-treatment. In particular, it appeared in sub-paragraph M that the threat of ill-treatment by the police if the appellant did not plead guilty was maintained in the corridors of the magistrate's court and persisted in right up to the moment when the appellant entered court to face this serious charge. To avoid futile ill-treatment, including actual torture, the appellant complied with the demands of the police and pleaded guilty. In his plea in mitigation, however, the appellant tried to alert the magistrate to the reality of the case by saying, at the bottom of page 5 at top of page 6 of the record.

"I have been in custody for a week and it is one of the

most painful experiences in life. I have not had a more

painful experience than in the last one week."

The reference to a painful experience should, Mr Kitaitu argued, have alerted the magistrate to the co-ercion being brought to bear on the appellant, and appreciating what had happened, the magistrate should have changed the appellant's plea to a plea of not guilty, and put the prosecution to proof of the charge they had brought against the appellant.

For the respondent Mr Chunga concedes that for a plea of guilty to be valid it must be a plea that has been entered voluntarily. Only a voluntary plea would be caught by the provisions of section 348. If the appellant's plea of guilty was induced by threats to the appellant, then it would be invalid and would not operate as a bar to an appeal against conviction. Mr Chunga, however, urged the court to peruse the record of the proceedings where there was every indication that the appellant pleaded guilty because he was guilty, and that plea was a true plea. So clear was this, Mr Chunga argued that there could be no justification for admitting evidence on the point. Both Mr Chunga and Mr Kiraitu referred the court to leading cases illustrating the circumstances in which an appeal will lie even when there has been a plea of guilty, and the circumstances in which an appellant will be allowed to adduce fresh or additional evidence on appeal. The court is greatly obliged to Mr Chunga and to Mr Kiraitu for their industry and for the pains they have taken. The court has carefully considered both the affidavit sworn by Mr Kiraitu and the record of proceedings in the court below.

Having examined the passage in the appellant's plea in mitigation where he describes his week spent in custody as being one of the most painful experiences in life, and reading it in the context of an address to the magistrate which was intended to arouse the magistrate's sympathy, this court is unable to construe the passage in the way argued by Mr Kiraitu. In the judgment of this court, these words only mean what they say, and represent the perfectly natural reaction of anyone who suddenly faces the prospect of losing his liberty. References to the appellant's career prospects, and the effect upon the appellant's family if the appellant is imprisoned show that the appellant's purpose was not to detract in any way from his plea of guilty but to persuade the magistrate that, because of his plea of guilty, he might be shown leniency. It so

happens that the appellant is qualified in law, and his experience and ability in that field are turned to good account when the appellant finds himself about to be sentenced. At page 6 lines 3 and 4 he draws the magistrate's attention to the help he has given to the police, and that he has not misled them. He goes on to remind the magistrate that the magistrate is not bound to impose a prison sentence but can, if he thinks it right to do so, deal with the offence by imposing a fine. At line 12 on the same page he urges the magistrate to impose a noncustodial sentence. Looked at as a whole, the appellant's plea in mitigation is the plea of a man who is in full command of himself as he addresses the magistrate. He knows what he wants to say, and he makes sure that he takes full advantage of the opportunity afforded him for saying it. In the appellant's first petition of appeal he complains that the magistrate did not consider what the appellant himself describes as his lengthy address in mitigation. "Lengthy" is a few description of the appellant's plea in mitigation and, in the light of that plea, it is quite impossible for this court to regard the appellant as a man who was subject to any sort of duress or constraint when he appeared in the court below. It is therefore impossible for this court to regard the appellant's plea as anything but a voluntary and unequivocal plea of guilty.

Section 348 must be given its full effect in these circumstances and the present appeal, in so far as it is an appeal against conviction, must be dismissed. Mr Kiraitu has argued that, if a direct appeal can not now be entertained, then the conviction in the court below should be reviewed, and additional evidence shall be admitted on review. The objection to that course, which is advanced by Mr Chunga, and is accepted by this court, is that there is nothing in the case that can properly be the subject of review. It is common ground that the magistrate followed the correct procedure where a person tenders a plea of guilty, and the court is satisfied that the appellant's plea of guilty was a voluntary plea. Evidence that the appellant was ill-treated while he was in custody would not assist the appellant, and would be irrelevant to the issue of voluntariness since that issue has been decided against the appellant, and must be regarded as closed.

Section 348 does not bar an appeal against sentence and the appellant is at liberty to pursue his appeal in that respect. Mr Chunga has indicted that he also wishes to be heard on the question of sentence. On behalf of the appellant Mr Kiraitu makes no further submission as to sentence and, on behalf of the respondent, Mr Chunga has nothing to add.

The sentence will therefore be upheld and the appeal against sentence dismissed.

Dated and Delivered at Nairobi this 26th day of January, 1987

J.W.A BUTTER –SLOSS

JUDGE

B.K. TANUI

JUDGE