REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPEAL NO. 875 OF 1986

NDABI……………………......…...………………………..APPELLANT

VERSUS

REPUBLIC………….……………………………………RESPONDENT

(Appeal from the Chief Magistrate's Court at Nairobi, Buch Esq)

JUDGMENT

The appellant was convicted in the court below on his own plea of guilty for distribution of seditious publications contrary to section 57(1) (c) of the Penal Code (cap 63) and was sentenced to 7 years' imprisonment. The appellant asked for leave to amend his petition of appeal to include grounds of appeal against conviction, but we refused that leave. His grounds of appeal are against conviction only. We have nevertheless considered the record and are satisfied that his plea was unequivocal, and that he was properly convicted. No appeal of his against that conviction shall therefore be allowed (section 348 of Criminal Procedure Code (cap 75)) and his appeal against conviction is dismissed.

As to the offence charged, the facts given were that on the night of April 3/4th the appellant distributed 100 copies of seditious publications called *Msalendo Mwakenya* in Kiambu township. The court saw the publications concerned. He was also said to have given another bundle to his friend for distribution although the charge does not mention that.

Also included in the facts were allegations that the appellant was an active and paid up member of an unlawful society, an offence for which the maximum sentence is 7 years and a fine of Kshs 50,000 and had distributed seditious publications between 1983 and 1984 in various parts of Kenya. It was also alleged that he took an unlawful oath and was administering the oath to others thereafter, for which, depending on the nature of the oaths concerned, might make him liable for something from 1 year's imprisonment to a sentence of death.

We are becoming concerned with the practice of referring to what appears to be matter extraneous to the charge before the court in giving the facts by prosecutors, and we have determined to consider the matter from first principles.

Section 72 (1) of the Constitution says:

"No person shall be deprived of his personal liberty save as may be authorized 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."

Section 207 of the Criminal Procedure Code (cap 75) 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 section 72 of the Constitution and section 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 Shulamhussein* [1959] EA 743).

This is a basic principle to which section 216 is subordinate and subsequent: section 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 *Republic 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 as Kshs 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 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 the prosecutor is restricted to the facts upon which the charge is founded by section 207 of the Criminal Procedure Code. 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 section 57(1) of the evidence Act (cap 80) allows evidence to be admitted that the accused person has committed or been convicted of or charged with any offence other than that 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 section 207 of the Criminal Procedure Code), 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 section 216 of the Criminal Procedure Code.

Since the matter in issue at this stage is the question of conviction, and since it is the state's case before us that the plea is unequivocal, with which we agree, 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, if it is probative at all, and should be excluded by the learned trial magistrate on that basis.

The same argument applies whether one is referring to section 57(1) or section 57 (1) (a) of the Evidence Act. Under section 57 (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. For the same reasons the antecedent history of the appellant should not be given before conviction is recorded.

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

Now under *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.

If 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 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-à-vis society.

In *Shiani v Republic* [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 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, and these matters are for the learned trial magistrate.

In the case of *Republic v Malakwen Arap Kogo* (1933) 15 KLR 115 these

considerations were said to be (at last 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.

We deal with other considerations later.

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 prosecutor should not concern himself with the seriousness of the offence, for that is the discretion of the court. Contrary if he is asked for assistance by the court, as in *Republic v Seguja* (1935) EACA 85.

It is argued before us that by the operation of section 5 to 16 of the Evidence Act, the other alleged offences are facts before the lower court and should be related to the learned trial magistrate.

There is however no procedure by which the prosecutor 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 accused not only for the offence before him, but also for the other offences. On the basis of the sentence passed and other comparable matters, we think that this may be 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.

Republic 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 allegations of other offences.

The problem received much consideration in the English Courts during 1979 of 1980. One such case was *Republic 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 drugs in the Midlands.

It was held that the evidence should not have been given. Since it was necessary in drug cases 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 particularized 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 structure 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 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 section 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. We see no reason why charges have not been brought if the prosecution thought it necessary to deal with the alleged involvement of the appeal and his sympathy with *Mwakenya*.

There is a very real danger that if other offences are mentioned to the court in this informal way, the learned trial magistrate may have fallen into the error of sentencing the accused in a kind of general way for all the offences mentioned.

He must by his record show that he has disabused himself of this possible error as distinct from considering them to see where in the scale of sentencing such charges should be found to lie.

The sentence may include an element of sentence for a charge for which the accused has not been charged but in respect of which the accused could be arrested and further proceedings taken, and that would be contrary to the Constitution in section 72(1). That is why the distinction we seek to make is not a distinction without a difference.

On perusal of the record it is quite clear that the learned trial magistrate was moved by the alleged participation in the *Mwakenya* movement. He has said so, and that comment is based upon material not properly before him.

He has also said that he wanted to reiterate what he had said in another case only that day. Unfortunately that record is not available to us. This practice of referring to comments in another file is a bad one.

We have been referred to 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 considered 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.

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

In *Ogalo s/o Owoura v Republic* (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.

Here we cannot say that there has been no breach of principle, as we have tried to point out in the above.

In *Nilson v Republic* [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 *Wanjema v Republic* [1971] EA 493, the general principles above set out were reiterated. It was further pointed out that it was an extraneous

matter which should not be relied upon for the magistrate to say that he had issued a warning the previous week as a reason for imposing a heavy sentence. We do not know in this case if the comment made about case no 2497 of 1986 falls into this class or not.

In *Wanyoni v Republic* [1980] KLR 116 an example was given of how the period of detention before the trial should be taken into consideration when sentence is assessed.

In this case it is quite clear that the appellant was a first offender, and had pleaded guilty. He had further apparently cooperated with the police in their enquiries, and 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 was 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. It seems to us that the learned trial magistrate did not in fact give effect to such a principle, although he said that he had such matters in mind, for he sentenced the appellant to 7 years' imprisonment where the maximum sentence he could have passed was 10 years' imprisonment.

We cannot see any reason for that other than that the learned trial magistrate failed to disabuse himself of the danger improperly introduced by the prosecutor that he should sentence for the other offences as well as for the offence charged, as opposed to taking the circumstances into consideration when passing sentence.

For those reasons we consider that the record shows that the learned trial magistrate did not give a material factor due weight in coming to his sentence, and that it cannot be excluded that he acted upon a wrong principle also as we have explained above, and we are of the view that we are required to interfere with it. The sentence of 7 years is set aside.

We therefore consider the proper sentence ourselves. In doing so we are referred to a case which has already been before this court, appears to have been dealt with by the same magistrate on the same day and in which similar circumstances existed.

In fact precedent is only able to help us to establish what is a manifestly excessive sentence, which is not the reason for which we have to consider the proper sentence ourselves. But even if precedent did come into the matter, we have already stated that we regretfully disagree with the decision on principle in that case, and so precedent does not help us.

In fact in these *Mwakenya* cases, the opinions of the courts, both the subordinate court and the High Court, have been widely deverging, and it is difficult to distil a standard scale, leaving aside the fact that the individual cases vary widely, and each case must depend on its own facts. We notice that, comparing

the final sentences in 1982, which involved in most cases active participation in an actual military event to the terror of the public, with the sentences now being passed in respect of *Mwakenya* cases, in the main the more recent sentences have been higher.

We have in mind the real threat posed to the stability of our country by those who assist in the dissemination of the ideas expressed in the sort of publication the appellant was distributing, and are of the view that the courts are required to take a firm view of such offences.

So taking to account the fact that the appellant is a first offender that he pleaded guilty, and so far as we knew, assisted in enquiries, his family responsibilities as put forward to the learned trial magistrate, and all the matters we have heard, we substitute a sentence of 31/2 years' imprisonment.

For the avoidance of doubt appeal against conviction, if any, is dismissed, and appeal against sentence is allowed to that extent.

Dated and Delivered at Nairobi this 25th day of November, 1987

D.C PORTER

JUDGE

R.B BHANDARI

JUDGE