

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO 326 OF 1987

ZEHRPLAINTIFF

VERSUS

REPUBLIC.....DEFENDANT

JUDGMENT

November 4, 1987 **Torgbor J** delivered the following Judgment.

This is an appeal against conviction and sentence. The appellant Paul Albert Zehr was charged together with Hetz Rohr on 4 counts involving unlawful possession and use of uncustomed radio equipments, they pleaded guilty and were convicted and sentenced to 3 months imprisonment on counts 1 and 3 and 2 months imprisonment on counts 2 and 4 to run concurrently.

The first and second grounds of appeal are that the plea was not unequivocal in that the language used by the court was unclear, the conviction was not recorded and the appellant had no opportunity to deny or admit the facts read to him.

The record shows that the language of the court was either Kiswahili or English and there is no indication on the record that the appellant did not understand the language actually used. The charge was read and explained and the appellant admitted the offence or charge as read and explained. No prejudice was caused. A conviction was not recorded but this was not a fatal error and the record shows that the appellant was sentenced after the trial indicating that he was convicted. Was the absence of a formal recording of a conviction prejudicial to the appellant? Not so in my view. Again the record shows that the appellant had an opportunity to mitigate after the facts were read during which he could if he wished have committed, denied or clarified the facts. I am satisfied therefore that no prejudice or miscarriage has resulted and that the plea of guilty was unequivocal.

The sentence of the trial court was however excessive as the offences were misdemeanours and the appellant might have been given the opportunity of a fine. Moreover the trial magistrate did take into consideration matters quite extraneous to the charges against the appellant. It was not shown that the appellant was in any way a security risk or that he had indulged in malicious allegations in the western press against this country. In fact the appellant is a retired person and has been resident in this country since 1979. The order for deportation was therefore unfair and unjustified. In the result the sentences of the trial court are set aside. As the appellant has been in prison for two weeks now it could not be appropriate to substitute a fine at this stage. Consequently, as a custodial sentence is unwarranted, the appellant is given such sentence as would secure his immediate release from prison.

Further, and upon the application of Principal State Counsel the order made herein is extended to the accused Hetz Rohr who is also to be released forthwith as the charges against him were similar to those against the appellant Paul Albert Zehr. Order accordingly.

November 4, 1987

TORGBOR

JUDGE