REPUBLIC OF KENYA

Gathitu v Republic

High Court at Machakos March 21, 1985

O'Kubasu J

Criminal Appeal No 1429 of 1984

(Appeal from the Second Class District Magistrate's court at Machakos)

Advocates

Mr Onyango Otieno for appellant

Mr Nyagah for respondent

March 21, 1985, O'Kubasu J delivered the following Judgment.

This is an appeal against both conviction and sentence. The appellant was convicted on his own plea of guilty on a charge of disobeying chief's order No 5/84/84 contrary to section 10(G) of the Chief's Authority Act (cap128). The record of the lower court is brief and I reproduce it here below.

> **"Accused present**
>
> **The substance of the charge and every element of it read and explained to the accused and understood.**
>
> **I admit the charge P O G&C.**
>
> **COURT: Offences are serious and very prevalent. I have been imposing fine option and this tendency is not helping.**
>
> **SENTENCE: Accused sentenced to 2 months imprisonment.**
>
> **ORDER: Charcoal to be fortfeited and disposed of the DC.**

The learned senior state counsel (Mr Nyaga) conceded the appeal, and in my view properly so. Mr Onyango Otieno for the appellant, pointed out that the plea was not unequivocal.

In Adan v R[1973]] E A 445 at p 446 the Court of Appeal set out the manner and steps of recording a plea of guilty when it stated:-

> ***"When a person is charged, the charge and its particulars should be read out to him so far as possible in his own language, but if that is not possible then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged if the accused then admits all those essential elements the magistrate should record what the accused has said as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and when this statement is complete should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea***

to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."

In the instant case the learned trial magistrate did not follow the procedure set out in Adam's case (supra). It is of course understandable that a magistrate is a very busy person and hence when a simple case such as the one we are dealing with comes up before the court there is a tendency to deal with it in summary manner. It must however be pointed out that even in simple cases an opportunity to explain or say something in mitigation.

Having considered the record of the lower court I am satisfied that the appellant's plea was not properly recorded, as the facts were never warranted to the court and the appellant was never given an opportunity to address the court. Hence, this appeal is allowed, conviction quashed and the sentence set aside. The forfeiture order is of course set aside. As the appellant had been released on bail there will be no order for his release. The republic is at liberty to charge the appellant afresh. Order accordingly.