



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL NO. 243 OF 1982

BONIFACE MUTUKUAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was convicted by the Second Class District Magistrate, on his own plea, for being in possession of Government stores contrary to Section 324(2) of the Penal Code (Cap 63) and was sentenced to twelve months' imprisonment. The drugs found to be in possession of the appellant were forfeited.

The appellant was charged before the District Magistrate on March 5, 1982 when he pleaded guilty to the charge. According to the record of the lower court, the proceedings of March 5, 1982 were recorded thus:

“The substance of the charge and every element of it read and explained to the accused and understood. Accused in his own words replies - It is true. Court: plea of guilty entered.”

Pausing for a while, it would have been desirable to explore such plea before plea of guilty may be entered. The magistrate should have asked if the accused admitted that he was found in possession of the Government stores which were marked and if the reply was in the affirmative, it should have been recorded. The court should have proceeded to ask the accused person whether he could give an account to the satisfaction of the court of how he came by such stores. If the reply of the accused person was in the affirmative, then a plea of not guilty should have been entered and the magistrate should then have proceeded to hear the case. If the reply of the accused person was in the negative, a plea of guilty may have been entered.

Be that as it may, in the instant case, the prosecutor set out the facts before the magistrate which the appellant admitted by saying that “The above facts are true.” These facts as they were set out to the magistrate are again set out in verbatim:

“Prosecutor. On March 2, 1982, the provincial Drugs Inspector accompanied by his deputy Mr Sabwa was on routine duties at Kinyatta Location where they found a clinic. They found the accused was said to be a junior clerical officer. They asked the accused to produce a register for inspection, and so doing they were not satisfied by the keeping of the register. They asked the accused to take them to his house where after a search, drugs were recovered as stated in the charge sheet.

The accused could not give account of how they came to be in his possession. On examination it was found that the drugs bore the initials KG and KMD - meaning Kenya Government and Kenya

Medical Department. The accused was then arrested and escorted to CID Office, Machakos where he was charged with the present offence. The drugs are detained at the CID Office, here in Machakos.”

After the appellant admitted the above facts, the prosecutor asked the court to treat the appellant as a first offender because he did not have the record of the appellant. The prosecutor went on to submit that the appellant was found running a clinic and he had in his possession drugs required to be used in Government Hospitals where Wananchi get free treatment. The prosecutor went on to say that the appellant must have obtained drugs illegally from the Government Hospitals or stores in order to make profit.

Appellant did not say anything in mitigation and the sentence was imposed the following day, namely March 6, 1982.

In his note on the sentence, the trial magistrate took into consideration all the submissions made by the prosecutor and commented, *inter alia*, that

“Drugs smuggling from hospitals and Government stores had been a cause of concern to the Government. We often find ourselves in situations where Government Hospitals have no certain essential drugs whilst on checking in private clinics they are to be found in plenty.”

He said that a situation like this must be discouraged and imposed a sentence of twelve months’ imprisonment. Mr Kilonzo for the appellant submitted that the trial magistrate failed to enter conviction against the appellant. He contends that entering a conviction after admission of facts is mandatory and failing to do so is a fatal error which cannot be cured. With respect, I do not subscribe to this submission. Although under Section 207(2) of the Criminal Procedure Code (Cap 75) (the trial magistrate’s attention is drawn to the same) the court is required to convict an accused person upon his admission to the truth of the charge, failure to do so is a defect which is curable.

Mr Kilonzo argued that although an interpreter was used, the record does not indicate the language used by the court, and that the court should indicate that it used the language understood by the accused person. Omission to do so is a fatal error. I do not agree with that proposition. Although, the court is required to interpret to the accused person in a language understood by the accused person (see Section 198(1) of the Criminal Procedure Code), it must be assumed that the court did so, especially having regard to the fact that an interpreter was used. Moreover, it was not a ground of appeal that the appellant did not understand the language of the courts or the language put to him by the interpreter. It is possible that occasion may arise when the language used by an interpreter may not be language used by an accused person. It would be desirable to state on the record the particular language used and whether it is understood by the accused person. In the instant case, failure to state the language used cannot be said, having regard to an interpreter having been used, that the appellant did not understand the language put to him. In any event, the observation of Spry VP at page 418 in *Desai v R* [1974] EA 416 may be pertinent for the subordinate courts:

“We would interpose here that we are of the opinion that whenever interpretation is required in any court’s proceedings, the fact should be recorded and the name of the interpreter and the language used should be shown.”

The substantial ground of appeal was that there was no plea of guilty in law. Mr Kilonzo submitted that the offences of conveying suspected stolen property under Sections 323 and 324 of the Penal Code (Cap 63) are unusual offences in that, after the charge as preferred is put to the accused, it ceases to be an ordinary offence in that the offence is not completely constituted until an accused person fails to give an account to the satisfaction of the court how he came by the suspected stolen property.

Section 324(2) of the Penal Code reads:

“Any person who is charged with conveying or having in his possession, or keeping in any

building or place, whether open or enclosed, any stores so marked, which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court how he came by the same, is guilty of misdemeanour.”

From the above it appears that the person must first be charged with conveying, or having in his possession or keeping in any building, Government stores marked in accordance with Section 324(1) of the Penal Code which empowers the Minister by notice in Gazette to give directions as to the marks which may be applied in or on any stores being the property of the Government of Kenya. Secondly, such stores must be reasonably suspected of having been stolen or unlawfully obtained. If the above ingredients of the offence are admitted or proved, the court can only find an accused person guilty of the misdemeanour if such accused person does not give an account to the satisfaction of the court of how he came by such property.

Mr Kilonzo submits that in the instant case, the trial court having failed to ask the appellant how he came by these drugs, the charge was not sufficiently put to the appellant to enable him to plead to the charge. On the face of the record, it would seem that the charge was sufficiently put to the appellant because the appellant admitted all the facts constituting the offence, amongst which facts was the fact that when confronted with the drugs found in his house, the appellant “could not give account of how they came into his possession.”

Upon the perusal of the record of the lower court, it appeared that the appellant intended to plead guilty to the offence, as submitted by Mr Mugo, the State Counsel for the Republic. However, Mr Kilonzo stated from the bar that the appellant was a clinical officer at a Government clinic at Kinyatta Location and the drugs found at his house were required to be stored there as there was no store at the government clinic. Moreover, the appellant was a purchasing officer. It would seem from the record that the trial court proceeded to deal with the appellant on the assumption that, “In this particular case the accused must have smuggled the drugs from the Government Hospitals or supply stores with the intention of selling the same drugs to *Wananchi* in his private unlicensed clinic.” If the appellant was found at the Government clinic as submitted by Mr Kilonzo, then it would seem that the trial magistrate was proceeding to deal with the appellant on an erroneous assumption. The facts stated by the prosecutor show that the drugs inspector found a clinic at Kinyatta Location and found the appellant, a junior clerical officer at the clinic. The facts did not specify that it was a Government clinic or a private clinic or as described by the trial magistrate, “his unlicensed clinic.” In these circumstances, had the appellant been given an opportunity to give an account of how he came by these drugs, it is probable that he would have said that he had an explanation or not.

In *Koech v R* [1968] EA 109, Sir John Ainley CJ has set out the procedure for recording a plea under Section 323 of the Penal Code which he describes as an unusual section calling for some deviation from the normal procedure, as the charge cannot set out all the facts which constitute the offence, as it simply lays the foundation for the procedure to be followed in cases of persons charged with conveying or having in their possession or keeping in a building property reasonably suspected of having been stolen or unlawfully obtained. I can do no better than the procedure laid down in *Koech v R* (Supra) at p 110:

“If however the accused does admit all the assertions in the charge he should then be told that if he does not give an acceptable explanation of his possession he will be convicted and possibly punished. If the accused declines to give any explanation he may be convicted without any more ado. If he says that he has an account of affairs which he wishes to give a rather difficult question arises. Is it proper to permit him there and then to give his account? We think that if the accused indicates that he intends to defend himself by giving an explanation of his possession the court should require the prosecution first to lead their evidence, for though the accused may admit the basic assertions in the charge, he may not admit in full the circumstances relied on by the prosecutions, and these circumstances may materially affect the credibility of the accused’s explanation. It will be proper then to treat the accused’s statement that he wishes to advance an explanation as equivalent to a plea of “Not guilty” in a more usual case, a plea which puts all in issue.”

I agree also with the submissions of Mr Kilonzo that an explanation must be given to the court and not to any other agents of enforcement of law because Section 324(2) envisages an account to the satisfaction of the court and not to any other person.

In these circumstances, I would say that there was no proper plea by the appellant before the lower court. In the event, the trial must be declared a nullity. It is so declared.

Mr Kilonzo argues that a retrial should not be ordered because the appellant had served a sentence of 21/2 months out of sentence of imprisonment of twelve months imposed by the trial magistrate, before he was released on bail pending appeal. Mr Mugo argues that retrial should be ordered because this is not a case where prosecution may wish to fill in the gaps in its case. It may be observed that the trial before the lower court is declared a nullity because of Mr Kilonzo's submission that the appellant is in a position to give an account of how he came by the drugs. In my opinion, the appellant should be given an opportunity to do so.

The principles applicable in ordering a retrial are stated in *Manji v R* [1966] EA 343, thus:

“In general a retrial will be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence for the purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it.”

In the instant case, the interests of justice require that a retrial be ordered where the trial is declared a nullity.

The appellant, who is on bond by this court, is required to appear before the Senior Resident Magistrate at Machakos on September 7, 1982 to stand a retrial. **Dated and delivered at Nairobi this 13th day of August, 1982.**

F.E ABDULLAH

JUDGE