



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Law, Miller & Potter JJA)

CRIMINAL APPEAL NO. 36 OF 1981

BETWEEN

OMBENA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

Potter JA This is a second appeal. The two appellants were jointly charged with five counts of selling price controlled goods at a price exceeding the maximum price, contrary to Section 26(1) of the Price Control Act Cap 504, and to regulations made thereunder, and with one count of failing to display a price list as required by regulations made under that Act. The appellants were both convicted by the First Class District Magistrate at Maseno on their own pleas on all six counts. They were each fined a total of Kshs 4,800 on the first five counts and they were both discharged on the sixth count. Their appeals to the High Court at Kisumu were summarily rejected under Section 352(2) of the Criminal Procedure Code. The appeal to this court is against those summary rejections.

The grounds of appeal to the High Court against conviction were the same in each case, and were —

- “1. That the District Magistrate erred in law in convicting the appellant and sentencing him (her) on six counts when only one plea is recorded.
- 2. That the plea of guilty is not an unequivocal plea.
- 3. That the District Magistrate erred in convicting the appellant before hearing and recording the facts of the case.”

The appellants also appealed against their sentences.

All the offences were alleged to have been committed on January 14, 1981, at 12.35 pm at Ndigwa Market in Siaya District. Each of the first five counts alleged that the appellants, while carrying on business which involved the sale by retail of the goods specified as controlled goods at a price exceeding the maximum price. Neither in the charges nor in the record is there any reference to the quantity of the various goods alleged to have been sold by either or both appellants. The alleged facts shown by the five counts and the fines imposed may be tabulated as follows:

Goods	Price sold	Overcharge	Fine for each
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appellant

1. Glucolin Baby Food	Kshs14.95	40c	Kshs 1,200
2. Cerealic Baby Food	Kshs18.60	Kshs 3	Kshs 3,000
3. Cadum soap	Kshs 1.80	10c	Kshs 300
4. Lady Gay soap	Kshs 2.75	5c	Kshs 150
5. Tea	Kshs 3.80	5c	Kshs 150

The relevant part of the record reads as follows:

“Interpreter - English/Dholuo by Mr Nyamori

Charge read over and explained pleas:

Accused 1 - I admit the charges

Accused 2 - I admit the charges

Court Pleas of guilty

Prosecutor:

Facts are as per charge sheets, Charge read over
and explained.

Accused 1 - The charges are true.

Accused 2 - The charges are true.

Order: Accused are convicted of the charges as laid on their own pleas of guilty.”

The prosecutor went on to tell the court that the goods involved were essential goods, that the excess charges were large, that the offences were prevalent, that courts all over the country, were concerned about the offences, that business men seemed not to be heeding severe sentences, that the law had had to be amended to provide for stiffer sentences, and that the appellants might be treated as first offenders. The appellants had nothing to say.

We agree with Mr Behan who appeared for the appellants in this court that the appellants’ petitions of appeal to the High Court raised points of law, and for that reason should not have been summarily rejected.

As to the first ground of appeal, we feel that it is not a desirable practice for the trial court to record only one plea in respect of more than one count. It is important that the accused should understand each count, and that the accused should answer separately the charge in each count, and that the words of each answer should be separately recorded. Otherwise the court cannot always be sure that the accused has both understood and applied his mind to each count.

As to the second ground of appeal, whether or not a plea can be accepted as unequivocal will depend on the circumstances of the case thus in *Wakelin v Rex* [1951] 18 EACA 185, the appellant pleaded guilty in

writing to two traffic offences, namely dangerous driving and driving an unlicensed vehicle. He wrote and signed the following statement on the back of the summons:

“I plead guilty of the two offences as given above and over the page”.

It was held by the Court of Appeal for Eastern African in that case that; as the appellant was literate in the English language, and as the full particulars of the two charges were set out on the summons, the plea taken by the magistrate was clearly unequivocal.

The appellant’s third ground is that the magistrate did not hear and record the facts of the case before convicting them. In *Adan v Republic* [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —

“Held:

- (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
- (ii) the accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;
- (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
- (iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
- (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded.”

In this case it is not certain that the prosecutor stated the facts, or that the appellants were given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record that the prosecutor said “Facts are as per charge sheets”, and that the charge was read over and explained a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal. In the *Adan* case the court said, at p 447:

“The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.”

We are aware of how busy magistrates and judges are in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand.

In all the circumstances of this case we do not consider that we should order a new trial. The appellants have had to incur the expense of two appeals, and there is no evidence as to the quantity of goods sold by them at unlawful prices.

We are concerned that in this case, as in the *Wakelin* case and the *Adan* case, the appeal to the High Court was summarily rejected under Section 352(2) of the Criminal Procedure Code. In the *Wakelin* case the court, in 1951, raised the question whether under the conditions by then obtaining in Kenya the existence

of Section 352 of the Code really served any useful purpose. We would hesitate to endorse such a strong view, especially since we are aware of the extreme pressure under which the resident judge in Kisumu has to work. But we would commend to the attention of future resident judges in Kisumu the following passage from the judgment in the *Wakelin* case at p 187:

“If the object of the section is to save time the present case is a good example of how easily the object can be defeated. Furthermore we should have thought, that where an appeal is brought either against conviction or sentence, when on the face of it the appeal appears frivolous or without merit, the appeal could be disposed of just as expeditiously by two Judges or one Judge, as the case may be, sitting in open Court, as by a single Judge perusing the record in his Chambers.”

We would not dispute that Section 352 may still have its uses. But we would point to the danger, which has been amply demonstrated to us in these sessions of this court in Kisumu, of the use of the power of summary rejection under subsection (2) of Section 352 in cases in which it is not absolutely certain that there is not a ground of appeal which takes the case outside the ambit of the subsection.

We accordingly allow the appeals of both the appellants and quash the convictions in both their cases. The sentences are set aside and any moneys paid in fines are to be repaid.

As **Law** and **Miller JJA** agree, it is so ordered.

Dated and Delivered at Kisumu this 23rd day of June 1981.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR