REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: TUNOI, O'KUBASU & DEVERELL, JJ.A.

CRIMINAL APPEAL NO. 55 OF 2005

BETWEEN

VASHUL ABDALLA (also known as

BASHIRI ABDALLAH) ……..…… APPELLANT

AND

REPUBLIC ……..……. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mr. Justice Mbaluto) dated 8th July, 2003

in

H.C.CRA. 55 OF 2002)
****

JUDGMENT OF THE COURT

This is an appeal against the judgment of Mbaluto J. delivered at Nairobi on 8th July 2004 in which he dismissed the appellant's appeal against his conviction and sentence in the Chief Magistrates Court, Nairobi (B. Olao C.M.) in Criminal Case No 585 of 2002.

The appellant had been charged in that Court in count 1 of:-

"Unlawfully being present in Kenya contrary to ***section 13 (2)*** (e) of the Immigration Act Cap 172 of the Laws of Kenya"; *and in* ***count 2*** *of:-*

"Failing to report entry into Kenya contrary to Regulation 3 (1) of the Immigration Regulations." The facts particularised under ***Count 1*** *were as follows:-*

> ***"VASHUL ABDULLA On the 5th day of February, 2002 at about 10:50 pm within the city centre of Nairobi within the Nairobi area being a citizen of Uganda was found being illegally in Kenya without a valid permit or passport."***

The facts particularised under Count 2 were as follows:- "

> ***VASHUL ABDULLA On the 5th day of February, 2002 at about 10:50 pm within the city centre of Nairobi within the Nairobi area being a citizen of Uganda failed to report on entry into Kenya to the nearest immigration officer."***

The relevant part of the record of the proceedings for 7th February 2002 when the case came up for plea before the Chief Magistrate was as follows:-

"Interpretation : English / Swahili.

Accused present.

The substance of the charge and every element of the offence has been stated by the Court to the accused person, in the language that he understands, who on being asked whether he admits or denies the truth of the charge replies:-

> ***Count 1 : I admit***
>
> ***Count 2 : I admit***
>
> ***Court: Plea of Guilty***

Prosecutor: On 5.2.02 at 10p.m., the accused who is a Ugandan was arrested by police on patrol. He has no permit to stay in Kenya neither had he reported his entry in Kenya.

> ***Charged: True***
>
> ***Court guilty own plea and convicted***
>
> ***Prosecutor: No record***
>
> ***Accused : I am a diabetic***
>
> ***SENTENCE***
>
> ***Count 1: 20,000/- in default six months***
>
> ***Count 2. 20,000/- in default six months***
>
> ***Consecutive. Repatriation thereafter.***
>
> ***R.O.A***
>
> ***B. OLAO ESQ.***
>
> ***C.M. 7.***
>
> ***2.02"***

We will now set out the portions of the MEMORANDUM OF APPEAL relevant to the appeal against conviction.

> ***"1. The Learned Judge of the Superior Court erred in law and in fact in finding that the***

plea was taken in accordance with the law and that the plea was clear and unequivocal notwithstanding the fact that there was overwhelming evidence to the contrary.

2. The learned judge of the superior court erred in law and in fact in making no findings on the ground raised at the superior court that the trial magistrate erred in entering a plea of guilty without first hearing the facts of each count as required by law.

3. The learned trial (sic) judge of the superior court erred law and in fact in finding that there was proper translation of the charge from English to the language that the appellant understood when the record of the trial court is clear that there was no proper translation of the proper translation (sic) of the charge."

The principal attack on the Chief Magistrate's handling of the taking of the plea was that he entered the plea of guilty without first hearing the facts of each count.

The law relating to this subject is well set out in ***Kato v. Republic [1971] E.A.542 at p. 543 I:-***

"The procedure relating to the calling upon the accused person to plead is governed by S.203 of the Criminal Procedure Code. In our view, if it can be clearly shown that an accused person has admitted all the ingredients which constitute the offence charged, it is then proper to enter a plea of guilty. The words "it is true" when used by an accused person may not amount to a plea of guilty, for example, in a case where there may be a defence of self - defence or provocation. As was said by this Court in the case of R. v. Yonasani Egalu (1942), 9 E.A.C.A. 65 at p. 67: "In any case in which a conviction is likely to proceed on a plea of guilty (in other words, when an admission by the accused is to be allowed to take the place of the otherwise necessary strict proof of the charge beyond reasonable doubt by the prosecution) it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every constituent and that what he says should be recorded in a form which will satisfy an appeal court"

In the present case before us as can be seen from the proceedings set out above the Learned Magistrate stated "***The substance of the charge and every element of the offence"*** to the accused before the plea was recorded. There is no assertion that the record is erroneous in so stating. Separate pleas were taken on each count and in each case the accused used the unequivocal words *"I admit"*.

The Chief Magistrate then recorded a plea of guilty.

After the plea of guilty the Prosecutor stated the facts relating to the arrest, the absence

of any permit to stay in Kenya and the accused's failure to report his presence in Kenya

. This is followed by the words "Charged.

Accused: True. Court: Guilty own plea and convicted" The superior court dealt with the issue in these terms:-

"The record further shows that after the charge had been read out to him the appellant admitted each count therefore (sic), a plea of guilty was entered on both.Thereafter the prosecution stated the facts which showed that the appellant a Ugandan was arrested by police on patrol and was found to have no permit to stay in Kenya and neither had he reported his entry in Kenya to which statement of facts he replied that it was true. Upon that response he was convicted."

The only criticism that, possibly, could be leveled at this procedure would be that it is not clear whether the sets of facts for each of the two counts were separately stated and the question as to admission or denial of the facts separately put, first as to the first count immediately after the facts relating to that count

had been stated, and then as to the second count immediately after the stating of the facts relating to the second count. It is this lack of separation between each count together with its facts from the other count together with its facts that is the basis for the appellant's suggestion that there was what he described as a defective *"blanket" p*lea.

It is to be noted that in this case the nature of the offence and the facts involved were simple and straight forward. While it would have been better if the facts in relation to each of the two counts had been separately stated before the plea was first taken on each separate count, this was cured by the subsequent statement by the prosecutor of the facts followed by the reply of "true" by the appellant. We are satisfied that the appellant fully understood the charges and pleaded guilty to every element of them unequivocally. Furthermore, we consider that in all the circumstances of this case there has been no miscarriage of justice and there are no valid grounds for overturning the decision of the superior court. Accordingly the appeal is hereby dismissed.

Dated and delivered at Nairobi this 8th day of July, 2005.

P. K. TUNOI

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JUDGE OF APPEAL

E. O. O'KUBASU

……..

JUDGE OF APPEAL

W. S. DEVERELL

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR