IN THE COURT OF APPEAL

AT KISUMU

(Coram:Hancox JA, Chesoni & Nyarangi Ag JJA)

CRIMINAL APPEAL NO. 22 OF 1984

BETWEEN

MICHAEL KARIUKI MBARIA..APPELLANT

AND

REPUBLIC...RESPONDENT

(Appeal from the High Court at Kakamega, Gicheru J)

JUDGMENT

The charge and particulars of offence which led to this appeal read as follows:-

"Allowing goods intended for illegal importation to be placed on a board of a motor vehicle for conveyance, contrary to section 184(b) as read with section 184(c)(iii) of the Customs and Excise Act (cap 472) Laws of Kenya". "3. Michael Kariuki Mbaria: on the 23rd day of March, 1983, at Ataba-Oburi village, along Kenya-Uganda border, in Kolanya sub-location, in north Teso Location in Busia District within the Western Province being in charge of Motor Vehicle registration number KLR 689 make Peugeot pick-up as driver and owner respectively, allowed goods unlawfully imported to wit 54 ladies' coats 286 gents' coats and 95 long trousers to be conveyed in the said motor vehicle".

The record shows that when this charge was read and explained to the appellant he replied:

"The motor vehicle was mine. I was the driver, I allowed goods in question to be conveyed on the same motor vehicle".

The prosecutor then narrated the facts and said, *inter alia*:

"Reaching at the motor vehicle, the goods were loaded on the vehicle after which police sprung up from the ambush ... The four accused were then arrested."

There was count 1 in which four accused persons including the appellant had been charged with importing goods, contrary to section 185(ii) and section 197(1) of the same Act and to which they all had pleaded guilty.

After the prosecutor had finished giving the facts the record reads:

"Accused 1 – story is correct

Accused 2 – do

Accused 3 – do

Accused 4 – do

Court – plea of guilty entered for all"

The prosecutor then emphasized the prevalence of the offence and asked for forfeiture of the motor vehicle. The magistrate sentenced the appellant to 2 months' imprisonment and ordered forfeiture of the motor vehicle. The term of imprisonment was to run concurrently with eight months' imprisonment awarded on count 1.

The High Court (Gicheru J) allowed the appeal, quashed the conviction and set aside the sentence on the 1st count, but dismissed the appeal against conviction on count II, where the appellant was charged alone and allowed the appeal against sentence only to the extent of substituting an absolute discharge for the two months' imprisonment. He upheld forfeiture of the motor vehicle because, he said, it was provided for under section 184(c)(iii). He also referred to sections 201(1) and 203(a) of the Act that deal with the effect of conviction on things liable to forfeiture and condemnation. We think these two last sections are complementary, to section 184(c)(iii) and do not add anything new to the provisions of section 184(c)(iii).

The appellant has appealed against the High Court decision on the following three grounds:

1. THAT the learned acting judge misdirected himself in law as to what constitutes an offence under section 184(b) and (c)(iii) of the Customs and Excise Act (cap 472, Laws of Kenya) and in particular what constitutes a conveyance under the section.

2. THAT the learned acting judge erred in law in upholding the conviction of the appellant in the second count in the absence of a finding in the first instance that the goods on Motor Vehicle registration number KLR 689 Peugeot 404 pick up had been imported contrary to the provisions of the Customs and Excise Act (cap 472, Laws of Kenya) and in particular after his lordship had made a finding that no offence in respect of the first count had been committed under the Act.

3. THAT the learned acting judge erred in law in sustaining the order for forfeiture when the appellant who was the owner of the Motor Vehicle ordered to be forfeited had not been given the statutory notice by the learned resident magistrate at the time the initial forfeiture order was made. In the circumstances the upholding of the conviction and sustenance of the order of forfeiture were erroneous.

In recording the response to the facts the magistrate recorded "do". We do not agree that that was what the appellant said, and, if he said so, that must have related to count 1 and not count II on which this appeal is. Furthermore, even if the word "do" related to the second count it meant nothing. It was

neither an admission nor a denial of the facts stated by the prosecutor.

The learned judge said:

"The facts outlined by the court prosecutor including the portion of the said facts set out above were admitted as correct by the 2nd appellant".

With respect this was a misdirection as the word "do" as we have said was not an admission of the facts outlined by the prosecutor.

The manner in which a plea of guilty should be recorded and the steps that should be followed was laid down by the former East African Court of Appeal in *Adan v Republic* [1973] EA 445. We set them out again. The trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands, he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded; the prosecution may 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; if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and change of plea entered but 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. The statement of offence in the second count charged the appellant with having the goods in the vehicle and with having conveyed the goods whereas the particulars charged him with conveying the goods. There were at least three charges and one could not tell to which one he was alleged to have pleaded guilty.

From what we have said above it is apparent that the magistrate did not follow the correct procedure for recording a plea of guilty as required by section 207(2) of the Criminal Procedure Code (cap 75) and in *Adan v Republic* – (*ibid*) and the irregularities and omissions committed by the subordinate court resulted into the appellant not having a satisfactory trial. We agree with the pronouncement in *Rex v Vashanjee Lilandar Dossani* (1946) 13 EACA 150 that the fairest and proper order to make where the accused person has not had a satisfactory trial is an order for a retrial. Section 361(2) of the Criminal Procedure Code (cap 75) gives this court authority and jurisdiction on a second appeal to remit the case, together with its judgement or order thereon, to the first appellate court or to the subordinate court for determination, whether or not by way of rehearing, with such directions as this court may think necessary. The upshot is that the appeal is allowed, the sentence and order of forfeiture set aside and the case remitted to the subordinate court for retrial according to law.

Dated and Delivered at Kisumu this 20th day of June 1984.

A.R.W.HANCOX

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JUDGE OF APPEAL

Z.R.CHESONI

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AG. JUDGE OF APPEAL

J.O.NYARANGI

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AG. JUDGE OF APPEAL

I certify that this is a true copy

of the original.

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