Case Number:	Criminal Revision 396 of 2018
Date Delivered:	20 Dec 2018
Case Class:	Criminal
Court:	High Court at Machakos
Case Action:	Ruling
Judge:	David Kipyegomen Kemei
Citation:	Simon Mutisya Mutiso v Republic[2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Machakos
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL REVISION NO. 396 OF 2018

SIMON MUTISYA MUTISO.....ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

RULING

Introduction

1. This is an application for review against the decision in Criminal Case No. 498 of 2018. The application is brought by way of a certificate of urgency filed in court on 11/12/2018 pursuant to section 362, 364, 365, 366 and 367 of the Criminal Procedure Code.

Brief Facts

2. The accused was charged with the offence of contravening a measure contrary to section 140(b) of the Environmental Management and Co-ordination Act Cap 387, Laws of Kenya. The particulars of the offence were that the accused on the 29th day of November, 2018 at 1220 hours in Masii Township, Masii Location in Mwala sub-county within Machakos County contravened a measure banning use of plastic flat bags prescribed under gazette no 2356 and 2334 by being in possession of flat bags approximately 24 packets of clear flat bags and 8 packets of black flat bags the same having been banned under the said gazette notice thus contravening the Environment Management and Co-ordination Act Cap 387, Laws of Kenya.

3. The accused pleaded guilty to the charge and was sentenced to serve 12 months imprisonment on 5.12.18. He now seeks a revision of the entire proceedings on conviction and sentence based on the following grounds inter alia:

The accused though he pleaded guilty, the court never convicted him before sentencing and therefore the plea is not valid and the proceedings are irregular and therefore each passing day the applicant is serving an illegal sentence which ought to be set aside at the earliest opportunity possible

Submissions

4. The advocate for the accused submits that the application dated 11.12.18 be allowed as prayed for there is clearly and error in the proceedings since the applicant was not convicted.

5. Mr. Cliff Machogu, Prosecution Counsel, has not opposed the appeal. Counsel submits that Section 207 of the Criminal Procedure Code provides for the steps to take. He submitted that the case of **Elvis Mwaniki v R (2018) eKLR** be of guidance to the court and the application be allowed as prayed.

Analysis

6. The issues for determination are whether the plea was unequivocal; whether the procedure that the trial court followed was proper and whether the sentence was proper.

7. In order to appreciate the submissions by both counsels, it is pertinent at this stage to refer to some of the relevant provisions of the CPC. Section 362 ***"deals with the powers of the High Court to call for and examine the record of any proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any order passed by the inferior court (read subordinate)."***

8. The high court in exercising its discretion under revisionary jurisdiction should bear in mind the provisions of section 364 of the Code. Under this section no order shall be made to the prejudice of the accused or other person unless he has been given an opportunity to be heard personally through his legal counsel.

9. The other consideration is that under Section 362 as read with Scion 364 of the Criminal Procedure Code the court may exercise any of the powers conferred on the court in its appellate jurisdiction as provided for in section 354, 357 and 358 of the Criminal Procedure Code. This same code further provides that where an appeal lies but the applicant instead proceeds by way of revision, the court should not entertain such application at the instance of a party.

10. I shall now address the issue of whether the plea was unequivocal. From the record learned trial magistrate indicates that the accused understands Swahili. She has recorded the plea in the words of the accused. The procedure provided under section 207 of the CPC is that the court shall record the plea of an accused person as nearly as possible in the words used by him or her. When the court is satisfied that he intends to admit the charge and the truth of all particulars and elements of the offence a plea of guilty will be entered and subsequent conviction and sentence.

11. The plea of guilty was entered and when the facts of the case were read over to him, he stated that they were true, however it is not indicated if they were explained to him in Kiswahili. The trial court took the mitigation from the accused who stated that he did not know the law until he was arrested. The trial court stated that the mitigation was considered but the ignorance of the law was no defence. The accused was then sentenced to 12 months imprisonment which was the mandatory sentence.

12. In the case of ***Adan V Republic [1973] E.A. 445*** *Court of Appeal of East Africa* laid down the steps to be taken where there is a guilty plea as follows:

(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 in 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 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.***

The Court in that case at **pages 446-447** observed as follows:

When a person is charged, the charge and the 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 the 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 reply must, of course be recorded.

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.

13. Section 207 of the Criminal Procedure Code (Cap 75) states as follows:

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refused to plead, the court shall order a plea of "not guilty" to be entered for him.

(5) If the accused pleads –

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) That he has obtained the President's pardon for his offence,

The court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge.

14. **Section 169** of the Criminal Procedure Code deals with the contents of a Judgment and from the record the accused was sentenced on his own guilty plea. No Judgment was written by the trial court in the premises.

15. The circumstances of this case are that the accused pleaded guilty to the charge. He appears to have understood the allegations against him and opted to admit having committed the offence. The only remaining procedure after the accused pleaded guilty was for a conviction and for the accused to mitigate. From the record the accused made a statement in mitigation but no conviction was recorded by the Court. Both counsels are in agreement that the proceedings are irregular, the sentence illegal and should be set aside. I take the position that the plea of the accused was not unequivocal. I find that the proceedings in the trial court against the accused were irregular and not in accordance to the Criminal Procedure Code. As a result the orders made must be set aside due to the aforesaid irregularity.

16. The next issue relates to the sentence imposed by the trial Court but however given the above scenario, I do find that there is no need to address the issue of sentence.

Determination

17. In the result the Applicant's Application dated 11/12/2018 has merit. The same is allowed in the following terms:-

(a) The proceedings of the trial court in **Machakos Chief Magistrate's Court Criminal Case No. 498 of 2018** conducted on the 5/12/2018 are found to be irregular warranting an order of revision.

(b) The sentence meted on the accused herein is hereby set aside and the accused is ordered to be released from custody forthwith and set at liberty unless otherwise lawfully held.

It is so ordered.

Dated and delivered at Machakos this 20th day of December, 2018.

D.K KEMEI

JUDGE