**Lebiringin v Republic**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 18 October 1973

**Case Number:** 179/1973 (40/74)

**Before:** Sir James Wicks CJ and Hancox J

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*[1] Criminal Practice and Procedure – Charge – Form of – Not necessary for charge to negative*

*exceptions to or qualifications of offence – Criminal Procedure Code, s.* 137 (*K.*)*.*

*[2] Criminal Practice and Procedure – Sentence – Loss of job can properly be taken into account.*

**JUDGMENT**

The considered judgment of the court was read by **Hancox J:** The appellant, who was at the material time a district officer at Kitui, was convicted on his own plea of guilty to an offence of possessing one elephant tusk in contravention of s. 33 of the Wild Animals Protection Act (Cap. 376). He was sentenced to two years’ imprisonment and the ivory concerned, and the vehicle allegedly involved in the commission of the offence, were ordered to be forfeited to the Government. Mr. da Gama Rose, who now appears for the appellant, has submitted that the purported plea of guilty was by no means unequivocal and that the conviction was, in consequence, a nullity. He further urged that the sentence imposed was, in any event, excessive, and that there is considerable disparity between it and (in particular) a sentence recently imposed upon the wife of an Assistant Minister of the government for similar, though in extent somewhat more grave, offences. State Counsel supports the conviction but concedes that the sentence is, under the circumstances, harsh and that some reduction is called for. We turn first to the passage cited to us from Halsbury’s Laws of England, Vol. 10, Simonds Edition, at para. 742 where it is stated– “A prisoner is not to be taken to admit an offence unless he pleads guilty to it in unmistakable terms with appreciation of the essential elements of the offence.” The underlining is ours, and we have done so because Mr. da Gama Rose urged very strongly before us that the particulars of the charge by no means contained all the essential elements of the offence so as to enable the appellant to have had full appreciation thereof. In this connexion he cited the Revisionary Order of Edmonds, J. in *Lukas Bachegwa v. R*. (1956), 29 K.L.R. 189 at p. 190. It is correct that s. 33 of the Act does refer to several other provisions in the same statute which would provide a defence to a person who would otherwise be amenable to a conviction for the possession of ivory. For instance, under s. 22 (5) of the Act if a licensee or permit-holder has wounded and made every endeavour to kill an elephant or rhinoceros, the Chief Game Warden may, at his discretion direct that the trophies (which term includes elephant tusks) shall be delivered to the licensee or permit-holder. A number of other sections are mentioned, and, Mr. da Gama Rose is submitting, as we understand him, that the prosecution must, in the charge sheet, negative by averment all those other provisions. We do not agree, and, in our opinion, the position is adequately covered by sub-para. (*b*) (ii) of s. 137 of the Criminal Procedure Code which states: “(ii) it shall not be necessary, in any count charging an offence constituted by an enactment, to negative any exception or exemption from, or qualifications to, the operation of the enactment creating the offence.” We therefore think that it was quite sufficient for the particulars of the charge to allege that the accused was in possession of the trophies concerned in contravention of the provisions of s. 33, as sub-s. (5) itself states. In this connexion we think that the words in the charge “. . . which trophies had been obtained by them . . .” are, strictly, surplusage and, as such, did not require to be proved. But the fact that they were included can, in our view, have occasioned no possible prejudice to the appellant. Indeed in the instant case we think that the words “otherwise than in accordance with the Act” would have sufficed. Certainly in our view the charge gave adequate particulars, and the appellant, holding the office he did, can have been, we are satisfied, under no possible misapprehension as to what was being alleged against him. The requirements of s. 134 of the Criminal Procedure Code were therefore satisfied. We come now to the alleged ambiguity in the plea. We are satisfied that the principles stated in para. 425 of *Archbold’s Criminal Pleading, Evidence and Practice*, 37th ed., accurately represent the law of this county, and that the several decisions cited to us are in effect but different examples of the application of those principles, recognising as they do that languages other than English are frequently involved, and that especial care is needed in such cases to ensure that the person accused of a crime fully understands all the ingredients of the charge and wishes to admit them. It is for this reason that such replies as “It is true”, “I admit it” and the like have frequently been held to be insufficient in Kenya. Moreover there is no single word, as we believe, approximating to the formal English admission of guilty. It is not that any particular form of wording is required to be recorded in answer to a charge. It is simply that the magistrate is, so to speak, a trustee to ensure that the accused person wishes to admit his guilt, and to satisfy himself on this point, and thus relieve the prosecution of what may sometimes be the onerous task of proving all that they allege beyond a reasonable doubt. The paragraph in *Archbold* to which we have referred states as follows: “It is important that there should be no ambiguity in the plea, and that where the prisoner makes some other answer than “Not guilty” or “Guilty”, as the case may be, care should be taken to make sure that he understands the charge and to ascertain to what the plea amounts. Where the plea is imperfect or unfinished, and the court of trial has wrongly held it to amount to a plea of guilty, on appeal the Court of Appeal may order that a plea of not guilty be entered and that the appellant be tried on the indictment:” The law on this subject has been recently restated here by the Court of Appeal in *Adan v. Republic*, [1973] E.A. 445 at p. 446 as follows: “The courts have always been concerned that an accused person should not be convicted on his plea unless it was certain that he really understood the charge and had no defence to it. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education and does not speak the language of the court. For this reason, it has long been a rule of practice that where a plea appears to be one of guilty, it must be recorded in the words of the accused (see, for example, Circular to Magistrates, No. 1 of 1911 of the High Court of East Africa). This is now a statutory requirement in all the three jurisdictions.” The court went on to cite with approval the decisions of Mosdell, J. in *Kibilo v. Republic*, [1971] E.A. 101 and of this court in *Marete v. Republic*, Cr. App. 743 of 1972 (unreported), in which the necessity, in serious cases at least, of the facts being stated to the court fully and at the time of the plea, so as to enable the accused to dissent from or explain any of the relevant facts, was emphasized. Now what happened in this case? The resident magistrate recorded an admission by the appellant that he was in possession of an elephant tusk, which he was carrying in his car without a permit from the Game Department. He then proceeded to hear the facts, which disclosed that he was stopped in his car by three game scouts on the Baragoi/Maralal road. In the boot of the car was one elephant tusk. The appellant failed to produce a permit and was, accordingly, arrested and charged. The appellant then stated: “I admit most of the facts. I admit that I carried an elephant tusk in my car and for which I had no permit under the Act.” The use of the phrase “most of the facts” should have sufficed, we think, at once to put the magistrate on enquiry. Yet he thereupon entered on the record the time honoured abbreviation “G.O.P.C.”. It is clear that the magistrate thereby entered a conviction against the appellant. Thereafter he deprived himself and the appellant of any opportunity to enter a plea of Not Guilty. From then on he was obliged to proceed to hear what the appellant had to say in mitigation and to sentence him as he thought fit. An explanation was then forthcoming from the appellant. He alleged he saw a white object lying on the ground, found it to be an elephant tusk and put it into the car with the object of taking it to the police station. The following further dialogue then occurred: “*Court* – May I call the game scouts to find out if it was true? *Accused –* No. I withdraw it. I now admit that I had no intention of taking this tusk to the police. *Accused –* After I found the tusk and kept it in the car and drove away. After some time I met the game scouts.” Then came the mitigation and the magistrate’s remarks in passing sentence. We now ask ourselves two questions: (1) Did the several replies of the appellant amount to an ambiguity in the plea, or show that he really did not wish to admit the charge and the facts put forward by the prosecution? (2) If not, did what happen before the magistrate amount to putting pressure upon the appellant to maintain what purported to be plea of guilty and to deprive him of that freedom of choice in his plea regarding which the Court of Appeal in England has been so emphatic? In this connexion we have considered the case of *R. v. Turner* (1970), 54 C.A.R. 352 and *R. v. Barnes* (1971), 55 C.A.R. 100, both of which appear in the passage in the Supplement to *Archbold* referred to by Mr. da Gama Rose. Having given careful and anxious consideration to the matter we are satisfied that the appellant not only understood what he was being charged with but fully intended to and did plead guilty. He was not an uneducated man but a district officer of some six years’ standing. His replies to the court indicate that he knew perfectly well what was lawful possession and what was not. We think that the magistrate was premature in recording a finding and conviction, and that had he postponed this until after the appellant’s admission that he had no intention of taking the tusk to the police no complaint could be made. As it is, we consider, taking the whole of the material recorded in the lower court into consideration, that there was an unequivocal admission of guilt on the part of the appellant. As to the second question, the only passage which has caused us difficulty is the magistrate’s offer to call the game scouts as witnesses. It would have been far better if, having refrained from making a finding earlier, he had said to the appellant some such words as “If that is what you maintain I shall regard your answer as a plea of not guilty.” If the appellant had then answered that he had no intention of taking the tusk to the police, and if the magistrate had then recorded a conviction, we think the plea would have been unassailable. We think that in some circumstances, given an uneducated or less intelligent accused, the reference to calling the game scouts (which was in any case irregular) might have amounted to oppression and to have deprived the appellant (in his own mind at least) of his free choice as to whether to plead guilty or not. In the circumstances of the instant case we are satisfied (ignoring for the moment that the passage concerned came after the recording of the conviction) that the proceedings in the lower court were neither oppressive nor unfair and that the appellant was never prevented from exercising his free choice as to whether to plead guilty or not guilty. We have considered the other authorities cited to us by Mr. da Gama Rose, (in one of which, for instance, *Koech v. Republic*, [1968] E.A. 109 the nature of the charge virtually precluded a plea of guilty), but we are in no doubt in the instant case that the conviction was right. This being so we dismiss the appeal against conviction. This leaves the matter of sentence. Mr. da Gama Rose has strenuously urged before us that no consideration was given by the magistrate to the fact that the appellant had had six years’ unblemished service as a district officer and that he will almost certainly, by reason of the conviction alone, lose his career. He asks us to say that that is sufficient punishment. Mrs. Dourado, for the State, as we understand her, concedes that the sentence is harsh and also excessive. It is true, as she pointed out, that the longer a person has served in a position of trust and responsibility, the greater is the degree of integrity that is expected and required of him. Therefore, she says, the fact that a man has served for six years as a district officer, does not of itself entitle him to leniency. With this we agree, but it is also true to say that the longer the service a person has in such capacity, the greater he will lose if he suffers a criminal conviction, and we think that this is a legitimate factor which can be taken into account, in appropriate cases, in an accused person’s favour. Mr. da Gama Rose also drew our attention to the record of Resident Magistrate’s Criminal Case 710 of 173, which was tied by the same magistrate. In that case Mrs. Esther Mwekeli Kariuki, the wife of an Assistant Minister for Tourism and Wildlife, was one of the accused. The charge, as amended, concerned the illegal possession of the tusks from two elephants, and the horns from two rhinoceroses, found in the boot of a car in which the two accused were at the material time. The evidence at the trial concerned three elephant tusks and three rhino horns, and that is the basis on which the magistrate wrote his judgment, but it is not necessary for us to try to resolve this apparent difference in the number of trophies of which the accused in that case were allegedly found in possession. The nett result was that the accused each received fines totalling Shs. 9,000/-, or in default a total of five years’ imprisonment, for illegally possessing the trophies from four animals. Mr. da Gama Rose invites us to compare the two cases. He suggests that there is a considerable disparity between the sentences passed and that the appellant in this case should have had the option of a fine. Of course, if the sentences passed in the other case were inadequate this would not necessarily avail the appellant, but Mr. da Gama Rose has gone further and submitted that a reading of both cases can only lead us to the conclusion that the magistrate did not act on correct principles when he passed sentence on the appellant. We decline to comment on the sufficiency or otherwise of the sentence passed in the other case, though we note that when passing sentence the magistrate expressed the view (in apparent conflict with what he had earlier said in the judgment) that a third person had led the accused into a situation in which they were left to face the music. We note also that the magistrate commented adversely on the appellant having told a “cock and bull story”, which he withdrew when it was suggested that the game scouts be called. In this we think he was taking into account for the purpose of sentence a portion of the proceedings which properly belonged to the taking of the plea. Bearing in mind that the appellant was a district officer of previous good character, that he did, as we have found, plead guilty, and that the loss of his career will already be a heavy punishment, we think the sentence of two years’ imprisonment passed on him was too severe. At the same time we think that this was a proper case for imprisonment, to mark the seriousness with which the courts must regard this type of offence. After due consideration we think that in this particular case, and without minimising the gravity of the offence, a period of imprisonment of nine months’ duration will suffice. Mr. da Gama Rose frankly states that he is unable to challenge the order for forfeiture of the vehicle. We agree that s. 47 (4) is mandatory in this respect and we accordingly maintain the order for forfeiture, both as regards the vehicle and as regards the elephant tusk. Accordingly for the sentence of two years’ imprisonment passed on the appellant we substitute a sentence of nine months’ imprisonment. To this extent only does the appeal succeed.

*Order accordingly.*

For the appellant:

*F da Gama Rose*

For the respondent:

*Mrs MAA Dourado* (State Counsel)