

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC. CR APPLICATION NO. 24 OF 2011

SIMON MAREGWA GITHIRUAPPLICANT

VERSUS

REPUBLIC RESPONDENT

(Being Revision from the original conviction and sentence by the Senior Principal Magistrate H.N. Ndungu at Kerugoya CR Case No. 257 of 2011)

REVISION

The Applicant was convicted by Senior Principal Magistrate court at Kerugoya on own plea of guilty of wilfully exposing and spreading infectious disease to the community contrary to section 28 of the Public Health Act (Cap. 242) and sentenced to serve six months in jail. The particulars of the charge were that on the 15th March 2011 at Kangaita Health Centre within Kirinyaga County he was found suffering from Pulmonary Tuberculosis and had defaulted

in treatment thereby exposing the community to the spread of the disease.

When the charge was read to the Applicant he is recorded to have replied:

"It is true."

The prosecution was asked to narrate the facts and his response was:

"Facts per charge."

The court detained the Applicant to noon to await the Community Service Orders report. The report was availed but did not recommend treatment on Community Service Orders. The Applicant was then asked to serve six months in jail.

The trial court's attention is hereby drawn to the provisions of section 207 of the Criminal Procedure Code and the decision in *Adan -vs- Republic [1973] EA 445* regarding the proper procedure to be followed during the taking of plea. The words "It is true" in answer to the charge meant nothing. (*Kariuki -Vs- Republic [1984] KLR 809*). It is not clear whether the Applicant was saying "It is true" because he had TB, or that he not sought treatment, or that he had exposed the disease to the public. It was equally

imperative for the court to ask the Prosecutor to state the facts of the alleged offence and after that to give the Applicant an opportunity to dispute or explain the facts or to add any relevant facts. The Prosecutor did not discharge its responsibility when he merely said "Facts per charge." In short, this plea was not satisfactorily taken.

Regarding sentence, the record does not indicate that the court asked the prosecutor to find out if the Applicant had any previous record. It is therefore taken that he was a first offender. He had pleaded guilty to this misdemeanour. It is a principle of sentencing that a first offender who has pleaded guilty to a misdemeanour ought not be given custodial treatment. (*Nilsson vs Republic [1970] EA 599*). One wonders why the court did not empathise with the Applicant who was a TB patient. The court should have considered the wide range of non-custodial sentences provided under section 24 of the Criminal Procedure Code.

Under sections 362 and 364 of the Criminal Procedure Code, the conviction is quashed and sentence set aside. The Applicant has been in jail since 30th March 2011 and I therefore do not consider

that a retrial is a viable option. He will therefore be released forthwith unless he is otherwise being lawfully held.

DELIVERED, DATED AND SIGNED THIS *6/11* DAY OF
July 2011.

A.O.
A. O. MUCHELULE
JUDGE

CERTIFIED TRUE COPY
OF THE ORIGINAL

Deputy Registrar
High Court of Kenya

2011 25/7/2011

Shm. O. de An

