Aswani v Republic (Criminal Appeal E097 of 2022)
[2023] KEHC 196 (KLR) (Crim) (19 January 2023) (Judgment)

Neutral citation: [2023] KEHC 196 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E097 OF 2022

LN MUTENDE, J

JANUARY 19, 2023

BETWEEN

JAMES AMBUKO ASWANI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 652 of 2020 at the Chief Magistrates' Court Kibera by Hon. M. Maroro - PM. on 15th July 2020)

JUDGMENT

1. James Ambuko Aswani, the Appellant, was charged with the offence of Stealing by Servant contrary to Section 281 of the *Penal Code*. Particulars of the offence were that on May 28, 2020 at Pork Spare Ribs Centre Dagoretti Corner Area, within Nairobi County, being a servant of Golf Mike Enterprises Ltd, he stole a motorcycle make Bajaj Registration Number xxxx valued at Ksh 112,000/= which came to his possession by virtue of employment.

2. The appellant admitted the charge at the outset, was convicted, and sentenced to serve five (5) years imprisonment.

3. Aggrieved, the appellant appeals against the conviction and sentence on grounds that: The plea was not procedural; His right to information was contravened; The trial was unfair; The trial was unfair, vitiated and lacked weight for sentence. The case was deficient of material contradiction of the duties; The court failed to follow guidelines on the content and form of a judgement; and, that the magistrate relied on a defecctive charge sheet to convict the appellant.

4. The appeal was disposed through written submissions. The appellant urged that the court failed to record if the plea of guilty was entered; that it was necessary to indicate if he had pleaded guilty and also

if the facts were true or correct. That the plea was a short cut in the interest of the prosecution, yet, the defence was prejudiced with such plea. That this denotes that the plea was ambiguous and equivocal. In this regard, the appellant relied on the case of *Adan –Vs- Republic(1973) EA 445*; and, the case of *Albanus Muasya –Vs- Republic,Criminal Appeal No 120 of 2004*.

5. Further that the court failed to indicate if an interpreter was present or absent and to record essential details which omission affected the conviction and sentence. That the court failed to determine whether the offence was proved pursuant to what was stated in the charge sheet. The appellant prays that this court finds that the sentence served is sufficient and order his release. The appellant relied on the case of *Mulamba Ali Mabanda –Vs- Republic (2018) eKLR*, where the Court of Appeal found that the appellant being a first offender had already paid the debt to the society and released him.

6. That the judgment did not comply with Section 169(1) of the *Criminal Procedure Code*, following failure to indicate the statement of the offence; the contested and uncontested elements of the charge. That the judgment must specify the offence charged and the law.

7. That the sentencing guidelines were not considered .That he is entitled to 1/3rd remission, where the plea of guilty is entered. Therefore, he urged the court to consider the value of the subject matter, his age, conduct and prevalence of the crime.

8. The appeal is opposed by the Respondent who submits that the appellant was convicted on his own plea of guilty. That: the plea was unequivocal and the sentence was proper; the charges were read out and a plea of guilty entered; the appellant did not mitigate; there was no error on the conviction, and, that the five (5) years period was legal and lenient.

9. This court is enjoined to re-evaluate what transpired before the trial court and to come up with its own independent finding. But, it must bear in mind the fact of not having witnessed what transpired at trial. (See *Okeno -v- R 1972 EA 32*).

10. The appellant brings the appeal herein against the conviction entered on his own admission to the charge of stealing by servant. The applicable law stipulate that no appeal lies against conviction on a plea of guilty and thus the appeal ought to be limited to sentencing.

11. Section 348 of the Criminal Procedure Code (CPC) provides that:

> No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.

12. In the case of *Odhiambo Olel -v- Republic [1989] KLR 444*, the court held that :

> ' Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely.'

13. However, certain exceptions apply and would see the court intervene and set aside conviction. In the case of *Alexander Lukoye Malika vs Republic [2015] eKLR*, the Court of Appeal held that:

> ' 'A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no

offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged.'

14. In the instant case the appellant urges that the plea was not unequivocal and that the elements or ingredients of the charge were not proved, meaning that the charge was defective. Further that his rights to fair trial and an interpreter were violated. The appellant further submits that dates indicate that he took plea before he was arrested.

15. The procedure for taking plea is set out in the provisions of Section 207 of the CPC where it is provided that:

> (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, guilty or guilty subject to plea agreement;
>
> (2) If the accused person admits the truth of the chargeotherwise than by 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.

16. In the case of Adan vs Republic [1973] EA 445 the Court held that:

> ' (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 an 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 with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.
>
> (v) 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.'

17. In this case the appellant was arraigned in court on July 15, 2020, and, the particulars of charge were read out. The language indicated as one he understood was Kiswahili, and, when the charge and its elements were read, the appellant's response was as follows: 'It is true'.

Facts were later read out as follows:

> ' The accused is an employee of golf Mike Enterprises Ltd. On May 20, 2022 the supervisor Wanjau instructed accused to do deliveries in town using motorbike Registration No xxxx Bajaj. He did not return. On May 29, 2020 one Mr Mwangi Manager called accused who said he was on the way to work. He delayed and called again to make a follow-up but accused phone was off. He then reported at Karen Police Station and the Registration No

of Motor Bike was circulated. After a few days accused was arrested in Donholm Estate doing bodaboda business using the same Motor Bike. He was arrested and the Motor Bike recovered exhibit No 1 and 2 employment record produced and Motor Bike. That is all.'

18. The appellant's response was that : 'facts are true and correct' .

19. The appellant was arrested on July 13, 2020; proceedings took place on July 15, 2020, as indicated at the outset, but, the learned trial Magistrate, after recording facts, erroneously indicated the July 12, 2020, on the court proceedings. Section 382 of the CPC provides thus:

> 'Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:'
>
> > 'Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.'

20. The indication of that wrong date was an error which was not prejudicial to the appellant.

21. In the case of *K N vs Republic [2016] eKLR*, the court stated that :

> ' The procedure for taking plea follows a well-beaten path. The leading case, Adan v R (1973) EA 445 emphasises that an accused person must not only understand the language used at his trial but also appreciate all the essential ingredients of the offence charged before his plea can be taken to be unequivocal. This need for taking the greatest care where the accused admits the offence was explained many years before the decision in Adan (supra) in Hando S/o Akunaay v Rex (1951) 18 EACA 307 as follows;
>
> 'Before convicting on any such plea, it is highly 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 such constituent.'

22. As regards the plea, the appellant was able to understand the charge, and, he responded in Kiswahili, a language that was indicated by the court. The court followed the procedure laid out by reading out facts and after giving him time to reflect on the same, he responded in the language he understood by admitting facts to be correct.

23. In the case of *Obedi Kilonzo Kevevo vs Republic (2015) eKLR*, the Court of Appeal stated as follows in relation to plea taking:

> ' The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. The facts as read to the accused must disclose the offence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty, thereafter, the facts are narrated to the accused person and he/she is once more asked to respond to the facts. It is important that both the statement of offence as contained

in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence. Otherwise, the plea is not unequivocal.'

24. In the case of *Ombena vs Republic 1981 KLR 450* the court held that whether a guilty plea is unequivocal or not depends on the circumstances of the case. Therefore, an appellate court must take the totality of circumstances into account in determining the equivocality or otherwise of a guilty plea.

25. Article 50(2)(m) of the *Constitution* guarantees a fair trial to include the right 'to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.'

26. This is a case where an interpreter was present, one Orwa. The trial court clearly indicated the language used which was Kiswahili. Also indicated was the language of the court. (English). In the case of *FUM vs Republic (2015) eKLR*, the Court of Appeal stated that:

> ' A language the appellant presumably does not understand. What binds and places on the same footing the testimony given in the two languages that are not the appellant's mother tongue is the fact that there was interpretation or translation. This was doubtless undertaken by the court clerk who was always present in court. It is common knowledge, of which we readily take judicial notice, that the role and function of court clerks in court includes centrally the interpretation of any testimony or proceedings given in a language an accused person does not understand. See, SAID HASSAN NUNO –VS REPUBLIC (Supra). There is no reason to believe, nor has it been alleged, that the court clerk who was present during the material dates when testimony was offered in Kiswahili failed to perform that function.'

27. The appellant herein did not request for an interpreter or intimate that he did not understand the language in which the charge was read. It is clear that the appellant understood the proceedings at all times until the stage of conviction and sentence, for the record clearly indicates that the charge sheet was read in a language he understood.

28. Similarly, the appellant has not indicated the information that he sought and was denied, the facts and charge having been read to him, he cannot claim that he was denied any information that led to his conviction. That ground therefore fails.

29. On whether the plea was vitiated, the court having complied with Section 207 CPC, the plea was unequivocal and could not be vitiated by any factors.

30. Section 208 of the CPC provides that:

    (1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).

    (2) The accused person or his advocate may put questions to each witness produced against him.

    (3) If the accused person does not employ an advocate, the court shall, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.

31. The appellant having admitted the charge the matter did not go to trial thus the prosecution did not have the burden to prove the offence. All that was required was the prosecution to prove existence of the elements of the offence.

32. Section 268 of the Penal Code provides:

> ' A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulent converts to use of any person, other than the general or special owner thereof any property, is said to steal that thing or property.'

33. Section 281 of the Penal Code provides:

> If the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into the possession of the offender on account of his employer, he is liable to imprisonment for seven years.

34. Therefore, the charge was required to show that the appellant was an employee of the complainant, that he stole the property of the employer that came into his possession in the course of the employment, and, finally that the appellant dishonestly appropriated the said property thereby depriving the employer of the same. (See *Emmanuel Kombo Onteri v Republic [2022] eKLR*).

35. Facts presented disclosed that the appellant was employed to do deliveries using the motor-cycle registration Number xxxx Bajaj. He took possession of the motorcycle by virtue of his employment and fraudulently deprived the employer of it. In the premises, the charge as framed was not defective.

36. On whether the court complied with rules of judgment writing under Section 169 of the Criminal Procedure Code; the law requires the court to list issues and determine each one of them. The appellant argues that the court did not list the contested and uncontested elements of the charge, the statement of the offence and the law relied on. However, the appellant having admitted the charge at the outset, the court was not duty-bound to delve into what was not of contest.

37. On sentence, Section 281 of the Penal Code provides for a sentence of upto seven (7) years imprisonment. A trial court has the discretion to impose a sentence that should be within the law. Ordinarily, an appellate court would not interfere with a sentence of a trial court unless it is found that the court acted on wrong principles or where it overlooks some material factors.

38. The appellant was sentenced to serve five (5) years imprisonment, which was within the law. However, some other factors should be considered. The court gave him a chance to mitigate, but, he opted not to say anything, which suggested that he was not remorseful. That notwithstanding, he was a first offender, the court was of the view that the sentence had to serve as a lesson to other offenders and thus it had to ensure that it was deterrent and also ensure community protection and denunciation. Having admitted the charge in advance and saved judicial time; and, further, having been a first offender, he deserved leniency. In the circumstances the sentence meted out was excessive.

39. The upshot of the above is that the conviction is affirmed, but, the sentence meted out is set aside and substituted with a sentence of three (3) years imprisonment, to be effective from the date of arrest, the July 13, 2020.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI, THIS 19TH DAY OF JANUARY, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Ms. Chege for the State

Court Assistant – Mutai