



**Hussein v Republic (Criminal Appeal E013 of 2022)  
[2023] KEHC 2719 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2719 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL APPEAL E013 OF 2022**

**JN NJAGI, J**

**MARCH 29, 2023**

**BETWEEN**

**ABDIRAHMAN HUSSEIN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. Simon Arome, SRM, in Marsabit Principal Magistrate's Court Criminal Case No. E184 of 2022 delivered on 18/7/22)*

**JUDGMENT**

1. The Appellant was charged in count 1 with the offence of stealing from the person contrary to section 279(a) of the *Penal Code*. The particulars of the offence were that on July 3, 2022 at Marsabit town in Marsabit Central sub-county within Marsabit County with another not before court stole one mobile phone Make Sumsang A12 valued at Ksh 36,000/=the property of Janet Nthenya (herein referred to as the complainant) from the person of the said complainant.
2. The Appellant was further charged in count 2 with the offence of stealing contrary to section 268(1) as read with section 275 of the Penal Code. The particulars of the offence were that on the July 4, 2022 at Marsabit town in Marsabit Centrral sub-county within Marsabit county he stole Ksh 3750/= from the Mpesa account Number xxxx the property of Janet Nthenya.
3. The Appellant pleaded guilty to the two counts and was sentenced to a combined sentence of 3 years imprisonment. The Appellant was aggrieved by the conviction and the sentence and filed the instant appeal.
4. The grounds of appeal are that the trial court failed to exercise caution or vital safeguards prior to convicting the Appellant on his plea of guilty; that the consequences of pleading guilty to the charge was not explained to the Appellant; that the Appellant was influenced by the Investigating Officer to



plead guilty to the charge; that he had not recovered from injuries; that the sentence meted out on him was harsh and excessive and that in the circumstances of the case the court should order a retrial.

5. The appeal was canvassed by way of written submissions. The Appellant submitted that the trial court did not warn him of the consequences of pleading guilty to the charge. That this was necessary because of the long sentence that awaited him upon pleading guilty to the charge that he was facing. The Appellant relied on the cases of *Paul Matungu vs Republic (2006) eKLR* and *Boit vs Republic (2002) KLR 815* where it was held that a court that accepts a plea of guilty must warn the accused person of the consequences of a plea of guilty and that the accused must be made to understand what he is pleading guilty to.
6. The Appellant further submitted that his right to fair trial under Article 50(2) of the *Constitution* was violated by failure to ensure that he understood the ingredients of the charge. That in the circumstances the plea was not equivocal.
7. The state through the Senior Principal Prosecution Counsel, Mr William Ochieng, submitted that they were conceding to the appeal for the reason that the plea was equivocal as the facts as given by the state were not detailed and specific as to give an outline of the events of that day. That the proceedings do not give the exact imprint on how the appellant responded in the language that he used.
8. It was further submitted that the trial court should have taken extra caution to warn the Appellant on the consequences of pleading guilty as he was unrepresented and the offence that he was facing was serious and was likely to attract a custodial sentence. Counsel referred to the case of *Paulo Malimi Mbusi vs Republic*, Kiambu Criminal Appeal No 8 of 2016 as quoted in the case of *Simon Gitau Kinene vs Republic, Criminal Appeal No 9 of 2016*.

#### **Analysis and Determination –**

9. This being a first appeal, the duty of the court is to analyze and re-evaluate afresh the evidence adduced before the lower court and drawn its own conclusions while bearing in mind that it neither saw nor heard the witnesses testify. The Court of Appeal in *Okeno vs Republic [1972] EA 32* set out the duty of a first appellate court as follows:

' An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.'

10. The issues for determination are:
  - (1) 1) Whether the plea was equivocal.
  - (2) Whether the sentence imposed on the Appellant was harsh.

#### **Whether the plea was equivocal –**

11. The Appellant argued that the trial magistrate did not make him understand the charge that he was facing.



12. The manner of taking pleas was explained in the case of *Adan v Republic (1973) EA 445* where the Court of Appeal laid down the steps which should be followed in taking pleas 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 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) 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.'
13. In the case for the Appellant, the plea was taken in Kiswahili language, a language which the Appellant understands and does not dispute as being conversant with. The court record indicates that the two counts were read out to the Appellant and he replied to each of the counts that the charges were true. The facts of the case were then read out to the Appellant which were as follows:
- On July 3, 2022 the complainant was walking home after closing her shop at 17.30pm. The accused was a pillion passage aboard motorcycle registration No which was not captured reached the complainant as she was walking and snatched her phone make Samsung A12 black in colour valued at Ksh 36,000/= . The phone had a phone cover. The complaint had stored her ID behind her phone in the cover. The accused and the rider drove off. He later used her identity card to withdraw Ksh 2,700/= and later withdraw Ksh 1000/=. He later dropped the complainant identity card near her shop. The complainant found the identity card and reported. The investigations were done and the phone was recovered. Here S/No xxxx – Exhibit 1 Mpesa statements Exhibit 2.
14. The Appellant was then asked whether he admitted the facts as read out and he answered in the affirmative. He was then convicted on his own plea of guilty.
15. The Appellant was then asked to give his mitigation wherein he gave a lengthy mitigation in which he stated that he was an orphan and that he was the sole breadwinner of his family. That he had two brothers in primary school. That he snatched the phone from the complainant. That he is the one who directed the police officers as to where the phone was. That he called Customer Care and they gave him instructions on how to set a new PIN. That he did set the PIN and withdrew Ksh 2750/= from the complainant's Mpesa account and later withdrew another Ksh 1000/=. He used the money to feed his children. That since he knew the complainant he dropped her identity card in front of her shop at a conspicuous place where she could see it. He pleaded for leniency in sentencing.
16. In my view the facts as set out by the prosecution were detailed enough and captured all the material ingredients of the offence. They were sufficient enough as to make the Appellant understand the offences that he was facing. It is therefore not correct as stated by the prosecution counsel that the facts were not detailed as to enable the Appellant to understand the offence that he was facing. The language which the Appellant answered to the charge is indicated in the court record. It is not correct for the prosecution counsel to state that it is not clear as to how the Appellant responded to the charge as the same is clearly stated. The lengthy mitigation given by the Appellant showed clearly that he understood the charges that he was facing. He admitted in mitigation that he snatched the money from the complainant. He admitted that he withdrew a total of Ksh 3750/= from the complainant's Mpesa



account after he tricked Safaricom into giving him instructions on how to reset the PIN. There is no doubt that the Appellant properly understood the charges that he was facing.

17. The Appellant argued that his right to fair trial was violated in that he was not warned of the possible sentence if he pleaded guilty to the charge. The charge that the Appellant was facing in count 1 carried a maximum sentence of 14 years while the charge in count 2 carried a maximum sentence of 3 years imprisonment. The Appellant was sentenced to serve 3 years imprisonment. I do not think that the sentence that the Appellant would face in the event that he pleaded guilty to the charge was of such a nature that it required the court to warn him of the likely sentence if he pleaded guilty. The Appellant was not facing a capital offence or a charge such as defilement which attracts a lengthy jail term. Even if there was a requirement to so warn the Appellant, he did not serve any prejudice as he was not sentenced to a lengthy period. The argument therefore holds no substance.
18. The Appellant alleged that he was influenced by the investigating officer to plead guilty to the charge. There was no evidence that the investigating officer was in court when the plea was taken. These are just mere allegations.
19. From the foregoing I am satisfied that the plea was taken in accordance with the guidelines as set out in *Adan vs Republic* (supra). The plea was unequivocal. The conviction is thus upheld.

#### **Sentence –**

20. Sentencing is a discretion of the trial court and being so it must be done judiciously. Guidance on the subject can be fathomed from the Court of Appeal decision in the case of *Shadrack Kipkoech Kogo - vs - R Eldoret Criminal Appeal No 253 of 2003* where it was held that:

' Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka – vs- R* (1989 KLR 306)'

21. The same Court in *Bernard Kimani Gacheru vs Republic [2002] eKLR* stated that:

' It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.'

22. The Appellant was charged with two counts – stealing from the person contrary to section 279(a) of the Penal Code and general stealing contrary to section 275 of the Penal Code. The trial magistrate in sentencing the Appellant imposed one combined sentence instead of imposing two separate sentences. This was a wrong approach in sentencing. The trial court ought to have sentenced the Appellant on each of the counts. The sentence was illegal. I do hereby set aside the combined sentence of 3 years imprisonment.



23. Stealing from the person is a serious offence. It carries a sentence of up to 14 years imprisonment. The Appellant in this case snatched the complainant's mobile phone from her hand. He proceeded to withdraw money from her Mpesa account. A deterrent sentence was called for in the circumstances of the case.

24. I have however considered that the Appellant pleaded guilty to the charge thus saving the court some precious time. He seemed to have been remorseful. I sentence him as follows:

Count 1 – to serve two-and a-half years imprisonment.

Count 2 – to serve two years imprisonment.

The sentence is to run concurrently from the date of plea, i.e on July 18, 2022.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 29<sup>TH</sup> DAY OF MARCH 2023.**

**J. N. NJAGI**

**JUDGE**

**In the presence of:**

Mr. Otieno for Respondent

Appellant – present

Court Assistant - Jillo

14 days R/A.

