Wario v Republic (Criminal Appeal E011 of 2023)
[2023] KEHC 21789 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21789 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL APPEAL E011 OF 2023

JN NJAGI, J

JULY 26, 2023

BETWEEN

TURA GUYO WARIO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. S. K. Arome in Marsabit Principal Magistrate's Court Criminal Case No. E014 of 2023 delivered on 22/05/2023)

JUDGMENT

1. The Appellant was charged with the offence of burglary and stealing contrary to sections 304 (2) and 279(b) of the *Penal Code*. The particulars of the offence were that on the 21st day of May 2023 at North Horr Township in North Horr Sub-County within Marsabit County he broke and entered (?) with intent to steal therein and did steal eight thousand two hundred (8,2000) shillings the property of Isako Elema Barako (herein referred to as the complainant).
2. The appellant pleaded guilty to the charge and was sentenced to serve 7 years imprisonment. He was aggrieved by the conviction and the sentence and filed the instant appeal.
3. The grounds of appeal are:
    1. That the trial magistrate erred in both matters of law and facts by failing to exercise any caution or vital safeguards prior to convicting the appellant on his plea of guilty.
    2. That the appellant was not accorded a fair trial.
    3. That the learned trial Magistrate failed to consider the mitigation by the appellant.
    4. That the sentence meted was harsh and excessive having regard to the circumstances.

5. That, the consequence of pleading guilty to the charge was not explained to the appellant.

4. This being a first appeal the duty of the court is as was set out by the Court of Appeal in *Okeno v Republic* [1972] EA 32 that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v Republic* (1957) EA (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R*. (1957) EA 570). 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, see *Peters v Sunday Post* [1958] EA 424."

5. Section 207 of the *Criminal Procedure Code* sets out the procedure of taking pleas as follows:

'207

(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 charge otherwise 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."

6. The Court of Appeal in the case of *Adan v R* (1973) EA 445 renditined the above provision 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 take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.

(iv) If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.

(v) If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.

7. In this case the record of the court indicates that the plea was taken as follows:

> The substance of the charge was read and explained to the appellant in Borana language that was being interpreted to the court by a court clerk, Mr. Jarso. The appellant upon

understanding the charge replied that the charge was true. The court thereupon entered a plea of guilty.

The Prosecution proceeded to give the facts of the case to which the appellant replied that they were correct. The trial court then convicted the appellant on his own admission of the charge. The prosecutor then informed the court that there were no records for the appellant as regards his previous conviction.

The appellant was then given an opportunity to mitigate. He sought for leniency from the court. He said that he would not repeat the offence. The court then stated that it had considered the appellant`s mitigation and proceeded to sentence him to 7 years imprisonment.

The question is whether the trial court employed the safeguards of taking pleas as set out in section 207 of the *Criminal Procedure Code* and as stated in *Adan v Republic*.

8. The charge against the Appellant was burglary and stealing contrary to sections 304(2) and 279(b) of the *Penal Code*. Section 304 of the Penal Code provides as follows: -

304 Housebreaking and burglary

(1) Any person who—

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.

9. Section 279 of the *Penal Code* provides that: -

" 279. Stealing from the person; stealing goods in transit, etc. If the theft is committed under any of the circumstances following, that is to say.

—

(a) If the thing is stolen from the person of another.

(b) If the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house ..... the offender is liable to imprisonment for fourteen years."

10. The facts of the case as given by the prosecution were that on the material day at 1040 hours the complainant was coming from a wedding. When he reached his bar, he found the front door having been broken. He checked around the broken door and collected an identity card No.38408941 in the name of Tura Guyo Wario, the appellant. There were foot marks at the place. He followed them and they led him to the house of the appellant. He found him asleep. He asked whether he had lost anything at the complainant`s shop. The appellant said that he had not lost anything. The complainant

asked him for his identity card but he did not have it. They went to the complainant`s bar and the complainant showed him the breakage. The complainant showed the appellant his identity card that had fallen in the shop/bar. The complainant called a person called James Bonaya. They escorted theappellant to North Horr Police Station and reported the incident. The appellant was re-arrested. The police visited his house and recovered Ksh.5,500/- under the bed. The appellant was charged with the offence which he admitted on his own plea of guilty.

11. The offence of burglary and stealing is committed when a person breaks into a dwelling house at night. I have noted that whereas the charge indicated that the appellant was charged with burglary and stealing, the particulars of the charge did not disclose what the Appellant was alleged to have broken into. The facts given by the prosecution however indicated that the appellant broke into a shop/bar and not a dwelling house.

12. Based on the facts read out by the prosecution, there was no offence of burglary disclosed as there was no breakage into a dwelling house. The facts disclosed an offence of breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code*. The section provides as follows:

> 306. Breaking into building and committing felony
>
> Any person who—
>
> (a) breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or
>
> (b) breaks out of the same having committed any felony therein, is guilty of a felony and is liable to imprisonment for seven years.

13. It is then clear that the trial court convicted the appellant for the wrong offence of burglary when there was no evidence of breaking into a dwelling house. The learned trial magistrate did not ascertain whether the facts of the case fitted the charge that the appellant was facing. The magistrate did not strictly follow the safeguards as set out in *Adan v Republic* in taking the plea. It was his duty to ensure that the appellant was convicted of the right offence. The magistrate failed to accord the Appellant a fair trial by convicting him for an offence not disclosed in the facts given to the court.

14. The question is whether the appellant suffered injustice for being convicted for an offence that was at variance with the facts of the case.

15. The offence of burglary is established under Chapter XXIX of the *Penal Code*. Section 187 of the *Criminal Procedure Code* provides as follows:

> 187. Charge of Burglary, etc.
>
> When a person is charged with an offence mentioned in Chapter XXIX of the Penal Code (cap. 63) and the court is of the opinion that he is not guilty of that offence but that he is guilty of another offence mentioned in that Chapter, he may be convicted of that other offence although he was not charged with it.

16. The appellant admitted breaking into the complainant`s building and stealing from therein. The offence of breaking into a building and committing a felony is an offence cognate to the offence burglary and stealing. The appellant can therefore be convicted of the offence of breaking into a building and committing a felony although not charged with it. It is my finding that the appellant was not guilty

of the offence of burglary and stealing under sections 304(2) and 279(b) of the *Penal Code* but was guilty of the offence of breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code*. I therefore convict the appellant of the offence of breaking into a building and committing a felony contrary to section 306 (a) of the penal Code. I accordingly set aside the conviction for the offence of burglary and stealing and substitute it with the offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code.

17. The maximum sentence for the offence of breaking into a building and committing a felony is imprisonment for a period of 7 years. The Judiciary guidelines on Sentencing outline the purposes of sentencing at page 15, paragraph 4.1. as follows:

> " Sentences are imposed to meet the following objectives:
>
> (1) Retribution: To punish the offender for his/her criminal conduct in a just manner.
>
> (2) Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
>
> (3) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
>
> (4) Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
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> (5) Community protection: To protect the community by incapacitating the offender.
>
> (6) Denunciation: To communicate the community's condemnation of the criminal conduct.

18. The Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic*, Petition Number 5 of 2015, gave guidance on sentencing as follows:

> " The court may, before passing sentence, receive such evidence as it thinks fit in order to inform to inform itself as to the proper sentence to be passed...It is without a doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at the appropriate sentence."

19. The appellant herein was a first offender. He broke into the complainant`s shop/bar and stole cash of Ksh.8,200/=. Of that amount Ksh.5,500/= was recovered. Considering that the Appellant was a first offender, I am of the view that a sentence of one year imprisonment is appropriate for the offence committed. In the premises, I sentence theappellant to serve oneyear imprisonment for the offence of breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code*.

20. It is ordered that the sentence commences from the date of plea, i.e. on May 22, 2023.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 26TH JULY 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ngigi for Respondent

Appellant – present in person

Court Assistant- Jarso

14 days R/A.

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