REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL APPEAL NO. 179 OF 2018

DAVID OCHIENG OMONDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

(Being an appeal arising from the sentence of Hon. H. Onkwani (Senior Resident Magistrate) at the Chief Magistrate's Courts Milimani on 17th August 2018)

1. On 17th October 2017, the appellant was arraigned in court charged vide criminal case number; 1818 of 2017, in the Chief Magistrate's Court at Milimani Nairobi, with the offence of; being in possession of ammunitions, without a firearm certificate, contrary to; section 4(2) (A) of the Firearm Act, as read with; section 3 (A) of the Firearms Act, in count 1 and being in possession of explosives, contrary to; section 29 of the Explosives Act (Cap 115) Laws of Kenya, in count 2. He pleaded not guilty to both counts. The case then proceeded to hearing, wherein two witnesses were heard.

2. However, on 20th July 2018, the record indicates that the accused sought for the charges to be read to him afresh. The same were read and he pleaded guilty, whereupon the court recorded a plea of guilty for him. The facts were then read to the accused and he confirmed that, they were correct. He was then convicted and subsequently sentenced to serve life imprisonment term, on count 1, with an order that the round of ammunition be forfeited to the State. He was sentenced to serve seven (7) years imprisonment on the 2nd count. The sentence was ordered to run concurrently and he was given fourteen (14) days right of appeal.

3. However, the appellant is aggrieved with the decision of the trial court and appeals against it in its entirety, on the grounds in the petition dated, 15th November 2021, as follows:

a) That, the Honourable Court erred in law and fact by convicting the Appellant on an equivocal plea of guilty in both counts.

b) That, the Honourable Court erred in law by sentencing the Appellant to serve a term of life imprisonment contrary to the express statutory provisions of section 4 (3) (a) of the Firearms Act Cap 114.

c) That, the Honourable Court erred in law by failing to take into account the period the Appellant had served in custody while sentencing the Appellant contrary to section 333 (2) of the Criminal Procedure Code Cap 75 Laws of Kenya.

d) That, the Honourable Court erred in law and fact by failing to afford the appellant access to his legal counsel on record before he changed plea.

4. As a result of the aforesaid, he prays for orders;

a) That, the appeal be allowed.

b) That, the conviction and sentence of the trial court are set aside.

c) *That, the appellant be set free forthwith*.

5. However, the Respondent, opposed the appeal through filing of submissions, without filing any formal response.

6. Be that as it were, the appeal was disposed of vide filing of submissions. The appellant submitted that, it was the sole duty of the trial court to caution the appellant, on the nature of the plea of guilty, considering that, it was coming so late into the trial process. However, the

trial court proceeded to record the change of the plea and a plea of guilty was entered. That, the plea of guilty as entered on 20th July, 2018, during the appellant's trial process was void, because the trial court did not caution itself, on the requirements to be considered, before a plea of guilty is entered; as provided for under section 207 of the Criminal Procedure Code and in *Adan vs Republic (supra).* Further, the proceedings of the trial court cannot confirm whether, indeed, the change of plea to guilty was read out to the appellant in his language of understanding. To this, it can clearly be discerned that, when the appellant firstly took plea on 1st November, 2017, the trial court was cautious enough to record the plea in a language the appellant understood, however on the date of the plea of guilty, the trial court did not address itself to the language the appellant understood. It was therefore, a clear contravention of established law on the conduct of plea of guilty. The appellant relied on the case of; *Obedi Kilonzo Kevevo (supra)* for the submission that, the trial court ought to have satisfied itself that, the appellant herein understood the consequences of the plea of guilty. Further, the appellant herein was entitled to access to his advocate on record before he changed his plea to guilty. Finally, the appellant was arrested on 16th October 2017 and arraigned in court on 1st November, 2017. That he remained in custody throughout the trial. Pursuant to the provisions of, section 333 (2) of the Criminal Procedure Code, the Sentencing Policy Guidelines, at clause 7.10 and 7.11, and the case of; *Ahamad Abolfathi Mohammed & another v Republic [20181 eKLR,* the trial court should have taken into account, the period that, he was in custody while sentencing him.

7. Respondents in its submissions dated; 4th December 2021, argued that, the principles to be applied in taking a plea, were laid down in the case of *Adan Vs Republic (1973) E.A. 445*. That, pursuant thereto, the plea in the subject matter herein, was unequivocal as per the procedure set out in that case.

8. Further, the appellant has not demonstrated that, the case involved complex issues of facts or law, which made him unable to effectively conduct his defence without legal representation. That, he was represented by a lawyer, who subsequently failed to attend court, despite seeking to be supplied with witness statements, the document the prosecution was relying on and an adjournment which were granted. Therefore, that ground of appeal of failure to be accorded legal representation does not hold.

9. Be that as it were, the Respondent referred the court to the charges and charge sheet and submitted that, it concedes to the grounds of appeal on sentence, in view of the fact that, the appellant should have been charged under section 4(2), as read together with section 4(3) of the Firearms Act, (Cap 114) of the Laws of Kenya and not section 4(2) A as read with section 3 (a), of the same Act.

10. However, despite the aforesaid, the appellant understood the charges, but the sentence of life imprisonment is excessive, taking into account, the period provided by the law. The Respondent also conceded that, the period the appellant was in custody, was not considered and should be taken into account in sentencing.

11. I have considered the arguments advanced by both parties and the submissions filed and I find that, the role of the 1st appellant court was well stated in the case of; *Okeno v Republic (1972)* by the Court of Appeal 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 (Pandya v. JR, (1957) E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. IR., [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 findings and conclusions; 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] E. A. 424)"*

12. In the instant matter, I find that the first issue to determine is; whether the charges as drawn, disclose an offence and/or whether the charge sheet is defective. The appellant was charged with the offence of; being in possession of ammunition without a firearm certificate contrary to section 4 (2) (a) as read with section 3 (a) of the Firearms Act, (Cap 114) Laws of Kenya in the 1st count and the offence of being in possession of explosives, contrary to; section 29 of the Explosives Act, (Cap 115) Laws of Kenya. The appellant argues that, section 3(a) referred to in the 1st count is irrelevant. The Respondent concedes and submits that, it should have been section 4 (3)(a), but argues that, the appellant has not suffered any prejudice by the reference to the wrong section. I find that, the offence in question is created under section 4 (2) (a) and not the section 3(a) of the Act. Therefore, no prejudice was occasioned to the appellant, as section 4 (3)(1) deals with sentence for the offence and is meant to guide the court. Therefore, the appellant's argument on the same fails

13. The second issue to consider is whether; the plea of guilty administered and/or taken is unequivocal. The court record indicates that, on the 1st day of November, 2017, when the appellant was arraigned in court the charges were read to him, in a language he understood and he pleaded "not guilty" to both charges. Therefore, at the time he requested for the charges to be read to him afresh, the charges were being read for the second time. He cannot therefore argue that, they were not read in a language understood. Even then, he could not respond to them, if he did not understand them anyway.

14. Furthermore, the appellant cannot argue that, he did not appreciate the nature of the charges and/or the seriousness therefore, as two key expert witnesses had testified and been cross examined by the appellant. Therefore, he understood the prosecution case relatively well when he took a plea of guilty.

15. Indeed, the lower court proceedings clearly show that, on the date the appellant changed his plea, the charges were read to him. The only omission was that, the trial court failed to indicate the language used on that date, but as already stated, that was dealt with at the initial plea taking. Again, the facts were read to the appellant and he confirmed they were correct. Similarly, after confirming the facts, the trial court should have recorded that; "the accused is convicted on his own plea of guilty" not just "plea of guilty entered". However, that omission did not prejudice the appellant.

16. Be that as it were, in my considered opinion the provisions of section 207 of Criminal Procedure Code, (Cap 75) Laws of Kenya and the principles laid down in the case of; *Adan vs Republic (1973) EA 446* were complied with. For better understanding, the subject provisions of section 207, states as follows: -

a) 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 a plea agreement.

b) If the accused person admits the truth of the charge otherwise than by a 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.

c) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

d) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

· The principles in Adan's case(Supra) stipulates as follows: -

a) Where a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand;

b) The magistrate should then explain to the accused person all the essential ingredients of the offence charged;

c) If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty;

d) The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts;

e) If the accused does not agree with the statement of facts or asserts additional fact which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to not guilty" and proceed to hold a trial;

f) If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence;

g) The statement of facts and the accused's reply must of course be recorded.

17. The appellant further faults the trial court, for failing to warn him of the danger of taking a plea without the presence of his lawyer. However, the court record clearly indicates that, the appellant's Counsel was in court on; 8th February, 2018, and sought for time to prepare for the case, in addition, he sought to be supplied with prosecution documentary evidence and the witnesses who had testified be recalled. He also applied for reduction of bond.

18. The court record shows that, the counsel was granted time and the matter adjourned for about three (3) months to; 17th May, 2018. On that date, the matter was adjourned due to the absence of the learned counsel and stood over to 4th July, 2018. In fact, the matter was subsequently adjourned to; 20th July, 2018, when the appellant changed the plea, this time he never requested (as in the past), to have his counsel in court. It suffices to note that, justice delayed is justice denied, and the court could not keep adjourning the matter to wait for a Counsel who was absent without an explanation.

19. Be that as it may, I find that, the plea taken was unequivocal and decline to quash the conviction of the appellant. In that regard, the provisions of section 348 of the Criminal Procedure Code 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 or legality of the sentence"

20. The next issue to consider therefore, is; whether the sentence meted herein is lawful. Both parties concede that, the sentence of life imprisonment on the 1st count is illegal. The provisions of; Section 4 (3) (a) of the Firearms Act, read as follows:

(3) "Any person who is convicted of an offence under subsection

(2) shall— '

(a) If the firearm concerned is a prohibited weapon of a type specified in paragraph (b) of the definition of that term contained in section 2 or the ammunition is ammunition for use in any such firearm be liable to imprisonment for a term of not less than seven years and not more than fifteen years;

21. Therefore, the maximum sentence on the 1st count should have been fifteen (15) years. In that case, the sentence of life imprisonment, is set aside and substituted with the minimum sentence of seven (7) years, as the accused is a first offender. The sentence on the second count of seven (7) years is legal as it is the minimum sentence provided under the law and I decline to interfere with it.

22. Finally, I concur with the parties that, the sentence meted out did not take into account the period, the appellant was in custody, from of

about nine (9) months. Pursuant to the provisions of; section 333(2) of the Criminal Procedure Code, and clause 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines, the period should have been considered.

23. In conclusion, I decline to quash the conviction, I allow the appeal on sentence on the 1st count only by substituting the life imprisonment with a sentence of seven (7) years. The sentence on both counts shall run concurrently and be calculated from 1st November, 2017, when the appellant was arraigned in court.

It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 11TH DAY OF JANUARY, 2022.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Mutullah for the appellant

Appellant present in person

Ms Akunja for the Respondent

Edwin Ombuna: court Assistant