REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL APPEAL NO. 39 OF 2018

OMAR GUYO OMAR .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 53 of 2017 in the Principal Magistrate's Court at Hola – Hon. A. P. Ndege - PM)

CORAM: Hon. Justice Reuben Nyakundi

Mr. Mwangi for the State

Appellant in person

J U D G M E N T

Omar Guyo, the appellant herein was indicted with three counts namely:

> **Count I – Possession of meat of wildlife species for the purposes of trading in bush meat contrary to Section 98 of the Wildlife Conservation and Management Act 2013**
>
> **Count II – Being in possession of a wildlife trophy without a permit contrary to Section 95 of the Wildlife Conservation and Management Act 2013.**
>
> **Count III – Being in possession of a wildlife trophy without a permit contrary to Section 95 of a Wildlife Conservation and Management Act 2013.**

He pleaded guilty to each of the counts as charged. The essence of the plea of guilty resulted in the imposition of punishment correspondingly against each admitted Count as follows:

> **Count 1 – A fine of Kshs.200,000/= in default to serve 12 months imprisonment.**
>
> **Count 2 – A fine of 1 million in default to serve 5 years imprisonment.**
>
> **Count 3 – A fine of Kshs.1,000,000/= in default to serve 5 years imprisonment.**

Being aggrieved with the conviction and sentence applicant preferred an appeal based on the following grounds:

> ***(1). That, I am the sole bread winner of the family hence my continued stay in prison will ruin the lives of my family.***
>
> ***(2). That, I am remorseful and hence beg for forgiveness.***
>
> ***(3). That, I beg for a non-custodial sentence or an attachment to the community service order so that I may serve my sentence at the same time attending to my family.***
>
> ***(4). That, given the opportunity of going out there I promise to remain a Law abiding citizen and an ambassador ensuring that other citizens will also abide by the Law.***

(5). That, though the 6 years sentence imposed upon me by the prosecution is within the requirements of the Law, I still feel that they are harsh.

Resolution

The Law on the jurisdiction of this Court is plain as expressly stated in **Pandya v R {1957} E.A. 336**.

> ***"On first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the judge or magistrate with such other materials as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses, but there may be other circumstances, quite apart from manner and demeanor which may shew whether a statement is credible or not which may warrant a court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen. On second appeal it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."***

In this case, the facts which rendered the decision on conviction and sentence were as refreshed below from the record:

> ***"Matters of facts. I have received information from KWS officer that they are perusing the report from their lab that had been forwarded to KWS officer Malindi. The report was procured but not relevant to this case. It is for another wildlife matter. The specific report concerning this report is not yet ready. The investigating officer PC. Agiza has just travelled to Nairobi to do a follow up. The 4th accused having pleaded guilty. I will use the facts available to me. On the 25.4.2017 at Khalaule village, officers from KWS – Hola Station received information from an informer that some men from Khalaule had in their possession wildlife species meat intended to use for trade. Officers went to the house belonging to one Guyo Aden Mchawi where the 4th accused and his accomplice were found while preparing nine Dikdik carcasses. They had 1 un-skinned Guinea fowl which was dead. Also wild hare which was not skinned. They were arrested and the meat taken as exhibit. Also 1 motorbike No. KMCJ 290M which had blood on the passenger's seat which seems to have been used to transport the game meat. They were apprehended and escorted to Hola Police Station and then presented to Garsen Law Courts for plea. My colleague produced the Dikdiks, Guinea Fowl and Hare as exhibit photographs were taken. Pexhibit Nos. 2A, 2B, 2C, 2D, 2E, 2F and 2G. Also the forwarding Memo and the certificate. Photo processed by Anthony Kinyanjui. Forwarding Memo – Pexhibit 3, Certificate – Pexhibit No. 4."***

The hearing of this appeal is grounded on the written submissions of both parties. The submissions by Learned counsel **Mr. Mwangi** was to the effect that the plea of guilty was unequivocal and therefore the appeals Court has no jurisdiction to interfere with the final orders of the trial Court.

The appellant

On his part he dwelt more on the manifest excessiveness of the sentence. He pleaded for mercy from this Court to take into account the prevailing mitigation so that the sentence of (11) eleven years could be set aside for home based non-custodial sentence. This matter though on appeal from a conviction arising out of a plea of guilty, the aftermath of the Judgment of the trial Court for the other accomplices charged together with the appellant raises eyebrows.

I therefore became curious to delve into carrying out a postmortem and carefully comb through the facts on the plea of guilty and the findings in the determination made in favor of the other co-accused arising out of the same transactions. There is every likelihood that the appellant who was basically unrepresented did not understand what he was pleading to in the first instance. It is trite that the trial Court has a duty to ensure compliance with the threshold in **Adan v R {1973} EA 45** in which the Court stated as follows interalia:

> ***"(i). The person pleading guilty fully understands the offence with which he is charged. The Court taking the plea of guilty must in its record show that the substance of the charge and every element or ingredient constituting the offence has been explained to him in a language that he understands and that, with that understanding and out of his own free will, the pleader admits the charge. This requirement applies not only to offences punishable by death but to all offences. In Ngigi v Republic, it was further held by the High Court that the accused should be required to admit or deny every element of the charge unequivocally.***
>
> ***(ii). Where the offence is one punishable by death, the Court recording the plea of guilty must show in its record that the person pleading guilty understands the consequences of his plea.***
>
> ***(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."***
>
> **(See also Kariuki v R {1984} KLR 809).**
>
> ***"Where the four accused persons were charged jointly their responses to the facts of the offence were recorded as follows: "Accused 1 – story is correct, Accused 2 – Do, Accused 3 – Do, Accused 4 – Do, Court – Plea of guilty entered to all" "The Court of Appeal said that the word 'do' recorded by the trial Court as the accused persons' answer to the charge meant nothing and was neither an admission nor a denial of the facts."***

In the face of this Court in **Njuki v R {1985} KLR 22** held:

> ***"That it has been sued time and again that the pleas recorded in the Courts such as I admit, I accept it, I plead guilty, it is true and so no cannot be considered as unequivocal plea."***

It is very important that in every circumstances in which the accused offers to enter a plea of guilty his or her constitutional rights under Article 50 of the Constitution on fair trial rights should be explained so that he or she can confirm that his or her plea is unequivocal with full knowledge of the consequences. The right to a fair trial is a basic norm in our constitution and international human rights Law. It entrenches the right where an accused person is presumed innocent until proven guilty by the state discharging the evidential burden beyond reasonable doubt.

However, in practical terms trier of facts in our criminal justice system accommodate pleas of guilty subject to guilty plea standards set out in the Adan case. In a plea of guilty procedure, the accused is assumed to have voluntarily waived full trial primarily for judicial expediency and efficiency. I take it that procedural Law has entrusted the legitimacy of plea of guilty subject to minimum standards under Article 50 of the Constitution being adhered to by the trial Court. That whatever best course elected by the trial Court, the standards of ensuring the plea is voluntary, informed and unequivocal and fact based should not be compromised. The right to a fair trial is non-derogable. It is my view that under Article 50 of the Constitution a fair hearing envisages that in all criminal prosecutions, the accused enjoys the right to be informed of the nature and cause of the accusation, right to be supplied with witnesses statements, right to a speedy and public trial, a right to legal representation and a right to adduce and challenge evidence by state.

As an essential component of fair administration of justice at the very minimum, the key complainant statements should be supplied to the accused in advance even before the trial Court entertains proceedings on a plea of guilty. While its an onerous task for a self represented person to navigate through the hurdles of our criminal justice system, the Court's oversight role under Article 50 (1) of the Constitution has to ensure the promotion of equality of arms. In essence even at the plea stage, that all the actors to a pretrial or trial stage have equal negotiating power in line with expected standards on a right to a fair trial. The conviction of an accused for an offence he or she is indicted of, is in my considered view complete by the Court in observing those fair trial rights. Its only after he pleads guilty subject to the protection and guarantees of rights to a fair hearing under Article 50 of the Constitution can that plea be considered unequivocal.

It is not an overstatement to hold that a plea of guilty in which an accused person has not been supplied with the witness statements on the nature of the complaint, or explained the minimal guarantees on fair trial rights, impliedly is considered as a trial in which he has been condemned unheard. He loses his or her autonomy to the state over the consequential orders which flow from a plea of guilty. It is necessary for the trial Court to investigate the level of preparedness of an accused person to plead to the charge. The accused should be given a chance to exploit the determinants of the principles of a fair trial as elucidated **in Juma & other v Attorney General {2003} eKLR:**

> ***"It is elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the Law and evidence."***

The heavy emphasis on trial Courts processing plea – of guilty in microwave time has the disadvantage of compromising the right to a fair trial. This is more so on the complexity of the Kenyan Legal system deemed to be inaccessible in all sphere for self-represented persons. This is the concern **Lord Denning** raised on the right to legal representation in **Pett v Greyhound Racing Association {1968} 2 ALL ER - 545**

> ***"It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it everyday. A magistrate says to a man: you can ask any questions you like; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?"***

I bear in mind that legal representation under Article 50 (2) (G) (H) of the Constitution is not always availed or required in criminal proceedings as contemplated by the Supreme Law. It is therefore the norm in Kenya for the state to initiate a prosecution, participate in plea of guilty sessions without providing the accused with the intended evidence on allegations levelled against her or him in the charge sheet. That omission in its entirety to supply witness statements in advance does not allow the accused to make an informed decision before taking plea. The only true basis of a plea of guilty is what justice and equity require of the Courts, that everyone is to be treated as an individual bearer of constitutional rights and entitled to actualize then at every stage of his or her trial.

At the same time those who find themselves compelled to answer some criminal allegations to do so after taking full cognizance of their rights, their legal implications, with full knowledge of the choice to be made under a plea of guilty or to demand a full trial on the merits. That quality process is now sometimes called unequivocal plea of guilty. Without full knowledge of the evidence held by the state not supplied to the accused is a distortion of justice that jeopardizes the fundamental rights of the accused, such as the right to presumption of innocence and fair trial guarantees.

The questionable nature of the so called plea of guilty in the instant appeal entered against the appellant fails to meet the minimal threshold of Article 50 of the Constitution. It is not enough for Courts to simply enter plea of guilty. There are a series of statements to interrogate to

ascertain the truth from the record. There are certain matters that are suspect and disregarded by the trial Court. The issue of the right to interpretation and the language appellant confirmed the proceedings could be conducted to his advantage has not been indicated. There is no evidence that the Learned trial Magistrate informed the appellant of the nature of the charges and the consequences of pleading guilty. The likelihood of the prescribed sanctions in the event of a plea of guilty were never brought to the notice of the appellant, an interrogation whether the arrest and detention in an oppressive atmosphere contributed or compelled him to enter a plea of guilty to charges he never committed in the first instance, whether in absence of legal counsel, the appellant had offered the plea of guilty under coercion, fear and misinformation in the process to bargain his way out of the pre-trial detention facility.

In my view of the appeal, drawing inspiration from the Judgment of the trial Court in respect of the other three accomplices who underwent a full trial, and at the end of it acquitted of any wrong doing confirms, that the appellant conviction was an abuse of the process, and was unfair to say the very least and in breach of Article 50 of the Constitution on fair trial rights, considered non derogable.

A critical complaint of the Judgment confirms, nonetheless the elements of the three counts were never proven by the state. The particulars of the decision as represented herein below shows that the charges were fictitious as the completed investigations failed to establish positively the source of the carcasses photographed and stated to be in possession of the appellant.

> ***"Applying the above decision by Justice Mativo, then the reasoning behind the finding that the animals herein were wild was therefore necessary. There is no such reasoning herein and any purported opinion on the same does not therefore stand up. Whereas there was an attempt to expertly identify the dikdik, I find no such attempt or reasoning with respect to the alleged guinea fowl and the bush hare. They could have well been meat of other species and not necessarily wildlife species or trophies as alleged. The upshot is that I do hereby find that the prosecution has not been able to prove its case against the defendant herein in all the counts. I do therefore enter a finding of not guilty in all counts."***

From the above domain the prosecutor's insistence that the appellant had committed an offence as charged did not have the full force of the Law. The written facts on record and readily accepted by the Learned trial Magistrate indicate no evidence on the elements of the charges in support of the conviction. The criteria on unequivocal plea of guilty that include ensuring the validity of the offence and which takes place in consonant with other fair trial rights. I add that when the voluntariness of the plea of guilty is defined from the state's perspective rather than from the satisfaction of the accused founded on free and voluntary admission of the charge that plea wanes because of the threats to infringement of a right to a fair trial.

For instance, had the appellant not pleaded guilty which was unfair, like his accomplices he was set to be acquitted after a full trial because of the deficiency in the prosecution case. Thus to that extent the appellant plea of guilty was not unequivocal but one elected out of convenience contributed by other external diverse forces.

I therefore find that the errors on the plea of guilty are not curable by the provisions of Section 382 of the Criminal Procedure Code. The entire process did occasion prejudice and a miscarriage of justice on the part of the appellant. Accordingly, I allow the appeal in its entirety by quashing the conviction and the sentence imposed by the trial Court. If there is nothing else to hold the appellant, he shall be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF DECEMBER 2021

…….

R. NYAKUNDI

JUDGE

IN THE PRESENCE OF

1. MR. MWANGI FOR THE STATE

2. THE APPELLANT