



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CRIMINAL APPEAL NO. 29 OF 2019**

**FIKIRINI KITSAO .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal from the decision of Hon. L.N. Juma, Resident magistrate, dated 4<sup>th</sup> of June, 2015 in Kilifi Senior Principal Magistrate's Court Criminal Case No. 15 of 2014)**

**JUDGMENT**

1. On 9<sup>th</sup> November, 2014 the appellant with others were charged in Count 1 with the offence of burglary contrary to Section 304(2) and stealing contrary to Section 279(b) of the Penal Code.
2. In Count II he was jointly charged with others for the offence of stealing contrary to Section 276 of the Penal Code. He also faced alternative charges of handling stolen properties contrary to Section 322(1)(2) of the Penal Code. He denied the 2 counts. The matter was adjourned several times.
3. On 8<sup>th</sup> May, 2015 when the appellant appeared before court, he indicated that he wanted to change the plea. The case was thereafter mentioned a few times as the prosecutor did not have the police file from Bamba Police Station.
4. On 18th May, 2015 the charge was read out to the appellant in Kiswahili language which he understands. He responded "*Nakubali*" to the 1<sup>st</sup> Count, which means he admitted the charge. He responded likewise in Count II.
5. A plea of guilty was entered for the appellant in both counts. The prosecutor prayed to be given time to look for some exhibits which were not in court. The case was adjourned to 21<sup>st</sup> May, 2015 when the facts were read out to the appellant. He responded in Kiswahili by saying "*Maelezo ni kweli*" which means that the facts were true.
6. The Hon. Magistrate placed the file aside so that she could give directions and sentence. When the case was called out at 3:05 p.m., the accused was no longer in lawful custody. He had escaped. A warrant of arrest was issued. He was escorted to court on 2nd June, 2015 under the said warrant.
7. The prosecutor informed the court that the appellant was a habitual offender and had been convicted and sentenced to 15 years imprisonment in Criminal Case No. 251 of 2015.
8. The Hon. Magistrate considered the facts of the case and that the appellant had a previous conviction. She sentenced him to 5 years imprisonment in Count I and 3 years imprisonment in Count II. The Hon. Magistrate ordered for the sentences to run consecutively.

**Analysis and Determination.**

9. This court has considered the mitigation grounds of appeal filed by the appellant. He stated that he was the sole bread winner for his family and that since he was convicted, his family had undergone serious difficulties in raising living standards and his children had dropped out of school. The appellant prayed to be given an opportunity to be re-integrated into the community.
10. He further stated that he was remorseful and regretted the circumstances leading to the commission of the offence. He said that he had reformed since he was incarcerated. He relied on the decision in **John Kalama Chea vs Republic**, Malindi High Court Criminal Appeal No. 94 of 2017 where the appellant was released after serving a shorter sentence than the one he had been sentenced for. The appellant prayed for

his appeal to be allowed.

11. The office of the Director of Public Prosecutions filed its submissions on 4<sup>th</sup> September, 2019 opposing the appeal. Ms Otulo, Prosecution Counsel relied on the case of **Alexander Lukoye Malika vs Republic** [2015] eKLR to demonstrate the instances in which a plea of guilty can be overturned on appeal.

12. In the case of **Adan Vs Republic [1973] EA LR 445**, the court set out the steps to be followed by a court when taking plea-

*“(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 raise 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. The record is clear that the charges in Counts I and II were read out to the appellant in a language he understood. He responded thereto. A plea of guilty was entered for the two Counts. The facts were then read out to him and he responded that they were true. It is thus apparent that the plea was clear and unequivocal. I uphold the conviction on the 2 Counts the appellant was charged with.

14. After being convicted, the Hon. Magistrate failed to give the appellant an opportunity to mitigate as provided in law. Even if the appellant had a previous conviction, he still had the right to mitigate. **In Joseph Kaberia Kahinga & 11 others v. Attorney General [2016] eKLR, the Court** had the following to say with regard to mitigation:

*“.....we wish to put mitigation in its proper place in the trial process. The law under Sections 216 and 329 of the Criminal Procedure Code requires the court to receive such evidence as it thinks fit to guide it as to the proper sentence to impose on an accused person after conviction. Mitigation is an important part of the trial where the court obtains information, which may be in the form of evidence or reports, whether expert or otherwise (for instance a medical or Probation Officer’s or Children Officer’s reports) giving the circumstances either of the offender, or the victim or their respective families or members of the community to which either of the parties belong. Some of this information have statutory underpinning, for instance under Section 323 of the Criminal Procedure Code the court is required to ask the accused person whether he has anything to say after his conviction and before sentence.”*

15. The above notwithstanding, this court noted that the appellant had served sentence since 4<sup>th</sup> June, 2015. I reduce the said sentence to the period already served. The appellant shall be set at liberty unless otherwise lawfully held.

**DELIVERED, DATED and SIGNED at MALINDI on this 28th day of February, 2020.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of**

.....for the appellant

.....for the DPP

.....Court Assistant