REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL APPEAL NO. 63 OF 2019

RICHARD MUTUNGA MUMO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal from the sentence passed by D. Orimba (SPM) in Kangundo*

*Criminal Case 1364 of 2018 on 22.11.2018***)**

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

RICHARD MUTUNGA MUMO.....1ST ACCUSED

DANIEL MUSEMBI WAMBUA.....2ND ACCUSED

JUDGEMENT

1. This is an appeal from the sentence of Hon. D. Orimba, Senior Principal. Magistrate in Criminal Case *1364 of 2018 on 22.11.2018* The appellant herein, **RICHARD MUTUNGA MUMO** faced two counts in **Criminal Case 1360 of 2018**; one of Breaking into a building with intent to commit a felony contrary to Section 307 of the Penal Code and the second count of Stealing contrary to Section 275 of the Penal Code. In **criminal case 1361 of 2018**, he faced 2 counts, one of entering a dwelling house with intent to commit a felony contrary to Section 305 (1) of the Penal Code and the second count of Stealing contrary to Section 268 as read with Section 275 of the Penal Code and an alternative charge of Handling stolen goods contrary to Section 322(2) of the Penal Code. In criminal case 1362 of 2018, he and his co accused jointly faced 2 counts, one of entering a dwelling house with intent to commit a felony contrary to Section 305 (2) of the Penal Code and the second count of Stealing contrary to Section 268 as read with Section 275 of the Penal Code. In criminal case 1363 of 2018, he faced 2 counts, one of entering a dwelling house with intent to commit a felony contrary to Section 305 (2) of the Penal Code and the second count of Stealing contrary to Section 268 as read with Section 275 of the Penal Code. In criminal case 1364 of 2018, he faced 2 counts, one of entering a dwelling house with intent to commit a felony contrary to Section 305 (1) of the Penal Code and the second count of Stealing contrary to Section 268 as read with Section 275 of the Penal Code and an alternative charge of Handling stolen goods contrary to Section 322(2) of the Penal Code.

2. When the charges were read to him in each of the five cases, the appellant informed the court that “it is true”. In criminal case 1364 of 2018, the facts as narrated by the prosecution were “facts as per the charge sheet. In criminal case 1360 of 2018, the facts were narrated and it was not clear what language was used. The facts were that it was reported on 19.11.2018 that the complainant’s house had been broken into and it was established that her TV was stolen and on 21.11.2018 the appellant was arrested. In criminal case 1361 of 2018, the facts were narrated and it was not clear what language was used. The facts were that it was reported on 19.11.2018 that the complainant’s house had been broken into and it was established that her TV was stolen and on 21.11.2018 the appellant was arrested; upon interrogation he led the police to the abandoned home where the TV and bolt cutter were recovered. In criminal case 1362 of 2018, the facts were narrated and it was not clear what language was used. The facts were that the complainant discovered on 5.9.2018 that his house had been broken into and on 25.11.2018 the appellant was arrested by the public and on interrogation he confirmed to have broken into the complainant’s house and sold the phone to his co accused who was arrested; they were jointly charged. The charge against his co accused was withdrawn under Section 87(a) of the Criminal Procedure Code. In criminal case 1363 of 2018, the facts were narrated and it was not clear what language was used. The facts were that it was reported on 19.11.2018 that the complainant’s TV was stolen and the appellant was arrested by the members of the

public and he led the police to where the TV was found.

3. In each of the respective cases, the appellant told the court that "*the facts are correct*". The trial magistrate entered a plea of guilty and convicted the appellant accordingly and sentenced the appellant to two years imprisonment each in respect of the 1st count and 12 months imprisonment in respect of the 2nd count and the sentences were to run concurrently. The appellant was dissatisfied with the findings of the trial court hence filed criminal appeal 63 of 2019 that was filed out of time pursuant to leave granted on 11.7.2019. There is no application for consolidation of the appeals, neither is an order for consolidation of the same. What is on record is an application for leave to file the appeal out of time and leave was granted in criminal appeal 63 of 2013 solely. However the court on 17.10.2019 directed the appellant to file separate appeals but the appellant seems not to have done.

4. I have seen files referenced as Appeal 84 of 2019 against Criminal case of **1360 of 2018; 85 of 2019** against C**riminal case of 1361 of 2018; 86 of 2019** against C**riminal case of 1362 of 2018 and 87 of 2019** against **Criminal case of 1363 of 2018**. However none of the files contain a memorandum of appeal; they simply contain the proceedings of the trial court. The files indicate on their cover that the respective appeals were lodged in the High court on 4.11.2018 and yet the date of judgement in the trial court was indicated as 22.11.2018. By all standards this information is misleading and is also careless and I urge the registry staff to be keen when opening files. Clearly there is no memorandum of appeal filed in the respective files 84 to 87 of 2019 and I am cognizant of directions given by this court on 11.7.2019 wherein the Deputy Registrar was directed to open separate appeals for the 5 matters. This means that as of today, there is no appeal in writing against the decisions and or Sentence in Criminal cases 1360 to 1363 of 2018. The court erroneously admitted the respective appeals that are evidently in contravention of Sections 350 and 351 of the Criminal Procedure Code.

5. Section 350 and 351 of the Penal Code Act is to the effect that

> ***350. Petition of appeal***
>
> > *(1) An appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall (unless the High Court otherwise directs) be accompanied by a copy of the judgment or order appealed against.*
>
> ***351. Appellant in prison***
>
> > *If the appellant is in prison, he may present his petition of appeal and the copies accompanying it to the officer in charge of the prison, who shall thereupon forward the petition and copies to the Registrar of the High Court.*

6. In what is seemingly a combined memorandum of appeal against the Sentence in Criminal cases 1360 to 1364 of 2018 the appellant sought that he was a first offender and sought for leniency; he sought that he be heard de novo; he averred that he was under the influence of drugs; he prayed for a non-custodial sentence; he prayed for consolidation of all the counts to run concurrently. As of the date of writing this judgement the petition that is before me is in respect of Criminal Appeal 63 of 2019 against the sentence in criminal case 1364 of 2018 and I so proceed with the same. As there was an error in admitting the said appeals 84 to 87 of 2019 against Case 1360 to 1363 of 2018 as is now apparent it is necessary to vacate the earlier orders admitting Appeal numbers 84 to 87 of 2019 and direct the appellant to file the petition of appeals in the said files. Consequently the decisions in respect of the same are hereby stayed and that the appellant is directed to regularize the court record by supplying his respective Memorandum of Appeals for the four matters.

7. The appellant prayed that the appeal be allowed and the conviction quashed and sentence set aside.

8. The appellant in support of the appeal, submitted that he sought reduction of the sentence on each count as they were too much for him.

9. In response, the learned counsel for the state opposed the appeal and submitted that the appellant was convicted on his own plea hence he can only challenge the legality of the sentence. According to counsel, the sentence meted on the appellant of two years was within the law and urged the court to dismiss the appeal. Counsel pointed out that the complainants were not the same and the sentences ought t run consecutively.

10. In rejoinder, the appellant submitted that since the sentences were given in one day, the same ought to run concurrently.

11. The issues to be determined are the propriety of the plea of guilty and the orders that the court may grant. According to section 348 of *The Criminal Procedure Code*, no appeal is allowed in the case of any person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the legality of the plea or to the extent or legality of the sentence.

12. Having been convicted on his own plea of guilty, the appellant is challenging the sentence. However the facts reveal that there are issues with regard the manner in which the plea was recorded, *a priori* the legality of the plea.

13. The correct procedure of recording a plea of guilty and the steps to be followed by the court is now well established following the decision in ***Adan v. Republic, [1973] EA 446*** where Spry V.P. at page 446 stated it in the following terms:

> **"When 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. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. 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. 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. If the accused**

does not agree with the statement of facts or asserts additional facts 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. 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. The statement of facts and the accused's reply must of course be recorded."

14. It is incumbent upon a trial court when recording a plea to be meticulous in ensuring first that the charge is read and explained to the accused in the language he or she understands or is familiar with to enable him or her plead to the same properly and in unequivocal manner. In cases where an accused pleads guilty, to record the answer the accused gives as clearly as possible in the exact words used by the accused. Reading the facts of the case is meant to ensure that an accused's plea is taken in unequivocal manner and there should be no doubt as whether the accused has understood the charges facing him in addition to the substance and every element of the charge.

15. The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty and thereafter, the facts are narrated to the accused person and he or she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence, otherwise the plea is not unequivocal. The facts as read to the accused must disclose the offence. The accused is only to be convicted when facts narrated are in unison with the offence charged (see ***R v Peter Muiruri & Another (2014) eKLR***).

16. With all due respect the facts as read out do not indicate the language that was used to enable the appellant understand the details of the charges that were facing him. The court proceedings on the date plea was taken does not indicate the selected language of interpretation used. The facts also do not indicate the elements of the two offences that the appellant was charged with as elucidated from the provisions of Section 305 (1) of the Penal Code and Section 268 as read with Section 275 of the Penal Code. In the result, the facts as narrated by the prosecution not being in the language the appellant understood, do not disclose the elements of the offence that the appellant was charged with the plea was equivocal and cannot sustain the conviction. Consequently the appeal must succeed with the result that the conviction ought to be quashed and the sentence set aside.

17. Where a conviction is quashed and sentence set aside, the question always follows as to whether there should be a re-trial. It is a basic principle of constitutional law that no person may be twice placed in jeopardy, that is, put on trial with the possibility of conviction and punishment, for the same criminal offense. In cases where the appellate court forms the opinion that a defect in procedure resulted in a failure of justice, it is empowered to direct a retrial but from the nature of this power, it should be exercised with great care and caution. An order for a retrial should not be made where for example due to the lapse of such a long period of time, it is no longer possible to conduct a fair trial due to loss of evidence, witnesses or such other similar adverse occurrence.

18. The Court of Appeal in the case of **Mwangi vs. Republic [1983] KLR 522 held** as follows;

"…several factors have therefore to be considered. These include:

1. ***retrial will not be ordered if the conviction was set aside because of insufficient evidence.***

2. ***A retrial should not be ordered to enable the prosecution to fill up the gaps in its evidence at the first trial.***

3. ***A retrial should not be ordered where it is likely to cause an injustice to the accused person.***

4. ***A retrial should be ordered where the interest of justice so demand.***

Each case should be decided on its own merits."

19. Because of the infraction on the procedure of narrating the facts to the appellant I find that a retrial will occasion injustice because the appellant was sentenced to 2 years imprisonment and 18 months imprisonment that presumably are running from 21.11.2018 when he had been in custody and by the time the matter is sent back to the trial court, he will have served the bulk of her sentence and there is no guarantee that the matter will be heard and finalized in the trial court before the bulk of the sentence is served . The circumstances of the case do not warrant an order for a retrial. The appeal must succeed.

20. In the result I find merit in the appellant's appeal. The same is allowed. The conviction is quashed and the sentences set aside. The appellant is ordered to be set at liberty forthwith unless otherwise lawfully held. This order applies solely to the lower court file **Kangundo SPMC CR No.1364 of 2018.**

It is so ordered.

Dated and delivered at **Machakos** this **28th** day of **April,2020**.

D. K. Kemei

Judge