REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 128 OF 2019

DANIEL KALOVYA WENZI..... APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the sentence of the Senior Resident Magistrate Hon. A. Ndungu dated 19/08/2019 in Makindu SPMCR No. 775 of 2019.)

JUDGMENT

1. **Kalovya Wenzi** the Appellant herein was charged of the offence of breaking into a building and committing a felony, contrary to section 306(a) of the Penal Code. The particulars as stated in the charge sheet were that on the night of 14th and 15th day of August, 2019 at Siembeni town in Kibwezi sub-county within Makueni county jointly broke and entered into a bar of Isika Sammy and stole ten (10) bottles of Kane extra, thirteen (13) bottles of Moonwalkers, five (5) Guaranas, four (4) packets of cigarettes, two (2) dozens drinking water and Sayona sub-hoofer all valued at Kshs.18,300/= property of **Isika Sammy.**

2. When he was arraigned in court on 19th August 2019, the charge was read to him and he pleaded guilty and was convicted. After mitigation he was sentenced to three (3) years imprisonment.

3. Being dissatisfied with the conviction and sentence he lodged an appeal on 28th August 2019 in person. However, on 27th February 2020 the firm of Muyasa & Co. advocates filed an amended petition of appeal upon obtaining leave from the court on 25th November, 2019.

4. He raises the following grounds:

a) That, the learned trial Magistrate erred both in law and facts when he failed to find and hold that there was no enough evidence on the part of the prosecution because they relied on the brief facts of the charge sheet.

b) That, the learned trial Magistrate erred both in law and in fact when he failed to find and hold that the prosecution had failed to prove their case beyond reasonable doubt and as such give the benefit of doubt to the Appellant.

c) That, the trial Magistrate erred in law and fact by considering some hearsay evidence in her conviction and as such reached a wrong decision.

d) That, the learned trial Magistrate erred both in law and fact when she convicted the Appellant against the weight of evidence.

e) That the learned trial Magistrate erred both in law and fact by imposing a sentence which was excessive in the circumstances.

f) That the learned trial Magistrate erred in both in law and fact in convicting the accused of the offence of breaking into a building and committing a felony contrary to section 306(a) of the Penal Code when it was clear from the facts as read and all the circumstances that the plea was equivocal.

g) That the learned trial Magistrate erred in law and fact in failing to indicate the language used in court and whether there was an interpreter.

5. The appeal was canvassed by way of written submissions. Mr. Munyasya for the Appellant submits that the Appellant's plea was equivocal. The reason for this he says is that the ingredients and nature of the case were not explained to the Appellant with certainty as required by law. That the nature of the admission is not clear. That a detailed inquiry into the offence should have been made by the court from the accused to be sure that he understood the charge. He relied on the case of **Samuel Wafula Ominde Kiambu HCCRA No. 96 of**

6. He also submits that the record does not indicate the language used by the court during trial. It does not also indicate whether or not there was an interpreter in court.

7. On whether a retrial should be ordered or not he submits that the errors were not due to any fault of the Appellant and so no retrial should be ordered. He argues that the complainant is no longer interested in the matter and he even wrote a letter to the court to that effect.

8. Mrs. Gakumu learned counsel for the Respondent opposed the appeal. In her submissions she argues that the appeal is incompetent by virtue of section 348 of the Criminal Procedure Code which provides as follows:

> ***"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 of legality of the sentence."***

9. She submits that the requirements for recording of a plea of guilty provided for in section 207 Criminal procedure Code and which were elucidated in **Adan –vs- R (1973) E.A 445** are as follows:

i. The charge and all the essential ingredients of the offence should be read to accused in his language or in 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 immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any other relevant facts.

iv. If the accused does not agree with facts or raises any questions or on his guilt, his reply must be recorded and charge of plea entered.

v. If there is no charge of plea, a conviction should be recorded and the statement of facts relevant to sentence together with the accused reply should be recorded.

10. Counsel contends that the charge was read and explained to the Appellant in Kiswahili language which he understood. Secondly, Article 50(2) of the constitution which provides that

Every accused person has the right to a fair trial, which includes the right –

a) To be presumed innocent until the contrary is proved;

b) To be informed of the charge, with sufficient detail to answer it.

was complied with to the letter.

11. On sentence she argues that the sentence of three (3) years is too lenient compared to what section 306 Penal Code provides as the sentence i.e. seven (7) years imprisonment. That the discretion exercised by the trial Magistrate is in line with the Supreme Court decision of **Francis Karioko Muruatetu & Anor. No. 15 & 16 of 2015.**

Analysis and determination

12. This is a first appeal and I am duty bound to re-analyze and re-consider all the evidence on record and come to my own conclusion. See **Okeno –vs- R (1972) E.A; Kiilu & Anor –vs- R (2005) 1 KLR 174; Simiyu & Anor –vs- R (2005) 1KLR 192.**

13. I have considered the evidence on record, grounds of appeal and the submissions by both parties. The two issues I find falling for determination are: -

i. Whether the plea was unequivocal.

ii. If (i) is in the affirmative whether the sentence is harsh and excessive. If (i) is in the negative what would be the next cause of action.

14. The case of **Adan –vs- R** (*supra*) has clearly set out the principles upon which a plea should be taken. The same have been summarized at paragraph **9** of this judgment. The Appellant has raised issue with the fact that there was no interpretation and so he never understood the charge and its contents. The trial court is also accused of not inquiring from the Appellant if he understood the charge.

15. All these issues can be discerned from the record. The Appellant faced a charge under section 306 (a) of the Penal Code which provides:

Breaking into building and committing a 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"***

The main ingredients in this offence are: breaking into a building; entering and committing a felony.

16. The particulars in the charge sheet are as reproduced in paragraph **1** of this judgment. A scrutiny of these particulars shows:

- There was a breakage and entry into a bar owned by Isika Sammy.

- Several named items were stolen from the said bar.

17. The record shows the Coram on 19th August 2019 as follows:

19.08.2019

Before Hon. A.G. Ndungu – SRM

Prosecutor – Chepkonga

Court clerk – Winfred

Accused – present

1st accused – Kiswahili

2nd accused - Kikamba

18. Contrary to the Appellant's allegations the record shows there was a court clerk in court called Winfred. The Appellant who was the 1st accused indicated his language of use as Kiswahili.

19. The national language of Kenya is Kiswahili while the official languages are Kiswahili and English. (*See* ***Article 7(1) and (2)*** *of the constitution*). The courts use English and Kiswahili as their official languages. The presence of Winfred as the court clerk confirms that he understood both official languages. Since the Appellant elected Kiswahili as his language of use it clearly meant Winfred was interpreting for him the English into Kiswahili. There was therefore no need for a special interpreter for him.

20. After he pleaded guilty to the charge the court called upon the prosecutor to give the facts. These facts are more elaborate than the particulars in the charge sheet. They are detailed and indicate that the Appellant was found in possession of a Sayona – sub hoofer which was one of the stolen items and which the complainant identified. This was his response;

"Maelezo ni ya ukweli". Meaning – Facts are correct."

21. He did not deny any of the facts and neither did he raise any issue with the said facts. He was thereafter convicted. He was given an opportunity to mitigate. He did not say anything in mitigation which could have negated his plea of guilty. I therefore find that the learned trial Magistrate followed the principles laid down in the case of **Adan –vs- R** (supra) and the plea is unequivocal.

22. The Appellant was said to be a first offender. In mitigation he said he is old with a family that depends on him. The particulars show that the value of the stolen items was Kshs.18,300/=. It is also not lost to the court's mind that there was a co-accused. Given the circumstances of the case, the trial court should have called for a pre-sentencing report for consideration before sentencing him to three (3) years imprisonment.

23. The result is that the appeal succeeds on sentence alone. I therefore uphold the conviction and set aside the sentence of three (3) years imprisonment. The Appellant is fined Kshs.30,000/= in default five months imprisonment. Credit should be given for the period he was in prison from 11th September, 2019 – 1st October 2019 when he was released on bond pending appeal.

Orders accordingly.

Delivered, signed & dated this 30th day of June 2020, in open court at Makueni.

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H. I. Ong'udi

Judge