



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

HIGH COURT CRIMINAL APPEAL NO.18 OF 2019

KHADIJAH ABDI BONAYA.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

***(Being an appeal from the conviction and sentence by HON. G. O. KIMANGA (SRM) IN KERICHO
CR. CASE NO.1756 OF 2019 delivered on 13/5/2019 at Kericho)***

JUDGMENT

1. The Applicant was charged with the following charges.

COUNT 1:- Being in possession of **NARCOTIC DRUGS** Contrary to Section 3(1) as read with Section 3(2) of the Narcotic Drugs and Psychotropic Control Act No.4 of 1994.

2. Particulars of Count 1 were that on 30/4/2019 at Litein Township in Bureti Sub-County within Kericho County, the Applicant was found in possession of 60 rolls of bhang, 22 brooms of bhang, ¼ kg of bhang and another broom of bhang with a street value of Kshs.27,000/= which was not medically prepared.

3. The Appellant was charged with a 2nd Count of Burglary Contrary to Section 304(2) and Stealing Contrary to Section 279(b) of the Penal Code.

4. The particulars of the 2nd Count were that on the night of 27th and 28th September, 2018 at Litein Township in Bureti Sub-County within Kericho County, the Appellant jointly with others not before Court broke and entered the dwelling house of **SELINA AUMA OMITI** with intent to steal and did steal from therein 1 D-light Sola Panel, one Gas Cooker, One T.V. Set, make Aucuma and cash kshs.44,900 the property of **SELINA AUMA**

5. The Appellant was charged with a 3rd Charge of having suspected stolen property Contrary to Section 323 of the Penal Code in that on 30/4/2019 at Litein Township I Bureti Sub-County within Kericho County having been detained for the offence of being in possession of bhang was found in possession of one phoenix Solar Pane, Omax Music Mixer, one Sumsung flat Screen TV 21 Inch, one Girro Flat Screen TV 14 Inch, 1 GLD flat Screen TV 14 Inch, one HP Monitor, one HP CPC, one LG Decoder, one Tecno Mobile Phone and one Laptop make Lenovo reasonably suspected to have been stolen or unlawfully obtained.

6. The Appellant pleaded guilty to the charges and the prosecution gave the facts as follows:-

Facts are that on 30/4/2019 at 6 p.m. Police Officers from Litein got tip off that the Accused had Narcotics namely bhang in her Kiosk at Litein Township and was selling to young persons. The Officers proceeded there where they met Accused and several young men about 20. The Officers conducted search. Each man had roll of bhang. Search at house, they recovered rolls (60) in her trench coat, arrested them, proceeded to her home for further search where they recovered 22 rolls of bhang wrapped in broom like under her bed.

There were assorted electronic items 1 d-light solar panel, 1 phoenix solar panel, Mixer, Sumsung TV, Flatscreen TV 14 inch, Flatscreen G18, 1 computer monitor, LG decoder, 1 Tecno Mobile Phone, 1 Lenovo Laptop. Was interrogated but could not account for the items. Escorted to Litein Police Station. Police called public to identify the items. Selina Auma, member of Public positively identified D-light solar panel using receipt and an abstract for reports made. Accused was arraigned in Court with Exhibits.

7. The Appellant was convicted on her own plea of guilty and in mitigation she asked for forgiveness and said she is the sole bread winner of her family and a single mother with children in school.

8. The Court sentenced the Appellant as follows:-

COUNT I:- 4 years Imprisonment.

COUNT II:- 3 ½ Years imprisonment.

The sentences were to run concurrently.

9. The Appellant has now appealed to this court against the sentence on the following grounds.

(i) **THAT** the Trial magistrate erred in fact and in law in convicting the Appellant on a charge whose particulars were fatally defective.

(ii) **THAT** the plea was unequivocal.

(iii) **THAT** the Trial Court did not consider the Appellant's mitigation.

(iv) **THAT** the Trial Court erred in convicting the Appellant yet the charges were not translated into Borana, the only language she understands.

10. The parties filed written submissions which I have duly considered. The Appellant submitted that the only language she understands is Borana and that the charges were not translated into the only language she understands.

11. The first duty of the Appellate court is to re-evaluate the evidence before the trial court and arrive at its own independent conclusion bearing in mind that the trial court had an opportunity to see the witnesses.

12. In the case of **Okeno vs. Republic [1972] EA 32**, the Court of Appeal set out the duties of a first appellate court 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (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 finding and conclusion; 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 vs. Sunday Post [1958] E.A 424.”

13. Similarly in **Kiilu & Another vs. Republic [2005]1 KLR 174**, the Court of Appeal stated thus;

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.

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; 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.”

14. In the current case the Appellant was convicted on her own plea of guilt and she does not have a right of Appeal against the conviction unless she is challenging the conviction on the basis that the plea of guilty was equivocal.

15. The issues for determination in this Appeal are as follows;

(i) **Whether the plea was unequivocal**

(ii) **Whether the Appellant understood the language in which the plea was taken.**

(iii) **Whether the charges were fatally defective.**

(iv) **Whether the Trial Court considered the Appellant's mitigation.**

16. In the case of **Adan v Republic [1973] EA 445**, one of the leading authorities on the way to take a plea, it is required that the charge and all the essential ingredients of the offence should be explained to the accused in his language or a language he understands. The said case set down the following simple steps;

“(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 raises 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.”

17. It is therefore a legal requirement that when a person is charged, the charge and the particulars should be read out to him or her, so far as possible in his or her own language, but if that is not possible, then in a language which he or she can speak and understand.

18. I find that the record does not show the language in which the plea was taken. It is granted that criminal proceedings must be conducted in a language understood by the accused person. This is an explicit requirement of a fair hearing. This is captured in Article 50(2)m of The Constitution 2010 which provides that,

“50(2) Every accused person has the right to a fair trial, which includes the right

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

19. The issue of language is also the subject of Article 50(3) which reads;

“If this Article requires information to be given to a person, the information shall be given in language that the person understands.”

20. Those Constitutional requirements are repeated in Section 198(1) of The Criminal Procedure Code as follows: -

“whenever any evidence is given in a language not understood by the accused; as he is present in person, it shall be interpreted to him in open Court in a language he understands.”

21. The requirement to use a language the Accused person understands extends to all proceedings including plea taking.

22. For those reasons I find that the plea was not unequivocal and the next question is whether this court should order a retrial.

23. The general principle in regard to re-trials is that a re-trial should only be ordered where it is unlikely to cause injustice to the accused. In *Obedi Kilonzo Kevevo –Vs- Republic* (2015) eKLR the Court of Appeal held that:-

“Generally, where a suspect has not had a satisfactory trial, the fairest and proper order to make is an order for a retrial. A retrial on the other hand will be ordered only where the interests of justice require it and if it is unlikely to cause injustice to the appellant”.

24. I find that the Appellant has been in custody since she was convicted and a retrial will be prejudicial to her.

25. I allow the Appeal and I accordingly quash the conviction and set aside the sentences imposed upon the Appellant.

26. I direct that the Appellant be set free unless lawfully held for any other reason.

Dated, Delivered and Signed this 24th Day of September 2020

A.N ONGERI

JUDGE