



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL APPEAL NO.3 OF 2020**

**CORAM: HON. R.E. ABURILI J**

**GEORGE OMULLO TINGIA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(An appeal from original conviction and sentence of Bondo PM Criminal Case No. 1110 of 2019 by Hon. S.W. Mathenge, SRM dated 24<sup>th</sup> December 2019)*

**JUDGMENT**

1. The appellant herein **GERORGE OMULLO TINGIA** was charged with the offence of Burglary contrary to section 304 (2) and stealing contrary to section 279(6) of the Penal Code. Particulars of the offence are that on the night of 22<sup>nd</sup> December, 2019 at unknown time, at Ajigo Market Ajigo Sub location in Bondo sub county within Siaya County broke and entered into a dwelling house of Berley Akoth Obiero with intent to steal therein and did steal from there in one bag containing assorted clothes, personal documents, one national identity card, cash Kshs 1,180, one pair shoes the property of Berley Akoth Obiero items being of the value of Kshs 5000.
2. The appellant also faced the alternative count of handling stolen goods contrary to section 322(1) of the Penal Code. The particulars are that on the 22<sup>nd</sup> day of December 2019 at around 1450 hours at Ajigo market Ajigo sub location in Bondo Sub county within Siaya County, otherwise than in the course of stealing retained one bag containing assorted clothes, one pair shoes and personal documents all valued at Kshs 3,000 the property of Berley Akoth Obiero knowing or having reason to believe that it was stolen goods.
3. The appellant was arraigned on 24/12/2019 before Hon S.W. Mathenge, Resident Magistrate and upon the charge and particulars thereof being read out to him by the court in the English language, he pleaded guilty to the main count of burglary and stealing and he was convicted accordingly. The prosecution then stated that they had no records and the court accorded the appellant an opportunity to mitigate. In mitigation, the appellant prayed for forgiveness and stated that he was supposed to go to school. He prayed for non-custodial sentence.
4. The trial magistrate then sentenced the appellant to serve 2 years imprisonment on the charge of stealing and two years' imprisonment on the charge of burglary, sentences to run concurrently.
5. Aggrieved by the said conviction and sentence, the appellant despite delaying to file an appeal within the statutory stipulated period of 14 days he applied before this court vide Miscellaneous Criminal Application No 3 of 2020 for extension of time and by a ruling delivered on 27th January 2020 this court granted the appellant leave to file an appeal within 14 days of even date hence this appeal.
6. The Petition of Appeal is dated 6<sup>th</sup> February 2020 accompanied by written submissions. In the said petition of appeal, the appellant sets out 9 grounds of appeal which basically challenge the charge facing the appellant on the ground that the facts as read out to the appellant did not disclose any offence for burglary, that the plea of guilty as recorded by the trial court was equivocal. That the charge was not read in the language understood by the appellant, that the trial court did not explain to the appellant the gravity of the offence and the consequences thereof and that the sentence imposed on the appellant was unduly harsh and manifestly excessive in the circumstances.
7. The appellant therefore urged this court to allow the appeal, quash the conviction and set aside the sentence imposed on the appellant and set him at liberty.

**SUBMISSIONS**

8. In support of the grounds of appeal, the appellant's counsel Ms Anyango Owino filed written reiterating that the plea was equivocal and cited section 207 of the Criminal Procedure Code on how a plea of guilty should be recorded by the trial magistrate. Counsel also cited the

cases of **Adan V Republic [1973] EA 445** and **Kariuki v Republic [1984] KLR 809** the locus classicus cases on how an unequivocal plea of guilty should be taken by the trial court.

9. Counsel for the appellant submitted that in the instant appeal, even though the interpreter was present in court, interpretation services were not accorded to the appellant and that the facts readout to the appellant omitted the element of time which is an essential ingredient of the offence of burglary which must have been committed at night. That the facts as read out to the accused/appellant speak to the third person and not the appellant. It was submitted that the prosecution only narrated facts of the alternative charge of handling stolen property to which the accused /appellant responded that facts were correct yet the alternative charge was never read out to the accused person and that neither was he convicted of the same hence it is not evident on record whether he understood the facts. Reliance was placed on the case of **Republic v Yosnami Egalu & others [1965]9 EA 65**.

10. Counsel submitted further that there is no evidence that the trial magistrate explained to the appellant the consequences of the admission of the offence hence the appeal against conviction and sentence that followed should be allowed.

11. Opposing the appeal, Mr. Okachi Senior Principal Prosecution Counsel or the Respondent made oral submissions at the hearing of the appeal on 16/9/2020 contending that the appeal has no merit. Counsel submitted that the plea was unequivocal as the language of the court used and which the appellant said he understood was English and that he admitted the charge. Further, that the appellant mitigated and the sentence imposed was lenient and lawful hence this court should uphold the lower court's decision.

#### **ANALYSIS & DETERMINATION**

12. Section 348 of the Criminal Procedure Code bars appeals from subordinate courts where an accused was convicted upon a plea of guilty except on the extent and legality of sentence. The said section provides:

*facts or to add any relevant facts;*

*d. if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused reply.*

**See also Korir v. Republic [2006] E.A. 124**

18. My task in this appeal is therefore to determine whether the above procedure was followed in the trial court. For this reason, and having reproduced the charges as framed in the charge sheet dated 24<sup>th</sup> December 2019, I will reproduce verbatim the facts of the case as read to the appellant in the English language in trial court and his response in English thereof. The facts as stated by the court prosecutor Mr. Mayaba were that:

be committed at night.

23. The appellant also contended that he was not warned of the consequences of pleading guilty to the offence. However, I find no substance in this allegation as the offence charged was not a capital offence or an offence that carried long term sentence like in the case of defilement to warrant such warnings.

24. On whether the facts as read out and admitted by the appellant disclosed the offence of burglary, The Appellant was charged with the offence of **Burglary C/S 304 (2) and stealing contrary to section 279(6) of the Penal Code. The said Section provides:**

***“If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.”***

25. The charge was read out in th English language and that is the only language that is indicated on record therefor I find no reason to doubt the trial court’s appreciation of which language the appellant understood as he has not told this court that he did not understand the English language used by the trial court. I dismiss the allegation that the plea was taken in language that the appellant did not understand.

26. However, in a charge of burglary, the facts must clearly disclose that the offence took place at night. The court is not supposed to interpret or infer the facts as was in this case where the prosecutor only said the complainant went to sleep and forgot to lock the door. The facts do not even disclose the name of the complainant. In the absence of proof of the exact time the offence the Appellant had been charged with occurred, this court is unable to conclude that the offence of burglary had been committed and proved beyond reasonable doubt from the facts read out to the appellant

27. The fact that the Appellant had the unnamed complainant’s bag containing assorted items was not proof of burglary.

28. This court finds that the Prosecution did not, from the facts read out and admitted by the appellant, prove the charge of burglary and in this regard, the Learned Trial Magistrate therefore erred in convicting the Appellant on the said charges.

29. From the charge sheet, the offences are alleged to have been committed on 22/12/2019 but the facts did not establish the actual time of commission whether at night as required in section 304(2) of the Penal Code. The charge sheet also shows that the appellant was arrested on 22/12/2019 and in the alternative charge of handling stolen goods, the appellant was found in possession of some of the alleged stolen items. In my humble view, the alternative charge of handling stolen goods was therefore a reasonable charge which the trial court could have considered as the facts in the main count did not disclose the offence of burglary. However, there was no such consideration of the alternative charge which was relevant.

30. This court has power to re-evaluate the evidence and convict the Appellant on the alternative charge.

31. In considering this alternative charge, this court takes into account the events of 22/12/2019 when the Appellant was said to have been arrested with PW 1’s items. However, since the facts did not disclose the charge of burglary, the trial court should have rejected the plea of guilty on the first count and asked the appellant to plead to the alternative count of handling stolen goods which she did not.

32. For the above reasons, I need not delve into the sentence imposed and whether it was harsh or excessive as the trial magistrate in fact convicted the appellant to jail not sentencing him to the respective jail terms.

33. Accordingly, I hereby find this appeal merited. I allow the appeal against conviction and sentence imposed on the appellant herein. I quash the appellant’s conviction and set aside the two years prison sentence imposed.

34. I would have ordered for the retrial of the appellant but he has served nearly nine months imprisonment of the 2 years concurrent sentence imposed.

35. The principles governing whether or not a retrial should be ordered were enunciated by the Court of Appeal of East Africa in the case of **Fatehali Manji v Republic [1966] EA 343** as follows:

***“In general, a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause injustice to the accused person.”***

36. 31.In **Mwangi v Republic [1983] KLR 522** the Court of Appeal held thus:

***“We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.”***

37. In the instant case, as earlier stated, as the appellant has served nearly half of the two years’ imprisonment, it would not be in the interest of justice to order for a retrial. Therefore, unless otherwise lawfully held, I hereby order that the appellant is hereby set at liberty forthwith.

38. On the whole, the appeal herein is allowed. The conviction of the appellant on an equivocal plea is hereby quashed and sentence thereof set aside. Unless otherwise lawfully held, the appellant **GEORGE OMULLO TINGA** is hereby set at liberty.

Orders accordingly.

**Dated, signed and delivered at Siaya this 21<sup>st</sup> Day of September, 2020**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

**Mr. Okachi SPPC for Respondent**

**Mr. Mirembe for Appellant**

**CA: Brenda**