REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL APPEAL NO. 113 OF 2019

ISAACK MUSYOKA KIMANTHI.......APPELLANT

-VERSUS-

REPUBLIC...RESPONDENT

(Appeal arising from the conviction and sentence by Honourable C.C. Oluoch (SPM) at Mavoko Senior Principal Magistrate's Court in Criminal Case No. 692 of 2018 delivered on 19.10.2018)

BETWEEN

REPUBLIC ....PROSECUTOR

-VERSUS-

ISAACK MUSYOKA KIMANTHI.............ACCUSED

JUDGEMENT

1. This is an appeal from the conviction and sentence of Hon. C.C. Oluoch Senior Principal Magistrate in Criminal Case No. 692 of 2018 on 19.10.2018. The Appellant was on 19.10.2018 charged with the offence of Burglary and Stealing contrary to section 304(2) and 279 of the Penal Code. The particulars of the charge were that the appellant "on the night of the 15th and 16th day of October, 2018 at Njogu-Ini area in Athi River Sub-county within Machakos County, jointly with others not before court, broke and entered into the office of the Chief Athi River location with intent to steal therein and did steal one black bag containing assorted clothes valued at Kshs 1,600/=, one jungle smoke jacket and a pair of handcuffs the property of one CECILIA MBETE NZYOKA." The appellant also faced an alternative charge of handling stolen goods contrary to section 322(1) as read with section 322(2) of the Penal Code.

2. When the charge was read to him, and interpreted in Kiswahili language, he responded that it was true and a plea of guilty was entered. The facts were read out to him by the prosecutor who produced the recovered items. The appellant told the court that the facts were correct. The court duly indicated that the appellant was convicted on his own plea of guilty. The court was informed that the appellant had been convicted in Cr 272 of 2018 and was serving 18 months' jail; that the offence was committed while the appellant was still serving under CSO. The appellant in mitigation told the court that he sought to be forgiven. The court noted that the appellant was not a first offender and that the offence called for a deterrent sentence. The appellant was on 19.10.2018 sentenced to 3 years' imprisonment in respect of the offences of Burglary and Stealing contrary to section 304(2) of the Penal Code and then 3 years' imprisonment for the offence of stealing contrary to section 279 of the Penal Code.

3. The appellant was dissatisfied with the decision of the trial court and on 5.8.2019 he appealed to this court after the grant of the requisite leave. The appellant prayed that the appeal be allowed, the conviction be quashed, and that the sentence be set aside. He sought that the sentence meted on him be interfered with. On record are written grounds of mitigation wherein the appellant sought that the court interfere with the decision of the trial court on the grounds of legality and severity of the sentence; vitiated conviction(sic); offence duplicity; grossly defective charge sheet; flawed plea of guilty; lacuna in weight of evidence; disregarded mitigation and remorse and rehabilitation.

4. Submitting in support of the appeal, the appellant sought to invoke the provisions of section 361 of the Criminal Procedure Code and urged the court to consider his mitigation. Reliance was placed on the case of **Jason Akumu Yongo v R (1983) eKLR** in submitting that the charge sheet was defective for one count had 2 sections of the penal code being section 304(2) and 279 of the Penal Code. It was submitted that section 279 of the Penal Code was in conflict with the particulars of the case. The appellant challenged the procedure for taking the plea and he submitted that he was remorseful. Reliance was placed on the case of **Ogolla s/o Owor v R (1954) EACA 270** in urging the court to interfere with the sentence.

5. In response, the learned counsel for the state conceded to the appeal and argued that the plea that was recorded was in line with the procedure. It was submitted that the court did not factor the mitigation of the appellant and that the sentence was excessive. The court was urged to reduce the sentence and bear in mind the time served.

6. The issues to be determined are on 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.

7. Having been convicted on his own plea of guilty, the appellant in his submissions by challenging inter alia the manner in which the plea was recorded, is in essence appealing the legality of the plea. However this challenge did not appear in the memorandum of appeal since in the memorandum of appeal the appellant seemed to seek for a downward review of the sentence meted on him.

8. Be that as it may, the 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*."

9. 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.

10. 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 and confirms the same to be true. 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***).

11. The sections that the appellant was charged with provide as follows;

> *Section 304(2) (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years*.
>
> Section 279(b)
>
> *If the theft is committed under any of the circumstances following, that is to say (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;*
>
> *the offender is liable to imprisonment for fourteen years*
>
> ***"dwelling-house"*** *includes any building or structure or part of a building or structure which is for the time being kept by the owner or occupier for the residence therein of himself, his family or his servants or any of them, and it is immaterial that it is from time to time uninhabited; a building or structure adjacent to or occupied with a dwelling-house is deemed to be part of the dwelling-house if there is a communication between such building or structure and the dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other, but not otherwise*;

12. For a charge under sections 304(2) of the Penal Code, it is necessary that the facts of the offence should specify; - the entry of a building used as a human dwelling; intent to commit a felony or having committed a felony in the building breaks out of the building. In the instant case, the facts as narrated by the prosecutor do disclose that the appellant broke into and entered the office of the chief. With all due respect the facts as read out are not in tandem with the provision of the law under which the appellant was charged. However when the appellant heard the facts and attended his trial he gave a positive response hence it can be said that the appellant understood the details of the charges that were facing him. In the result, it can be said that the plea was equivocal as the fact that the appellant was aware of the charges facing him. The same can sustain the conviction for the offence charged.

13. On the same count is a charge under section 279(b) of the Penal Code and the requirements to be elicited from the facts are that a thing was stolen from a dwelling house and that it was valued over Kshs 100/-. Yet again the position is the same as indicated in paragraph 12

above.

14. The appellant in his submissions has pointed out that the charge was bad for duplicity. I have looked at the charge sheet and noted that there are two different offences on the main count that require difference elements to be proved and as such I find that the charge is bad for duplicity. Black's Law Dictionary, 2nd edition defines duplicity as "*the technical fault in pleading, of uniting 2 or more causes of action in one count in a writ, or 2 or more grounds of defence in one plea, or 2 or more breaches in a replication, or 2 or more offences in the same count of an indictment*." The test to be met is whether there was a miscarriage of justice. See the cases of **Yozefu v Uganda (1969) EA 236** and **Saini v R (1974) EA 83** as well as **Laban Koti v R (1962) EA.** I find that there was indeed duplicity of charges; There was no fairness accorded to the appellant who pleaded guilty to two distinct and separate offences that were coined as one, however there was no miscarriage of justice because the breaking, the entry, the stealing were all part of the same incident and it was in order to include them in the same count. I am guided by the case of **Uganda v Amisi (1970) EA 291** in which it was observed that it is permissible to charge an accused in one count in respect of acts which are stated in a way that shows separate actions done separately in one single transaction which constitutes an offence. For that reason the charge would not be bad for duplicity. It was however not in order to have two sections of the law in the same count; but all in all there was no miscarriage of justice neither was there any prejudice occasioned to the appellant because he was aware of the charges he faced; he attended trial; he had the opportunity to raise the issue at trial and even on his grounds of appeal but he waived that option and belatedly opted to raise them in his submissions. Further, vide his memorandum of appeal, the appellant seemed to seek for a review of sentence thereby implying that he had no beef with his conviction.

15. The issue to be considered is what the court may do when faced with the instance where the facts prove that the appellant ought to have been charged under section 306 of the Penal Code and was instead charged under section 304 and no amendment was preferred by the trial court before it became functus officio. The court ought to consider a retrial.

16. As was stated in the case of **Ahmed Ali Dharmsi Sumar vs Republic 1964 E.A 481** and restated in **Fatehali Manji vs The Republic 1966 E.A. 343**:-

> ***"In general a re-trial 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 purpose 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 interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."***

17. 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. A 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."

18. I am satisfied that the prosecution evidence would sustain a conviction upon a retrial. However, because of the infraction on the provision of the law that the appellant was charged with, I hereby order a retrial. The availability of witnesses shall not be complicated as the prosecution witnesses can be availed with ease. Again, the appellant has barely served a fraction of his sentence and hence the justice of the case merits a retrial.

19. The appellant has also challenged the sentence imposed on him. The principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court were observed in the case of **Ogolla & s/o Owuor v Republic [1954] EACA 270** where the court stated:

> ***"The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in JAMES Vs. REPUBLIC [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case."***

20. Similarly, **Section 382 of the Criminal Procedure Code Act provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:**

> *"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:*

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

21. As indicated earlier the impropriety in the manner that the plea was taken merits interference by this court and in this regard I find irregularity was occasioned by the trial court in arriving at the conviction and sentence.

22. In the result, the appeal succeeds to the extent that the conviction is quashed and the sentence set aside and substituted with an order for a retrial. The appellant is hereby ordered to be presented before the Senior Principal Magistrate Mavoko Law Courts on the **17.9.2020** for the purposes of retrial.

It is so ordered.

Dated and delivered at Machakos this 16th day of September 2020.

D. K. Kemei

Judge