



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 20 OF 2018

FREDRICK MUTEMBEI KALUMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Chief Magistrate Court at Isiolo in Criminal case No. 302 of 2016 dated and delivered on 4th October 2016 –Hon R.G. Mundia –Rm)

JUDGEMENT

1. The appellant was charged and convicted on his own *plea of guilty* for the offence of **Stealing from a locked motor vehicle contrary to Section 279 (g) of the Penal Code**. The particulars of the offence were **1. Fredrick Mutembeikaluma 2. Douglas Mugambi 3. PhylossOkalaAiyetaih** on the night of 18th and 19th day of May 2016 at SokoMjinga in Isiolo District within Isiolo County with others not before court, broke from a locked motor vehicle, KCD 098Y and stole 2 blue dust coats labelled Mt. Kenya Milk and a bag containing the companies documents, cheque leaf in the name of NgachaMaina of Kshs. 379,691/=, 2 mobile phones of Kshs. 10,000/= the property of M/S Meru Central Dairy Cooperative Union and in order to commit such theft opened a locked motor vehicle KCD 098Y by breaking the window pane with metal bar.

2. The Trial court sentenced the appellant to seven (7) years imprisonment.

3. The appellant being aggrieved by the trial courts determination filed its memorandum of appeal raising six grounds of appeal summarised as follows;

(i) **That I was embarrassed by many counts read to me regarding the accusations I wasn't aware about.**

(ii) **That, I was in a state of confusion and I wasn't aware of what exactly was going on.**

(iii) **That the sentence was harsh and excessive.**

(iv) **That the trial court explained nothing to me concerning the consequence of pleading guilty to this offence.**

(v) **That I pray for an order for retrial as now am in my senses and ready to face prosecution.**

4. The appeal was canvassed by way of written submission. The appellant Submitted that the plea of guilty was unequivocal hence did not meet the threshold under Section 207 of the Criminal Procedure Code. He relied on the cited cases of **Adan V Republic (1973) EA 455 and Simon Gitau Kinene v Republic [2016] eKlr**. On sentencing he submitted that the same was excessive given his plea of leniency, he had no previous record and that the stolen goods were recovered. The appellant prayed the court to commute the sentence to the time of 4 years already served to date.

5. At the first instance all the accused persons pleaded not guilty to the offence. On 4/10/2016 the appellant asked the court to read the charges again.

6. The Court record reads as follows;

Before: RG Mundia RM

C/P: Kathurima

C/A: Mohamed

Accused 1: Present

Accused 2: Present

Accused 3: Present

Accused 1: I want the charge read again

Court: Charges read over and explained in Kiswahili

Accused 1-true

Court: A plea of guilty entered

7. After the facts were read to the appellant proceedings went further as follows:

Accused: Facts are correct

Court: Accused Convicted on his own plea of guilty

Mitigation

Your Honour my co-accused had nothing to do with the second accused. I had contracted him as my fundi. The third accused was my newly wedded wife.

Further I pray for leniency.

C/P: Your Honour I pray that the exhibits be returned to the owner through the investigation officer Cpl Polyne.

I also wish to withdraw the charges against the 2nd and 3rd accused and withdrawal under Section 87 (a) CPC.

Court: They are discharged with otherwise accused legally held sentencing on 14/10/2016.

Exhibit to be released to owners through investigation officer.

Sentence

Mitigation noted. Accused sentenced to seven years imprisonment. Right of appeal 14 days.

8. I wish to analyse the issues presented in the appeal under two headings;

(a) Whether the plea of guilty is equivocal?

(b) Whether the Sentence was too severe?

(c) The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in **Adan v Republic (1973) EA 445 at 446:**

“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 guilty, 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.....”

(d) In **Ombena v Republic [1981] Eklr** whether or not a plea can be accepted as unequivocal will depend on the circumstances of the case. It also held that;

“...The bald record that the prosecutor said “Facts are as per charge sheets”, and that the charge was read over and explained a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal...”

9. In this case the charges were read out to the appellant and explained in Kiswahili. From the proceedings one cannot discern whether Kiswahili is the language the appellant understood. It is not recorded that the charges were read out to him in Kiswahili because it was the Language he understood. The appellant admitted to the plea by stating “true”. This is in English. When the facts were read out to the appellant it is recorded that he admitted to the same by stating “facts are correct”. It is similarly not recorded who read the facts to the appellant and in what language the facts were read out to the appellant. This was not the correct procedure. The trial Court ought to have first ascertain the language the appellant understood. Seek the need of an interpreter where necessary. Read the charges to the appellant in a language he understood. See also; **David Nyongesa Okwaenge vs Republic [2010] Eklr**

10. Another more stringent and mandatory step escaped by the court is the explanation of the all the essential ingredients of the offence charged. When the court states charges read over and explained in Kiswahili, the limit to such explanation is not expressed. The severity of the sentence was also not made known to the appellant.

11. In **Elijah Njihia Wakianda v Republic [2016] eKLR** the Court of appeal Held as follows;

“We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language. We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process.

12. Also in the case of In the case of **Paulo MalimiMbusi v R Kiambu Crim. App. No. 8 of 2016** cited in **Simon GitauKinene v Republic [2016] eKLR** the court held as follows:

“In those cases where there is an unrepresented Accused charged with a serious offence, care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behooved the Court to warn the Accused Person of the consequences of a guilty plea.”

13. Given the circumstances of this case it is my considered view that the plea of guilty entered was not safe. Where, as here, a plea of guilty is not unequivocal, the ensuing conviction and sentence cannot be allowed to stand. See **Elijah NjihiaWakianda (supra)**. Accordingly I quash the conviction and set aside the sentence.

14. I have also considered whether it is wise to Order a re-trial in this case. At this time the appellant has already served four years imprisonment. The Penal Code provides for a maximum sentence of 14 years, the trial court had sentenced the appellant to seven years imprisonment. A re-trial will only give the prosecution an opportunity of filling gaps in its case. See also **Caleb Wawire Sifuna v Republic [2018] eKLR & John Njeru v Republic [1980]eKLR**

15. Having considered the evidence in its totality, the appeal succeeds. Accordingly, the conviction is quashed and the sentence set aside and unless otherwise lawfully held, it is ordered that appellant shall be released and set free forthwith.

HON ANNE ADWERA ONG'INJO

JUDGE

RULING DATED AND DELIVERED AT MERU ON THIS 29TH DAY OF OCTOBER 2020

HON ANNE ADWERA ONG'INJO

JUDGE