



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

CRIMINAL APPEAL 81 OF 2018

KENNEDY MJARASI MWARUTA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. E.K. Kagoni (SRM))

in Criminal Case No. 1349 of 2018, delivered on 10th August 2018

at the Chief Magistrate's Court at Mombasa)

JUDGMENT

1. The Appellant was charged with, and convicted of the offence of stealing by servant contrary to section 281 of the Penal Code, on his own plea of guilty. The particulars were that on 7th August 2018 at Multiple Inland Container Depot Kibarani in Changamwe sub County within Mombasa, being a servant to Multiple ICD (K) Limited, he stole 44 pairs of women open shoes valued at Kshs 22,000/=, the property of M/S Multiple ICD(K)Limited which came into his possession by virtue of his employment.

2. The Appellant was thereupon sentenced to serve two (2) years imprisonment. He is aggrieved by the conviction and sentence, and his Advocates, J.A. Abuodha & Company Advocates preferred this appeal by way of a Memorandum of Appeal dated 23rd August 2018. The grounds of appeal revolve around the plea taking by the Appellant, and Appellant's mitigation and sentence. The Appellant's Advocate in this respect averred that the trial magistrate erred in law and fact in failing to note that the plea taking was done in contravention of Article 50(1), and 2(b) of the Constitution; in failing to note that the plea was not unequivocal; in failing to determine the language understood by the Appellant and proceeding in a language the Appellant did not comprehend; in failing to warn the Appellant of the charges of pleading guilty; and in failing to note that the facts of the case were not explained to the Appellant and that the Appellant was in a state of confusion when he pleaded guilty.

3. Further, that the trial magistrate failed to consider the mitigation statements by the Appellant, and failed to give the Appellant the option of paying a fine when sentencing him. Ms. Abuodha, the Appellant's Advocate, made oral submission in Court during the hearing of the appeal in which she reiterated the above arguments. She added that the charge was for goods worth Kshs 20,000/= , yet the trial magistrate sentenced the Appellant to 2 years imprisonment to teach the public a lesson, but was not concerned about the Appellant's mitigation.

4. Mr. Masila, the learned Prosecution counsel, also made oral submissions and contended that the Appellant's plea was unequivocal, and took into account the decision in **Adan vs Republic**. He submitted in this respect that the trial magistrate read and explained to the Appellant the particulars of the charge, recorded his response, the prosecutor thereafter read the facts which were not disputed by the Appellant, and which proved all the ingredients of stealing. Furthermore, that after mitigation the trial Court sentenced the Appellant appropriately, and one of the elements of sentencing is to teach the members of the public a lesson, therefore the trial magistrate did not err in noting this principle.

5. I have considered the Appellant's mitigation and the submissions by the Prosecution. The issues for determination by this court are firstly, whether the plea of guilty by the Appellant was unequivocal; secondly, whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute; and lastly, whether the said sentence is amenable to reduction and /or variation.

6. The procedure to be applied in taking a plea of guilty was well enunciated in the case of **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

“(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 facts relevant to sentence together with the accused's reply should be recorded."

7. This procedure was reiterated by the Court of Appeal in **Kariuki vs Republic (1984) KLR 809** .The procedure as laid out in **Adan vs Republic (supra)** is also provided for under *section 207* of the Criminal Procedure Code which provides as follows:

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

(3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

8. Coming to the present appeal, the record of the trial Court shows that on 9th August 2018, the proceedings were as follows:

"9/8/2018

MAGISTRATE: Hon. E. Kagoni (Ms) SRM

PROSECUTOR/STATE COUNSEL: M/s Fundi

COURT CLERK: Momanyi

ACCUSED: Present

English/Kiswahili

The substance of the charge (s) and every element thereof has been stated by the court to the accused person in the language the he/she understand, who being asked whether he/she admits or denies the truth of charge (s) replies; True

Court:

Pleas of guilty entered for accused person.

Prosecutor:

I do not have the exhibits pray for a mention tomorrow.

Court:

Facts and sentencing on 10th August 2018. Accused to be remanded at Changamwe Police Station."

9. On 10th August 2018 the proceedings continued with the facts being given as follows :

"10/8/2018

Before Hon. E. Kagoni – SRM

Court Prosecutor: Fundi

Court clerk: Momanyi

Accused: Present

Prosecutor:

Matter for facts-on 7th August 2018 at Multiple ICD at around 10.10pm security guards at patrol stopped on truck KBW 102F/ZD 2514 which was leaving the premises. They reinstructed the driver to open the truck for inspection. He complied. Inside they found a box full of ladies open shoes. The driver told them that he had been given the box by the accused person to drop it to a place he was to collect them from. The driver was arrested and when the accused person was called he came and owned up for stealing the goods. He was escorted to Changamwe Police Station together with the exhibit whose value is KSh 22,000. Accused person's letter of appointment exhibit 1. The 44 pairs of shoes exhibit 2.

Accused:

The facts are true.

Court:

Accused convicted on his own plea of guilt.

Prosecutor:

No records.

Accused in Mitigation (A.I.M):

I plead for leniency. I was tempted. I regret mu actions.

Court:

Mitigations considered. Accused person broke his employer's trust by stealing from him. Employees have to learn to be trusted by their bosses. Metting non-custodial sentence on the accused person will not serve as a lesson to the rest. Accused has to be punished so that the rest learn from him. He is to serve 2 (two) years in prison.

Right of appeal 14 days.

HON. E. KAGONI (SRM)

10/8/2018"

10. It is evident from the said proceedings that there was an irregularity in the way the plea was taken. The elements of a charge, the particulars thereof and the facts giving rise to the charge are a package so to speak, when it comes to the recording an unequivocal plea of guilty. Consequently, the facts giving rise to the charge are required to be read immediately after the admission of a charge to ensure that the Accused person fully understands the facts that he or she is pleading to that constitute the offence he or she is accused of, and is still at liberty after the facts are read to dispute the same and plead not guilty. This also enables the trial court to relate the facts to the offence charged, and determine if they disclose the occurrence of the alleged offence, before proceeding to convict an accused person.

11. In the present appeal, it is evidence from the record that while the charge was read to the Appellant on 9th August 2018, the facts were read to him on 10th August 2018, and there is no record of the Appellant taking a fresh plea on that date. It is thus not evident to which charge the said facts related to.

12. I therefore find for the above reasons that the Appellant's plea of guilty was not unequivocal, and the conviction of the Appellant for defilement was not safe. The only outstanding issue therefore is whether I should acquit the Appellant or order a retrial. The principles governing whether or not a retrial should be ordered were summarized the case of Muiruri vs. Republic (2003) KLR 552, the court considered a similar situation and held as follows, inter alia:

“Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice require it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely the prosecution making or not.”

13. The Appellant was sentenced in 10th August 2018, and has therefore served six months of his sentence. Balancing all the interests, and taking into account the values of items that he was charged with stealing, I am of the view that it would not be in the interest of justice to hold a retrial.

14. I accordingly allow the appeal, and quash the conviction of the Appellant for the offence of the offence of stealing by servant contrary to section 281 of the Penal Code. I also set aside the sentence of two (2) years imprisonment imposed upon the Appellant for this conviction, and order that he be and is hereby set at liberty forthwith unless otherwise lawfully held.

DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF FEBRUARY 2019.

P. NYAMWEYA

JUDGE