REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 105 OF 2017

BETWEEN

WILLIAM AMBETSA .....APPELLANT

AND

REPUBLIC .....RESPONDENT

(Being an appeal from original conviction and sentence of five (5) years dated 4th September, 2017 by Hon. F. Makoyo, SRM in Butere PMCCr. Case no. 304 of 2017)

J U D G M E N T

Introduction

1. The appellant herein WILLIAM AMBETSA was convicted on his own plea of guilty to the charge of burglary contrary to Section 304(2) and stealing contrary to section 279(b) of the Penal Code. He was sentenced to 5 years imprisonment.

The Appeal

2. The appellant was aggrieved by both conviction and sentence, hence this appeal. The grounds of Appeal are as follows:-

1.) THAT the learned trial Magistrate erred in law and fact in holding the appellant's plea of guilty as unequivocal without first enquiring into the state of mind of the appellant as at the time of entering such plea

2.) THAT the learned trial magistrate grossly erred in law and fact by instantly passing sentence upon the appellant's plea of guilty without first informing the appellant of his rights as contained under Article 50(2) (g) (h) and (j) of the Constitution.

3.) THAT the learned trial magistrate grossly erred in law and fact in failing to adequately warn the appellant of the consequences of pleading guilty

4.) THAT the learned trial magistrate grossly erred in law and fact in handing the appellant a harsh custodial sentence without considering other available options including but not limited to probation and CSO

5.) THAT the learned trial magistrate grossly erred in law and fact by denying the appellant a chance to mitigate

6.) THAT the learned trial magistrate grossly erred in law and fact in handing the appellant a harsh sentence without considering the fact that the appellant was a first offender.

3. The appellant prays that his appeal be allowed, conviction quashed and sentence set aside.

4. This being a first appeal against sentence and conviction arising from a plea of guilty, the duty of this court in this regard is to satisfy itself as to whether or not the plea of guilty was unequivocal in accordance with the laid down principles for taking plea of guilty set out in the case of **Adan – vs- Republic [1973]EA 445**

The Charge and the facts

5. The particulars of the charge to which the appellant pleaded guilty are that on the night of 13th and 14th July, 2017 at Shibale Village, Ibokolo Sub-Location in Butere Sub-County within Kakamega County jointly with another not before court, broke and entered the dwelling house of Simon Atsulu Shikuku with intent to steal therein and did steal there [from] one bed, one sack of maize, two mobile phones make Samsung Galaxy and Techno, two chicken, one T-shirt one vest all valued at kshs.16,300/=, the property of SIMON ATSULU SHIKUKU.

6. In the alternative, the appellant was charged with handling stolen goods contrary to section 322(2) of the Penal Code. The particulars of the offence are that on 14th day of July, 2017 of Shibanga Village, Ibokolo Sub-Location in Butere Sub- county otherwise than in the course of stealing, dishonestly retained one bed valued at kshs.5,000/= knowing or having reason to believe it to be stolen goods, the property of SIMON ATSULU SHIKUKU.

7. When the appellant appeared for plea on 17th July, 2017, and after the substance of the charge was explained to the appellant in Kiswahili, a language he confirmed he understood, he answered, "**It is true**" to the main count and a plea of guilty was then entered. The facts were then given by the prosecution. Though the record does not indicate whether the appellant was asked by the court to admit, reject or add to the facts, the answer given by the appellant in response to the facts was:-" facts aren't correct"

8. The court correctly recorded " Plea of not guilty entered." The matter was then fixed for mention on 27th July, 2017 for pre-bail report. The appellant was in the meantime supplied with copies of charge sheet, investigation diary and witness statements (four). On 21st July, 2017, the appellant was granted bond of kshs.20,000/= with a surety of similar amount.

9. When the appellant appeared again on 4th August, 2017, he told the court he wanted to change his plea. The charges were read and explained to the appellant afresh in Kiswahili but the record does not show that he admitted the charge. The prosecution then went on to state the facts as follows; "facts as previously read to court – Bed -PExhibit 1. The appellant then stated "facts are correct" The court proceeded to convict the appellant on his own admission and after mitigation in which the appellant pleaded for leniency, the court asked for a pre-sentence report and set the case for mention on 11th August, 2017 for the report. Upon consideration of the presentence report, the appellant was sentenced to 5 years imprisonment.

Analysis and Determination

10. Having set out the record in his case, the only issues that arise for determination are whether the plea taken on 4th August, 2017 was unequivocal and secondly whether the sentence passed by the learned trial court was excessive in the circumstances.

11. With regard to the first issue it is my considered view that the requisite steps for taking of a guilty plea were all not followed by the learned trial Magistrate. In the first place, there is no admission by the appellant after the charge was read and explained to him. Secondly, the facts given by the prosecutor on that day were no facts at all. The facts had first been given on 17th July, 2017, and this court is of the considered view that by 11th August, 2017, the trial court would not, without having the facts given a fresh expect the appellant to remember those facts and to plead to them. For the two reasons, I find and hold that the plea taken on 11th august, 2017 was not unequivocal.

12. The other issue for consideration is on sentence. The offence of burglary and stealing has two limbs to it and the sentence for each limb is clearly set out in the Penal Code. For the offence of burglary, the sentence is 10 years while the offence of stealing from a dwelling house is 14 years. The sentence of 5 years imposed by the learned trial Magistrate is amorphous, in that it does not take cognizance of the two punishable offences in the charge sheet. The same is therefore an illegal sentence.

13. For the above reasons, I would allow the appeal, quash the conviction and set aside the sentence of 5 years imprisonment. Should the appellant be set free? No. The errors committed by the learned trial Magistrate would be cured through a retrial.

14. Accordingly, I make the following final orders in this appeal:-

1.) The appeal on both conviction and sentence is allowed

2.) The case is hereby remitted to the principal Magistrate's court Butere for retrial

3.) The retrial shall be conducted before a Magistrate other than Hon. M/s Shimenga who issued the orders the subject of this appeal.

4.) Until the appellant is produced before the court at Butere on 8th July, 2019, he shall remain in custody.

It is so ordered

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court in open court at Kakamega on…21st.....this day of …June….2019

JUDGE

In the presence of:-

Present in person…….for Appellant

Mr. Ngetich…….....for Respondent

Polycap…….....Court Assistant