REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 27 OF 2018 CONSOLIDATED WITH

CRIMINAL APPEAL NO. 29 OF 2018

EZEKIEL WAWERU WANGOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

[1] This is an appeal arising from the Judgment, conviction and sentence passed by **Hon. H. M. Nyaberi**, **SPM**, on **20 April 2018** in **Iten Senior Principal Magistrate's Criminal Case No. 361 of 2018: Republic vs. Robinson Kiprono Yator & 4 Others**. This Appellant, Exekiel Waweru Wangoi was one of the accused persons in that case in which they were jointly charged, in the main count, with the offence of stealing contrary to **Section 275** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. The particulars of that charge were that, on the 15th day of April 2018 at Kapsowar Trading Centre within Marakwet West Sub-County in Elgeiyo Marakwet County, joint with others not before the court, they stole a motor cycle Make Bajaj Boxer, Registration No. KMEG 238C valued at Kshs. 93,000/=, the property of Nelson Mandela Nyakundi.

[2] In the alternative to the charge of stealing, the Appellant was jointly charged with **Shadrack Kiptoo Rutto** (the 3rd Accused before the lower court) with the offence of handling stolen goods contrary to **Section 322(1)(2)** of the **Penal Code.** In this regard, it was alleged that, on the 15th day of April 2018 at Marura area within Eldoret East Sub-County in Uasin Gishu County, jointly with others not before the court, and otherwise than in the course of stealing, they dishonestly undertook the disposal of a motor cycle, make Bajaj Boxer, Registration Number KMEG 238C valued at Kshs. 93,000/=, the property of Nelson Mandela Nyakundi, while having reasons to believe it to be stolen property.

[3] The record of the lower court shows that the Appellant pleaded guilty to the main charge of stealing and was consequently convicted on own plea of guilty, and sentenced to 2 years imprisonment on **20 April 2018** along with his co-accuseds**.** He thereafter lodged this appeal on 26 April 2018 contending that:

[a] He is a first offender and an orphan;

[b] He is the breadwinner for his wife, children and siblings;

[c] He pleaded guilty to the offence; and that he only participated in brokerage to find a buyer;

[d] The sentence was harsh on him as a first offender; and that he promises to be a law abiding citizen if pardoned.

[4] The Appellant thereafter engaged Ms. Gona, Advocate to act for him and Counsel filed a Petition of Appeal dated 3 May 2018 based on the following four grounds:

[a] That the Learned Trial Magistrate erred in law and in fact by holding that the Appellant stole the motor cycle registration No. KMEG 238 Bajaj Boxer and yet the plea was equivocal;

[b] The Learned Trial Magistrate erred in law and in fact by holding that the Appellant stole the motor cycle yet the Appellant did not understand the plea;

[c] The Learned Trial Magistrate erred in law and in fact by holding that the Appellant stole the motor cycle yet the Appellant did

not understand the language of the court;

[d] The Learned Trial Magistrate erred in law and in fact by holding that the Appellant stole the motor cycle yet the Appellant did not understand the consequences of the plea.

[5] The appeal was urged by **Ms. Gona, Advocate,** vide the written submissions filed herein on **29 June 2019**. She faulted the procedure used by the trial court to record the guilty plea, contending that the Appellant's plea was not unequivocal as by law required. She relied on Section 207 of the Criminal Procedure Code and the cases of **Adan vs. Republic [1973] EA 445; Simon Gitau Kinene vs. Republic [2016] eKLR 445** and **Kiambu Criminal Appeal No. 8 of 2016: Paulo Malimimi Mbusi vs. Republic** to support her submission that the trial court ought to have ensured that the Appellant understood the charge and its consequences, and then recorded the words of the Appellant verbatim, instead of the English version of "It is true." Counsel accordingly urged the Court to allow the appeal and set aside the conviction and sentence of the Appellant.

[6] There appears to be no response on the part of the State. Nevertheless, I have given careful consideration to the appeal in the light of the grounds set out in the Petition of Appeal dated 3 May 2018 and the written submissions made by leaned Counsel as well as the record of the proceedings of the lower court. As the Appellant pleaded guilty to the charge before the lower court, this appeal can only be on sentence. This is because, unless the plea is shown to be equivocal, **Section 348** of the **Criminal Procedure Code, Chapter 75** of **the Laws of Kenya,** is explicit that:

"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence."

[7] Counsel for the Appellant having impugned the plea taking process, the two issues arising for my determination in this matter are:

[a] Whether the plea was properly taken and whether the same was unequivocal;

[b] The propriety of the sentence imposed by the lower court on the Appellants.

On the Plea

[8] Section 207 of the **Criminal Procedure Code** provides that:

(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.

[9] The above provision was given consideration in ***Adan vs. Republic [*1973] EA 446** and its salient aspects reiterated thus:

"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."

[10] Consequently, having carefully perused and considered the record of the lower court, it is manifest to me that the charges were read over and explained to the Appellant, and that he understood the substance thereof and made a response thereto, which was recorded by the trial court. The facts were then presented by the Prosecutor; and the Appellant called upon to react thereto. He admitted those facts and it was upon that clear admission that a conviction was recorded against him before being invited to address the court in mitigation. Thus, upon reconsideration and re-evaluation of the proceedings before the lower court, I am satisfied that it complied well with the provisions of **Section 207** of the Criminal Procedure Act and the prescriptions of **Adan vs. Republic** (supra).

[11] Nevertheless, the use of templates for purposes of plea-taking, as was the case herein, is to be deprecated. As was observed by the Court of Appeal in **Elijah Njihia Wakianda vs. Republic [2016] eKLR**, each case is peculiar and the plea-courts ought to have the free hand to adapt to the circumstances of each case, especially in instances where the accused persons plead guilty and the charges entail imprisonment and therefore a curtailment of the right to liberty. In that case, the Court of Appeal expressed the following view with regard to the use of templates in plea-taking which ought to have been heeded by the lower court:

> **"With respect, we find this disturbing. It seems to us that this is part of a template used by courts at plea taking. That is why it speaks of "charge(s)" when there was a single charge and the rather odd "in a language he understands", when it is more normal and logical to simply state the language used. This smacks of a mere going through the motions, a recital of ritual. While that may not much matter when the plea entered is one of not guilty followed by a trial with all its attendant safeguards, it assumes a critical dimension when the plea is one of guilty and leads to conviction. We think that it is good practice for the specific language used to state the elements of the charge to 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."**

On the Sentence

[12] In ***Ogalo s/o Owuora vs. Republic [1954] 21 EACA 270,*** it was held:

> **"The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground than if the member 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 v Republic [1950] 18 EACA 147***, it is evident that the judge has acted upon some 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."**

[13] While Section 275 of the **Penal Code** attracts a penalty of up to 3 years imprisonment, the court's discretion ought to be exercised judiciously; and it is for this reason that **The Judiciary Sentencing Policy Guidelines**, were formulated. Thus, care must always be exercised to ensure a rational approach that takes into account all the relevant factors to ensure proportionality and uniformity, among other considerations. For instance, it is suggested thus at paragraph 7.18 of the Guidelines aforementioned that:

> **"Where the option of a non-custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non-custodial sentence. The court should bear in mind the high rates of recidivism associated with imprisonment and seek to impose a sentence which is geared towards steering the offender from crime…"**

[14] There being no dispute that the Appellant was a first offender, and taking into consideration that the stolen motor cycle was recovered and restored to the owner, I find the sentence of 2 years imprisonment imposed on the Appellant to be excessive. Thus, having been served about 5 months of the sentence before his release on bond, I would set aside the sentence imposed on the Appellant herein and substitute it with imprisonment for the period served; with the result that unless otherwise lawfully held, the Appellant is hereby set at liberty forthwith.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH DAY OF SEPTEMBER 2019

OLGA SEWE

JUDGE