REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 28 OF 2018 CONSOLIDATED WITH

CRIMINAL APPEAL NO. 29 OF 2018

ROBINSON KIPRONO YATOR...….....1ST APPLICANT

GILBERT KIPTOO KIPROP.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. **Robinson Kiprono Yator**, (hereinafter "the 1st Appellant), filed his Petition of Appeal herein on **3 May 2018** against the Judgment, conviction and sentence of **Hon. H. M. Nyaberi**, **SPM**, delivered on **20 April 2018** in **Iten Senior Principal Magistrate's Criminal Case No. 361 of 2018: Republic vs. Robinson Kiprono Yator & 4 Others**. His Grounds of Appeal were that:

a. The learned magistrate erred in law and in fact by convicting and sentencing him despite the fact that the proceedings were conducted in languages not understood by the Appellant before him;

b. The learned magistrate erred in law and in fact by failing to hold that the plea of guilty by the Appellant in the subordinate court was not unequivocal hence he should have proceeded to enter a plea of not guilty;

c. The learned magistrate erred in law and in fact by failing to accord the Appellant a fair trial in the subordinate court;

d. The learned magistrate erred in law and fact by convicting the Appellant despite the fact that the charges facing him were defective and thus a nullity;

e. The learned magistrate erred in law and in fact by failing to take into account relevant factors and as a result he passed a sentence which was excessive in the circumstances;

f. The learned magistrate erred in law and in fact by taking into account irrelevant and extraneous factors hence passing a sentence which was excessive in the circumstances;

g. The learned magistrate erred in law and in fact by imposing a sentence which was manifestly excessive in the circumstances.

2. Accordingly, the Appellant prayed that the Judgment of the subordinate court be set aside and substituted with an order quashing his conviction and setting aside his sentence. His appeal was consolidated with **Eldoret High Court Criminal Appeal No. 29 of 2018**, which was filed on the same date by one of his co-accuseds before the lower court, namely, **Gilbert Kiptoo Kiprop** (hereinafter "the 2nd Appellant). The said appeal was premised on the same grounds as set out herein above in the case of the 1st Appellant. Hence, the 2nd Appellant asked for the exact same prayers as the 1st Appellant.

3. The brief background to the appeal is that the Appellants were arraigned before the court of the Senior Principal Magistrate at Iten, charged, jointly with three others, 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.

4. In the alternative to the charge of stealing, the two Appellants were charged with having suspected stolen property contrary to **Section 323** of the **Penal Code.** In this regard, it was alleged that, on the 18th day of April 2018 at Tendwo Village in Kaptagat Location within Keiyo South Sub-County in Elgeyo Marakwet County, they were jointly found in possession of a motor cycle make Bajaj Boxer Registration Number KMEG 238C valued at Kshs. 93,000/=, the property of Nelson Mandela Nyakundi.

5. The record of the lower court shows that the Appellants pleaded guilty to the main charge of stealing and were consequently was convicted on own plea of guilty, and sentenced to 2 years imprisonment on **20 April 2018.** It was in the light thereof that their Advocate, **Ms. Chesoo** faulted the Appellant's conviction and sentence, contending that the plea was taken in disregard of the provisions of **Section 207** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**; and the principles laid down in **Adan vs. Republic [1973] EA 446**. In particular, Counsel submitted that the charge and its particulars were neither read over to the Appellants in their language, nor in a language which they could speak and understand; and therefore, that their trial was unfair from the standpoint of **Article 50(2)(j)** of the **Constitution of Kenya.**

6. It was further the submission of **Ms. Chesoo** that the sentence imposed on the Appellants was excessive in the circumstances and was passed in utter disregard of the objectives of sentencing as explicated in The Judiciary: Sentencing Policy Guidelines. Counsel urged the Court to bear in mind the principles underpinning the sentencing process as set out in the Guidelines aforementioned, including the principle of proportionality. She, likewise, relied on **Ogola s/o Owuora vs. Reginum [1954] EA 270; Wanjema vs. Republic [1971] EA 49; Shadrack Kipchoge Kogo vs. Republic, Criminal Appeal No. 253 of 2003; and Millicent Wangsia Murage alias Millicnet Wanja Murage vs. Republic [2017] eKLR** and urged the Court to find that, in terms of sentencing, the lower court erred in principle and allow the appeal.

7. On behalf of the State, **Mr. Mulamula** opposed the appeal. His submission was that the Appellants' plea was taken in strict compliance with the requirements of **Section 207** of the **Criminal Procedure Code**, and that the language of communication was Kiswahili, as reflected in the record of the proceedings. He similarly defended the sentence imposed, granted that the offence carries a maximum of three years' imprisonment; and urged the Court to note that the Appellants were not remorseful.

8. I have given careful consideration to the appeal in the light of the grounds set out in the Petition itself, the written and oral submissions made by leaned Counsel as well as the record of the proceedings of the lower court. Granted the provisions of **Section 348** of the **Criminal Procedure Code, Chapter 75** of **the Laws of Kenya,** this appeal is limited to the aspect of sentence only; for that provision 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."**

9. In the premises, the two issues for my determination 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

10. **Section 207** of the **Criminal Procedure Code** provides that:

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.**

11. 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."

12. With the foregoing in mind, I have scrutinized the record of the lower court and note that Charge was read over and explained to the Appellants in a language that they understood and that their individual responses were taken down. The facts were then presented by the Prosecutor; and that after the facts were read, again the Appellants' reaction was sought and they admitted those facts before a conviction was recorded against each of them. They were thereafter afforded an opportunity to express themselves in mitigation before the sentence was imposed. In the premises, there was due compliance with the provisions of **Section 207** of the Criminal Procedure Act and the prescriptions of **Adan vs. Republic** (supra).

13. However, Counsel for the Appellants impugned the fact the following aspects of the proceedings:

"The substance of charge(s) and every element thereof has been stated by the court to the accused-person(s) in

1. English

2. Kiswahili

3. Keiyo

4. Marakwet

5. Others

The language that he/she understands who being asked whether he/she admits or denies the truth of the charge(s) replies."

14. The contention of Counsel was that the proceedings do not disclose the languages understood by each of the accused persons; and that the record refers to "he" and yet there were 5 accused persons before the court. A look at the original record shows that the lower court used a template to take plea, and that he then struck out the options that were inapplicable and ticked those that were, in his view, relevant to the circumstances. For instance, he ticked Kiswahili as the applicable language and the "he" pronoun as opposed to "she". Overall, it is manifest that the communication between the Appellants and the lower court was in Kiswahili language and that it was not hampered in any way as to occasion a miscarriage of justice.

15. Nevertheless, as was observed by the Court of Appeal in **Elijah Njihia Wakianda vs. Republic [2016] eKLR**, the use of such templates should be discouraged, to give the plea court the flexibility to adapt to the peculiar circumstances of each case. In that case, the Court of Appeal expressed the following view with regard to the use of templates in plea-taking:

"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."

16. **As to the submissions that the charge particulars were not complete as the word "suspected" was omitted, ICounsel further**

On the Sentence

17. 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."**

18. Needless to say that **Section 275** of the **Penal Code** attracts a penalty of up to 3 years imprisonment; and therefore, one might quickly conclude, as did Counsel for the Respondent that the sentence passed in this instance is, on the face of it, lawful. However, with the formulation of **The Judiciary Sentencing Policy Guidelines**, 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. Hence, in the said Guidelines, it is recognized thus at paragraph 2.1:

> **"These guidelines provide a framework within which courts can exercise their discretion during sentencing in a manner which is objective, impartial, accountable, transparent and which would promote consistency and uniformity in the sentences imposed… They are geared towards anchoring the exercise of discretion in sentencing upon principles as opposed to being a subjective process…"**

19. Accordingly, it is recommended, 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…"**

20. It is with the foregoing in mind that I find the sentence of 2 years imprisonment imposed on the applicants excessive, granted the facts that the Appellants pleaded guilty; that they were first offenders; and that the stolen motorcycle was recovered. Thus, having been served some 5 months of their sentence before their release on bond, I would set aside the sentence imposed on them by the lower court and replace it with the period served.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF SEPTEMBER 2019

OLGA SEWE

JUDGE