REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 131 OF 2014

ISAACK MIDEKO ..... APPELLANT

VERSUS

REPUBLIC ..... DEFENDANT

(Appeal arising from the original conviction and sentence in Criminal Case No. 480 of 2014 at the Resident Magistrate's Court, Kapsabet (Hon. B. Kiptoo) dated 21 February 2014)

JUDGMENT

[1] The Petition of Appeal filed herein on **1 August 2014** by the Appellant, **Isaack Mideko**, shows that he filed this appeal against the conviction and sentence of 7 years imprisonment imposed on him by the Resident Magistrate at **Kapsabet** on the **21 February 2014** in **Criminal Case No. 480 of 2014** for the offence of Burglary and Stealing contrary to **Sections 304(2) and 279(b)** of the **Penal Code**, **Chapter 63** of the **Laws of Kenya.** His cause of complaint was that he pleaded not guilty to the Charge and that the sentence that was imposed against him is harsh; granted that he has a family that wholly depends on him for support, which stands to suffer as a result of his long incarceration. He therefore beseeched the Court to review the sentence with a view of its reduction or transmutation into a non-custodial sentence.

[2] The brief background to the appeal is that the Appellant was arraigned before the court of the Resident Magistrate, **Hon. B. Kiptoo,** charged with the offence of **Burglary** contrary to **Section 304(2)** and **Stealing**, contrary to **Section 279(b)** of the **Penal Code**. He was also charged, in the alternative, with the offence of **Handling Stolen Property** contrary to **Section 322(2)** of the **Penal Code.** The proceedings of the lower court show that the Appellant pleaded guilty to the alternative charge of **Handling Stolen Property,** was convicted on his own plea of guilty, and was sentenced to 7 years imprisonment on **20 February 2014.** He has in effect served four years of his jail term.

[3] On behalf of the State, the appeal was opposed by **Ms. Oduor**. She submitted that the Appellant pleaded guilty and admitted the facts of the case and was therefore rightfully convicted and sentenced to 7 years imprisonment. She was of the view that the sentence was lawful in the circumstances as the same was imposed by the Court after taking into account the mitigating factors that were presented by the Appellant. In her view, the Learned Trial Magistrate was lenient to the Appellant.

[4] Having perused the grounds set out in the Petition of Appeal and the record of the lower court, it is apparent that what is in issue is the propriety of the sentence, granted that the Appellant pleaded guilty and was accordingly convicted on his own plea. This is because **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."

[5] Hence, in the case of **Olel v Republic [1989] KLR 444**, this position was propounded thus:

> **"Having considered the submissions by both learned counsel on the interpretation of section 348 ... we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact of what the marginal note also states..."**

[6] And, because this is a first appeal, the Court is under duty to satisfy itself that the plea is itself unassailable before giving attention to the key question of the legality and propriety of the sentence. In **Okeno vs. Republic [1972] EA 32** the Court of Appeal for East Africa had the following to say in this regard:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination ... and to the appellate court's own decision on the whole evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions...It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses..."

[7] It is with the foregoing in mind that I have carefully perused and considered the proceedings of the lower court. That record confirms that that the Appellant was on the **20 February 2014** arraigned before the Resident Magistrate at Kapsabet Law Courts, charged with the offence of **Burglary** contrary to **Section 304(2)** and **Stealing** contrary to **Section 279(b)** of the **Penal Code**. The Charge was read over and explained to the Appellant in Kiswahili language, a language that he understood, and his response was a plea of guilty. It is also evident that the Court granted him an interval of time from **20 February 2014** to **21 February 2014** when the facts were presented by the Prosecutor; and that after the facts were read, again the Appellant admitted those facts. He however contended in mitigation that he had bought the chicken; whereupon, the plea in respect of the main charge was changed by the trial court to a plea of Not Guilty. The Court then proceeded to read to him the alternative charge, which he admitted as follows in Kiswahili language:

"Nakubali. Nilijua ni ya uwizi lakini sikujua ziliibwa wapi"

[8] Accordingly, a plea of guilty was entered in respect of the Alternative Charge upon which he was convicted and sentenced to serve 7 years imprisonment. Thus, as to whether the plea was unequivocal, it is instructive to bear in mind the steps entailed in the plea-taking process as laid down in ***Adan vs. Republic [*1973] EA 446** by **Spry, V.P**. Here is what the Learned Judge had to say:

"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."

[9] In the light of the foregoing clear steps, it can be seen that whereas the Trial Magistrate substantially complied in respect of the Main Charge, the same cannot be said of the Alternative Charge. The lower court opted to rely on the facts that had been given in respect of the Substantive Charge; which had in effect been denied by the Appellant and on the basis of which a Plea of Not Guilty entered, to support the Alternative Charge. That was improper. Those facts having been denied, it was imperative that the facts in support of the Alternative Charge be set out and the Appellant's response thereto sought afresh before the conviction on own plea could be validly entered thereon. The importance of having the facts set out by the Prosecution in the plea-taking process cannot be overemphasized. In the case of **Adan vs. Republic (supra)** the purposes served thereby were explained thus:

"…The statement of facts serves two purposes; it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty; it is for this reason that it is essential for the statement of facts to precede the conviction..."

[10] Failure by the Prosecutor to present the facts in support of the Alternative Charge of Handling Stolen Property was therefore a fundamental flaw; and therefore, it cannot be said that the plea was unequivocal. In the premises, it would be pointless looking at the propriety of the sentence if, as has been found herein above, the underlying plea was not properly taken. This being my view of the matter, I would allow the appeal, set aside the conviction and sentence passed against the Appellant in Kapsabet Resident Magistrate's Court against the Appellant in **Criminal Case No. 480 of 2014** by **Hon. B. Kiptoo** on the **21 February 2014.** It is significant to note that the Appellant was charged with stealing 7 hens which were all recovered; and that he has so far served four of his 7 year term of imprisonment. In the premises, a retrial would not serve the ends of justice in the matter. Accordingly, it is hereby ordered that that he be released forthwith, unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE 2018

OLGA SEWE

JUDGE