REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

CRIMINAL APPEAL NO. 168 OF 2015

KYALO KIOKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal arising out of the judgment and sentence of Hon. T. Nchoe

RM in Criminal Case No. 666 of 2015 delivered on 17h November 2015

at the Principal Magistrate's Court at Makueni)

JUDGMENT

Kyalo Kioko, the Appellant herein, was charged in the trial Court with one count of stealing by servant contrary to section 281 of the Penal Code, and a second count of stealing contrary to section 275 of the Penal Code. The particulars of the first count were that on 10th October 2015 at Malivani village Unoa Sub location Wote Location in Makueni County, being a servant to Peter Mutiso Ndambuki he stole two phone batteries, one sheet and one pipe range all valued at Kshs 2,100, the property of the said Peter Mutiso Ndambuki. The particulars of the second count were that on 10th October 2015 at Malivani village Unoa Sub location Wote Location in Makueni County, the Appellant stole Kshs 6,400/= the property of Jane Wanja Kimani.

The Appellant was arraigned in the trial court on 28th May 2015 and he pleaded guilty and was convicted on his own plea of guilty. He was sentenced to serve seven years imprisonment. The Appellant has now appealed against the sentence in a Petition and Memorandum of Appeal filed in Court on 30th November 2015, seeking a reduction of the sentence and its substitution with a non-custodial sentence community service order, or to the period served in prison. The learned Prosecution Counsel, Ms. Mogoi did not file written submissions and left it to the Court to decide.

However, after perusing the proceedings in the trial Court I have noted that the plea of guilty was entered irregularly. The record shows that the proceedings on 28th May 2015 when the plea was taken were as follows:

"Before- T. Ole Nchoe, RM

Prosecutor- State Counsel Ndanu

Court clerk - Mwengi Interpretation -Kiswahili

Accused - present

The substance of the charge and every element of it read and explained to accused and understood.

Accused in his own words replies in Kiswahili

Accused: It is true.

T. NCHOE, RM,

28/5/2015.

Court: Plea of guilty entered.

T. NCHOE, RM,

28/5/2015.

Facts: 10/10/15 the accused had been employed by first complainant who wanted to sack him. He left and went to the complainants and stole sheet pipe range and two phone batteries. He also stole from Wayua Kimani 6,100/= on 25/10/15. The suspect resurfaced and required employment from the same employer. The matter was reported and some items were recovered from the accused;

Solar panel P exhibit 1

Sheet bulb and clip P exhibit 2.

T. NCHOE, RM,

28/5/2015.

Accused: Facts are correct.

T. NCHOE, RM,

28/5/2015.

Court: Accused convicted on own plea of guilty.

T. NCHOE, RM,

28/5/2015..

Prosecutor: No previous report.

T. NCHOE, RM,

28/5/2015.

Accused in mitigation: No mitigation.

T. NCHOE, RM,

28/5/2015."

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."***

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.**

Lastly, in **Ombena vs Republic (1981) KLR 45** it was held by the Court of Appeal that where an accused person is charged with more than one count the Court should record a plea on each count separately to ensure that if there is a plea of guilty, the same is unequivocal.

Coming to the present appeal, it is apparent from the record that the charges were read to the Appellant. However, it is not indicated whether his response of "it is true" was in relation to the first or second count, as the Appellant had been charged with two offences. It is also not indicated whether the plea of guilt was entered in relation to the first or second counts or both. Likewise his response that the facts as read were correct therefore cannot be found to have been to any of the two counts. The record of the trial Court consequently did not indicate the offence for which the trial magistrate was sentencing the Accused person to seven years imprisonment, given that the said Accused person was charged with two offences.

To this extent the proceedings for taking the Appellant's plea were irregular, and his plea of guilty was not unequivocal. His conviction was accordingly also unlawful. The conviction is therefore quashed, and

sentence of seven years imprisonment set aside. In addition, taking into account that the Appellant has been in custody since 28th May 2015, and given the value of the items he is alleged to have stolen, it would not be in the interests of justice for him to undergo a retrial, and he is hereby set at liberty unless otherwise lawfully held.

It is so ordered.

DATED AT MACHAKOS THIS 25TH DAY OF APRIL 2017.

P. NYAMWEYA

JUDGE