REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 50 OF 2016

ANTHONY SHABA BULETI……………………………….APPELLANT

VERSUS

REPUBLIC………………………………….……….RESPONDENT

(Appeal from original conviction and sentence in Othaya Senior Resident Magistrate's Court Criminal Case No. 464 of 2016 (Hon. Ben Mark Ekhubi, SRM) on 8th June, 2016)

JUDGMENT

The appellant was charged with the offence of house breaking contrary to **section 304 (1)(b)** and stealing contrary to **section 279 (b)** of the **Penal Code, (cap 63).** The particulars were that on the 4th day of June, 2016 at around 12 PM at Kaberero village, Kiandeni sublocation within Nyeri County, the appellant broke and entered a building used as a dwelling house by Jacinta Wangari Mwangi and stole the sum of Kshs 43,500/=(cash), Family Bank card (A/C No. 011000018341) and Equity Card (A/C No. 0080161558168) the property of the said Jacinta Wangari Mwangi. In the alternative, the appellant was charged with the offence of handling stolen goods contrary to **section 322** of the Penal Code.

The record shows that the appellant was convicted on his own plea of guilty on the principal count and he was accordingly sentenced to serve a maximum sentence of seven years imprisonment. He appealed against the sentence although the grounds in the petition of appeal filed in this court on 21st June, 2016 suggest that the appellant was also aggrieved by the conviction in spite of his plea of guilty. I understand these grounds to be only two; first, the decision of the learned magistrate is faulted because the learned magistrate is alleged to have overlooked the fact that the appellant was a first offender and second, the decision is also impugned because the learned magistrate did not consider the fact that the appellant did not understand the consequences of a plea of guilty.

Assuming that the appellant has a bone to pick with the manner in which his plea was taken and therefore whether it was unequivocal, **Section 207** of the **Criminal Procedure Code, Chapter 75 Laws of Kenya** sheds light on the answer to this question**;** it explains the procedure of taking pleas in the subordinate courts and states as follows:

> **207.(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;**
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> **Provided that after conviction and before passing sentence or making an order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**

The application of these provisions where a plea of guilty is entered was explained in the case of **Adan versus Republic (1973) E.A.445;** in that case the Court of Appeal set out the procedure for taking plea where the accused pleads guilty. The court said at page 446:

> **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 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.**

This statement is, in my view, self-explanatory and needs no further explanation. The court proceeded to explain the importance of the statement of facts; it said that firstly, it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and secondly, it gives the magistrate the basic material on which to assess the sentence. The court noted that it is not unusual that an accused person, 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 statement of facts to precede the conviction.

As far as the appellant's trial is concerned, the record shows that after the substance of the charge and every element thereof was explained to the appellant in English interpreted in Swahili language, he responded in the latter language: "ni kweli", meaning "it is true". The facts were then read to him and he again admitted they were true. The court then proceeded convict him on his own plea of guilty.

The procedure adopted by the trial court was substantially consistent with the provisions of **section 207** of the Criminal Procedure Code and therefore I find no basis to impeach the plea on the basis that it was not unequivocal. Although the appellant has submitted that the learned magistrate ought to have somehow warned him of the severity of the sentence of the offence with which he was charged, it does not appear from this provision of the law that such an obligation lies on the trial magistrate. According to the Court of Appeal in the case of **Adan versus Republic** (supra) the only burden on the learned magistrate is to explain to the accused person all the essential ingredients of the offence he is charged with and nothing more. In the circumstances, I would conclude that even if the appellant is assumed to have appealed against the conviction, that the appeal would fail.

As far as the sentence is concerned, the maximum sentence provided upon conviction of this offence is seven years imprisonment; this is the sentence the learned magistrate meted out against the appellant. In his mitigation, the appellant beseeched the magistrate to forgive him and apparently consider a less severe sentence. It does not appear however, that the learned magistrate considered the appellant's mitigation and further despite the fact that he found the appellant to be a first offender, he still imposed the maximum sentence provided for. I am of the humble view, the maximum sentence was harsh in the circumstances and therefore I am bound to disturb it. Accordingly, I alter the sentence and reduce it to five years; it shall run from the date of conviction. The appellant's appeal is allowed to that extent only. It is so ordered.

Signed, dated and delivered in open court this 16th June, 2017

Ngaah Jairus

JUDGE