



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. 30 OF 2015**

**MARIAM MUSA JOHN.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

1. When the Appellant herein, who is a Tanzanian citizen, was first arraigned before the lower Court at Kehancha on the 18/03/2015 she informed the court that she was a minor aged 15 years old. That prompted the court to order for an age assessment report which revealed that the appellant was indeed an adult aged 18 years old.
2. On 24/03/2015 the appellant alongside a co-accused were formally charged with the offence of child stealing. Whereas the said co-accused denied the charged the appellant readily admitted the same and the matter was put off to 26/03/2015 for the presentation of the facts.
3. When the matter came up later and the facts read out, the appellant admitted the facts and was accordingly convicted. On consideration of a Pre-sentencing report and the receipt of mitigations, the court sentenced the appellant to a three-year imprisonment. That was on 06/05/2015.
4. The Appellant being dissatisfied with the said conviction and sentence filed a Petition of Appeal about one week later. She instead narrated how she was not guilty of the offence and prayed that the appeal be allowed and she be set at liberty.
5. At the hearing of the appeal the Appellant appeared in person and basically reiterated the contents of the Petition of appeal. Mr. Kimondo opposed the appeal and argued that the Appellant properly participated in the proceedings and was lawfully convicted and sentenced.
6. As this is the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter.
7. In line with the foregone, this court in determining this appeal will principally endeavour to satisfy itself whether the plea as taken was unequivocal or otherwise.
8. The record of the proceedings before the subordinate court has been availed before me and I have carefully perused the same. This court has also carefully considered the submissions of the parties on record.

9. The law on this subject is well settled. **Section 207** of the Criminal Procedure Code 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 plea agreement;***

***(2) If the accused person admits the truth of the charge otherwise than by 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.’***

10. The above provisions have previously been subject to Court’s interpretation. And, in particular the procedure and steps to be taken in taking a plea of guilty were clearly laid down in the case of ADAN - vs- R ( 1973) EA 445 and in the Court of Appeal case of KARIUKI –vs- REPUBLIC ( 1954) KLR 809 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 take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.***

***iv. If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.***

***v. If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.***

11. In the case of KARIUKI –VS- REPUBLIC (supra) the Court went on and stated that:-

***“The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading.”***

In the case of ATITO -vs- R ( 1975) EA 278 the Court also held that the narration of facts supplemented the explanation by the trial magistrate of the ingredients of the offence.

12. Upon the promulgation of the Constitution of Kenya in 2010, the people of Kenya gave unto themselves an elaborate Bill of Rights under Chapter Four thereof.

13. **Article 50** thereof deals with the right to a fair hearing and in **sub-article (2)(b)** it states that:-

***“(2) Every accused person has the right to a fair trial, which includes the right-***

***(a).....***

***(b) to be informed of the charge, with sufficient detail to answer it.***

14. To therefore satisfy the above constitutional and statutory requirements, the Court when faced with a guilty plea scenario is called to exercise extreme care especially when the offence(s) involved carry serious legal penalties or are technical in nature moreso when the accused is unrepresented. The Court is called upon to ensure that the charge is read and explained to the Accused in such sufficient detail to enable the Accused make a very informed decision and to plead with such knowledge and information about the charge. All that must be clearly captured in the record including the language which the accused communicates in.

15. Another equally important aspect relates to the taking of the facts of the case. The purpose of the facts is to establish the ingredients of the offence before Court. It is the duty of the Court to scrutinize and be sufficiently satisfied that indeed the facts, as presented, do establish the ingredients of the offence. It is not enough for a Court to proceed and enter a conviction simply because the accused has admitted the facts, the facts must establish the commission of the offence. The Court should therefore endeavour to be fully satisfied that the facts truly connect the accused to the commission of the offence and that there appears no cause to the contrary as so clearly provided under Section 207 of the Criminal Procedure Code. (See: **Kakamega High Court Criminal Appeal No. 46 of 2014 Dishon Malesia vs Republic (2014)e KLR** ).

17. The record before the trial court is very clear. The consolidated charge was read to the Appellant in Kiswahili language. The appellant admitted the charge and a plea of guilty entered.

18. I have equally analysed the facts as presented before court and the same clearly disclose the ingredients of the offence of child stealing. The appellant was arrested in Tarime in Tanzania having left the country with the complainant's child. The appellant also admitted the facts.

19. The appellant indeed had ample opportunity to reflect and decide on how to plead to the charge and to respond to the facts as well.

20. The above discussion hence reveals that the plea of guilty as taken by the Court was and remains unequivocal. The appellant was hence properly convicted on his own plea of guilty.

21. Before I leave the aspect of plea-taking, I have noted in the record that when appellant admitted the facts the court went ahead and received mitigations. The court ought to have convicted the appellant prior to receiving the said mitigations. However that error does not go to the root of the plea of guilty and if it so does it is readily cured under **Section 382** of the Criminal Procedure Code.

22. On sentencing, **Section 174** of the Penal Code imposes the maximum sentence on conviction in respect of the offence of child stealing to seven years imprisonment. The appellant was handed down a three-year imprisonment which is indeed less than one-half of the maximum possible sentence in law. That sentence remains lawful as it is provided for in the law. The question we should ask ourselves is whether the same is harsh and excessive in the circumstances of this case.

23. The Court in the case of **Wanjema v. Republic (1971) EA 493** laid down the general principles upon which the first appellate Court may act in dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

24. I have taken into account all the issues in this matter together with the Pre-sentencing report and I find that the sentence was fair in the circumstances. I therefore do not wish to disturb the same.

25. The appeal is therefore dismissed.

26. As the appellant is a Tanzanian this court hereby orders that the appellant shall be repatriated to Tanzania on completion of serving the sentence.

Orders accordingly.

**DATED, SIGNED** and DELIVERED at **MIGORI** this 28<sup>th</sup> day of January, **2016**.

**A C. MRIMA**

**JUDGE**