REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO.9 OF 2014

DENIS LUSOLI ATSANGA.................................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(From original conviction and sentence in the Chief Magistrate's Court at Kakamega; Criminal Case No.2587 of 3013 (Hon J. Ong'ondo P.M.)

JUDGMENT

1. This is an appeal against conviction and sentence. ***Denis Lusoli Atsanga,*** (the appellant), was charged with the offence of grievous harm contrary to ***section 234*** of the Penal Code. Particulars were that on the 22nd November, 2013 at ***Mukulusu Village Murhanda Location in Kakamega East District***, within ***Kakamega County*** unlawfully did grievous harm to ***Benson Lubengo***. The accused faced a second count of malicious damage to property contrary to ***section 339(1)*** of the Penal Code, particulars whereof being that, on the 22nd November, 2013, at Mukulusu Village, Murhanda Location, Kakamega East District within Kakamega County unlawfully destroyed crops of Benjamin Lubengo valued at Kshs.12,932/80.

2. The facts giving rise to this appeal are as follows: On 2nd December, 2013, the appellant appeared before the ***Chief Magistrate S. M. Shitubu*** and pleaded not guilty to the charge in count 1. On 17th January, 2014, the prosecution added another charge of malicious damage to property as count 2, which was read to the appellant and he pleaded guilty leading to a plea of guilty being recorded. Shortly after, the appellant requested that the charges be re-read to him, which was done and he pleaded guilty to both counts and a plea of guilty recorded. When facts were read to the appellant he again admitted them. He was convicted and sentenced to serve ten (10) years imprisonment for count 1 and fined Kshs.10,000/- or three (3) months' imprisonment in default for count 2. It is this conviction and sentence that aggrieved the appellant who has now preferred this appeal and raised seven (7) grounds of appeal as follows:-

> ***"1. The court record clearly shows that the appellant did not follow the proceedings as to render the plea equivocal.***
>
> ***2. The learned trial magistrate erred in fact and law by convicting and sentencing the appellant in a defective charge, did not explain to the appellant the court language and it is not shown that there was specific interpretation of the language the appellant was comfortable with thus rendering the process inadequate for want of conformity with the law.***
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> ***3. The learned magistrate erred in fact and law by convicting and sentencing the appellant before offering him an opportunity to explain his side of the case hence the civil liberties of the appellant as provided in the Constitution were denied.***

> ***4. The learned magistrate erred in fact and law by convicting and sentencing the appellant in a situation where the plea was equivocal in the sense that as per the court record the only words the appellant uttered were "ni ukweli" in response to the charge which is far short of the required standards, and furthermore in the Kiswahili language which was not the language indicated as the language the interpretation to the appellant. Hence the learned magistrate by failing to recognise this anomaly rendered the entire proceedings leading to the conviction and sentence null and void for want of conformity with the law.***
>
> ***5. The learned magistrate erred in fact and law by entertaining the proceedings which were not supported by tangible evidence from the prosecution.***
>
> ***6. The learned magistrate erred by law and fact by meting out excessive sentence on the appellant.***
>
> ***7. The learned magistrate failed to appreciate the medical condition of the appellant as of and at the time plea was taken."***

3. Parties agreed to dispose this appeal by way of written submissions which they filed and are on record. The court was therefore called upon to determine this appeal on the basis of those submissions.

4. **Mr Aburili**, learned counsel for the appellant in his written submissions filed in court on 27th February, 2015, submitted that the record of the trial court did not indicate if there was interpretation and from which language to which language. Counsel submitted that apart from the record showing that the charge was read and explained to the appellant in Kiswahili, it did not show whether there was interpretation at all. Counsel further submitted that the response to the charge by the appellant "it is true" as recorded, does not show whether the words were uttered in English, Kiswahili or any other language. On the facts, the appellant admitted saying "it is true" which again counsel has taken issue with.

5. The learned counsel submitted that the plea was equivocal since even the coram did not indicate the language of proceedings. Counsel went on to submit, that the response to questions put to the appellant was not also recorded. In a nut shell, the appellant's case is that the plea was equivocal and has sought the quashing of the conviction and setting aside of the sentence. Counsel referred to the case of **Harold Wilson Omollo v Republic, Criminal Appeal No.192 of 2007** to buttress his submission for the proposition that proceedings that did not comply with the procedure for taking plea are null and void.

6. The respondent conceded the appeal for the reason that the plea was not equivocal since the language was not indicated, and the response by the appellant to the charge was recorded in English. And when the facts were read to the appellant, again the response was recorded in English. For those reasons, the respondent's conceded the appeal saying that the anomaly vitiated the trial.

7. I have considered this appeal, submissions by counsel and perused the records. This being a first appeal, it is the duty of this court to re-evaluate the evidence, analyse itself and draw its own conclusions. See **Okeno v Republic** [1972] EA 32. However, the court notes that in this appeal, no evidence was adduced except the facts read to the appellant hence it will have to consider the record in order to make its determination on this appeal regarding the unequivocality of the plea recorded by the trial court.

8. The appellant pleaded guilty to the charges he faced and was convicted on his own plea of guilty. That is the conviction and sentence that he has moved to challenge before this court. **Section 207(1)** of the Criminal Procedure Code provides with regard to reading of charges to an accused person thus:-

> **S. 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."***

9. The section is clear that it is the court that should state the substance of the charge to the accused and hereafter invite the accused to plead to the charge. On the other hand, **section 198** of the same code provides:-

S.198(1) ***"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."***

10. Giving "***evidence***" should be taken to include taking of plea and/or stating facts of the case. The same ***section 198(4)*** provides that the language of the High Court is English while the language of the subordinate court is both English and Kiswahili. ***Article 50(2)(m)*** of the Constitution provides that every person has a right to a fair trial which includes the right ***to have the assistance of an interpreter without payment, if the accused person cannot understand the language used at the trial.***

There is no doubt that the appellant was in person since he was not represented by an advocate.

11. The manner and steps of recording plea was discussed and laid down in the case of ***Adan v Republic*** [1973] EA 445 by the Court of Appeal for Eastern Africa 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. If the accused does not agree with the statement of 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." (emphasis)***

12. The procedure for recording plea as laid down in the above case was re-stated in the case of ***Kariuki v*** Republic [1984] KLR 809, while in the case of ***Njuki v Republic*** [1990] KLR 334, the court, referring to the case of ***Hondo s/o Akunany v Republic*** (1951) 18 EACA 305, held that the court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally. Here, the court was emphasising on the need for caution when recording a plea of guilty.

The Court of Appeal emphasised on the importance of stating facts in te case of ***Obedi Kilonzo Keveva v Republic*** [2015] eKLR thus:-

> ***"It is important that after a plea of guilty is recorded, the facts of the case are read to the accused. The importance of statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence."***

13. In the present appeal, according to the record, the appellant was charged in court on 2nd December, 2013. Interpretation was English/Kiswahili, and after the charge was read and explained to him in kiswahili, he replied – "***ni kweli***." At that point the prosecution asked for time to peruse the file. The court placed the file aside.

14. Later that day, the appellant is recorded to have informed the court that he had not heard the charges and requested the charge to be read again. According to the record, the charge was read once again and explained to the appellant in Kiswahili to which he replied – ***"si ukweli"*** – "***not true***" a plea of not guilty was recorded and the case was set for hearing on 17th July, 2014. The appellant was granted a bond of Kshs.50,000/- with one surety or cash bail of Kshs.20,000/-.

15. On 17th November, 2014, the record of the proceedings went thus:-

"Before J. Ongo'ondo PM

CIP Kariuki prosecutor

Elias Court clerk

Accused present

Prosecution – I had three witnesses

Accused – I am ready

Prosecutor – I apply to include charge of malicious damage as count 11.

Court: Count 11 has been read to accused in Kiswahili language he understands who replies:

Accused – It is true

Court – Plea of guilty entered.

Prosecution

Accused – I request count 1 to be read to me as well.

Court – Read charges a fresh

Count 1 – Charges have been read to accused in Swahili language which he understands who replies

Accused – It is rue.

Court – Plea of guilty entered

Count 11 – charges have been read to accused in Swahili language he understands

Accused – It is true.

Court - Plea of guilty entered."

16. Then facts were read by the prosecution and the appellant replied – "***it is true."*** The court then convicted the appellant on his own plea on both counts and sentenced him, to serve 10 years imprisonment in count 1 and a fine of Kshs.10,000/- or three moths' imprisonment in default in count 2. The sentences were ordered to run consecutively.

17. The appellant's counsel has taken issue with the learned trial magistrate's failure to indicate the language of the proceedings before his court, and whether those proceedings were interpreted. According to counsel, the appellant's plea of guilty was equivocal and the appellant did not understand what was going on and was therefore prejudiced.

18. According to the record, except on the first day, 2nd December, 2013 when the language of interpretation was indicated as English/Kiswahili, the record is silent on what language was used by the court in the subsequent dates, and one cannot tell whether there was any interpretation.

19. When the appellant appeared in court on the first day, he pleaded guilty but later changed his plea to that of not guilty. When the case came up for hearing on 17th January 2014, the language of the court was not indicated, but the appellant is recorded to have informed the court that he was ready. The record

is also silent on which language the appellant addressed the court, and whether there was any interpretation. It was important for the court to indicate in which language proceedings were conducted and if there was any interpretation for the benefit of the accused. Did the court conduct proceedings in English or Kiswahili which are languages of the subordinate court? Did the appellant address the court in Kiswahili or some other language? The record is silent on this.

20. Secondly, the manner in which the charge was read does not show that all the ingredients or elements of the offence were explained to the appellant and that he understood them. ***Article 50(2)(b)*** of the ***Constitution*** is clear that every accused person has a right to a fair trial which includes the right to be informed of the charge ***with sufficient detail*** to answer it. The way the charges were recorded to have been read to the appellant, did not contain sufficient detail to enable him understand and answer them. This is not in conformity with both the Constitution and the law.

21. Thirdly, the manner of recording a plea as laid down in the case of ***Aden v Republic*** (supra) was not complied with. The trial court did not appreciate that it was recording a plea of guilty and take caution by ensuring that the charges were read and all elements thereof explained to the appellant and that the appellant understood them before recording the plea of guilty. Furthermore, the court was required to record the appellant's plea in as near as possible, to what he said in response to the charges, which was not the case here.

22. Fourthly, the court was required to state the facts to the appellant and ask him to respond to those facts as a way of ensuring that the appellant understood the nature of the case he faced, and for the court to satisfy itself, that the plea of guilty recorded was unequivocal. Without indicating the language in which facts were read to the appellant, it is difficult to tell whether the appellant really understood those facts and that his response was voluntary.

23. Great caution must be taken when recording a plea of guilty, and the court must ensure that indeed the accused understands what he is pleading to and the consequence of his plea. This is because once a plea of guilty has been recorded, followed by a conviction and sentence, the accused is deprived of the right of appeal by virtue of **section 348** of the Criminal Procedure Code, except on the extent and legality of sentence – see ***Olel v Republic*** [1989] KLR 444.

24. Having given due consideration to this appeal and perused the record, I am satisfied that the learned trial magistrate did not follow the procedure and steps for recording the plea of guilty herein. The plea of guilty recorded cannot be said to have been unequivocal, and therefore, could not be a basis of a conviction. The prosecution has, in my view, rightly conceded this appeal because the recorded plea was vitiated. Consequently, I allow this appeal, quash the conviction and set aside the sentence on both counts. I order that the fine if paid, be released to the depositor.

25. The respondent, in its submission asked that a re-trial be conducted. The appellant's counsel has also submitted that a re-trial could be ordered. When should a re-trial be ordered? The law relating to re-trial is now well settled. A re-trial will only be ordered where the original trial was illegal or defective and justice requires it. The law was well stated in the case of ***Fetehali Manji v Republic*** [1966] EA 343, where the Court of Appeal for Eastern Africa laid the law thus:-

> ***"In general, a re-trial will be ordered only when the original trial was illegal or defective. It will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a re-trial should be ordered; each case must depend on its own facts and circumstances and an order for a re-trial should only be made where the interests of justice require it."***

26. In the case of ***Makupe v Republic*** [1984] KLR 523, it was held, that in considering whether or not to order a re-trial, ***each case must depend on its particular facts and circumstances and an order for a re-trial should only be made where the interests of justice require it and should not be ordered where it is***

likely to cause an injustice to the appellant.

27. From the above decisions, the guiding principle in deciding whether to order a re-trial is to do justice and avoid causing prejudice. In this appeal, the respondent's counsel sought a re-trial although the appellant's counsel does not seriously oppose it.

28. The offence was committed on 22nd November, 2013. The appellant according to the charge sheet, was arrested on 30th November, 2013. He was convicted on 17th January 2014, and sentenced to 10 years imprisonment in count 1 and a fine of Kshs.10,000/- in default 3 months' imprisonment with an order that sentences run consecutively.

29. I have considered this matter and the fact that the complainant suffered serious injuries. The interests of justice demand that a full trial be conducted, so that the appellant gets an opportunity to defend himself. I also take into account the fact that the appellant is not opposed to a re-trial and in my view, no prejudice will be caused to him.

30. For the above reasons, I order that the appellant shall be re-tried at the Chief Magistrate's court at Kakamega before a magistrate of competent jurisdiction other than a court presided over by ***Hon. J. Ong'ondo***. The appellant shall be presented to that court on 3rd August, 2016, for purposes of taking a plea for a re-trial.

Dated and delivered at Kakamega this 29th day of July, 2016.

E.C. MWITA

JUDGE