REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 75 OF 2015

(An appeal from the judgment of the Resident Magistrate, Embu in CR. Case No. 1943 of 2014 dated 17/12/2014)

JOSEPH MUCHANGI MWANIKI..…..... APPELLANT

VERSUS

REPUBLIC.....….....RESPONDENT

J U D G M E N T

1. The appellant was convicted on his own plea of guilty on two counts of housebreaking and stealing contrary to Section 304(1)(b) and stealing contrary to Section 279(b) of the Penal Code where two different complainants lost property valued at Kshs.3,000/= and Kshs.2,500/= respectively. The appellant was sentenced to serve the following sentence:-

Count I

Four (4) years imprisonment for housebreaking and seven (7) years imprisonment for stealing from a dwelling house.

Count II

Four (4) years imprisonment for housebreaking and seven (7) years imprisonment for stealing from a dwelling house.

2. It was ordered that the sentences do run concurrently.

3. In the petition of appeal, the appellant relied on three grounds. Firstly that the sentence of seven (7) years imprisonment was excessive considering that he was a first offender; that the sentence of house breaking should have been reduced and that his mitigation was not considered by the trial court.

4. The appellant in his written submissions introduced two grounds. Firstly, he said that he did not understand the language of the court since there was no interpretation. Secondly that he did not plead guilty voluntary since he was tortured by the police in custody including the investigation officer before being told to go and plead guilty in court.

5. The appeal was opposed by the respondent in its submissions filed in court on 21/10/2016. As for the sentences imposed, Ms. Nandwa submitted that they were within the law and not excessive since Section 304 sets the imprisonment term as between 7 and 14 years depending on the thing stolen. The state argued that the offences in the two limbs are different in each count and attract different sentences although they

form part of the same transaction.

6. It was further argued that the appellant failed to raise the issue of the alleged involuntary plea before the magistrate during the trial which renders his claim not credible. The state contended that having pleaded guilty, the appellant cannot appeal against conviction but only against the sentence.

7. In regard to Section 348 of the Criminal procedure Code, the law was settled in the case of ***K.N. VERSUS REPUBLIC [2016] eKLR Court of Appeal at Malindi Criminal Appeal No. 69 of 2014*** where it was held:-

> *"..it is now settled that Section 348 aforesaid is not an absolute bar to challenging a conviction from a plea of guilty on some ground other than the extent and legality of the sentence. In* ***Ndede Vs R [1991] KLR 567*** *this court explained that the first appellate court is not bound to accept the accused person's admission of the truth of the charge as there may be an unusual circumstance, such as injury to the accused, or the accused is confused, or there has been inordinate delay in bringing the accused person to court from the date of arrest.*
>
> *We think, in the circumstances of this case that this appeal is not barred by the provisions of Section 348 got the reasons we shall shortly revert to."*

8. In view of the Court of Appeal decision in this case, it is clear that an accused person who has pleaded guilty can appeal against both conviction and sentence.

9. The appellant contended that he did not understand the language of the court and that he did not understand the charge. I have perused the proceedings of the trial court. It is evident that the language of the court was not indicated. Article 50(2) of the Constitution provides:-

> *(2) Every accused person has a right to a fair trial which includes:-*
>
> *(b) to be informed of the charge with sufficient detail to answer it.*

10. The accused is entitled to have the charge explained to him and to have proceedings conducted in the language of his choice. The trial magistrate has a duty to inquire from the accused the language the accused understands and to make a record of the interpretation.

11. It was held in the case of ***MERCY KENDI VS REPUBLIC [2014] eKLR*** that:-

> *"I have perused the record and the proceedings. The record does not show the language in which the plea was taken. The trial court stated that it used the language known to the Appellant. The Appellant has raised an issue urging that she did not comprehend the proceedings. The record of the court should be clear as to the language first of the court, and secondly the language in which the plea was explained to the Appellant. There is nothing on record to show either the language of the court, or the language into which the plea was read over and explained to the Appellant. The Appellant's contention that the language used was not comprehended by her has not in the circumstances been controverted.*
>
> *I have come to the conclusion that the plea to the charge against the Appellant was not properly taken proceedings were materially defective. Consequently the plea recorded was equivocal in the light of the defect the conviction entered is null and void..."*

12. The failure by the trial magistrate to indicate the language used in taking plea was wrong and it borders on violation of the accused's rights for a fair trial as provided under Article 50(2) of the Constitution. The omission by the court of that critical duty renders the trial a nullity for all intents and purposes.

13. The appellant himself pleaded for an order for a retrial in the petition. The respondent did not address

this issue in its submissions. In ordering retrial, the court must consider whether if ordered, the retrial would be futile in that the witnesses may not be traced due to lapse of time or that the evidence available may not likely lead to a conviction.

14. It was held in the case of ***AHMED SUMAR VS REPUBLIC [1964 EA 481*** that:-

> *We are also referred to the judgment in **Pascal Clement Braganza Vs R. [1957] EA 152.** In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial 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 an accused person.*

15. In the case before me, I am of the considered opinion that a retrial if ordered, will not prejudice the appellant in any way. He was charged on 17/12/2014 and the plea taken, he was convicted and sentenced on the same day. The appeal was lodged on 17/9/2015 which was heard and concluded expeditiously within a period of one year.

16. This being the trend the prosecution is not likely to have a problem in tracing the witnesses. All considered, I find this case suitable for a retrial.

17. The proceedings in Embu Chief Magistrate Criminal Case No. 1943 of 2014 are hereby declared a nullity including all the consequential orders. The sentence is accordingly quashed and the appellant set at liberty forthwith.

18. A retrial is hereby ordered to be dealt with by another magistrate other than the one who conducted the trial herein.

19. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF NOVEMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

The Appellant

Ms. Nandwa for Respondent