



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 110 'A' OF 2014

(Appeal against conviction and sentence from the original Criminal Case No. 469 of 2014 in the Senior Principal Magistrate's Court Hamisi arising from the judgment of [HON. J. K. NG'ARNG'AR, SPM] delivered on 4.8.2014)

DAVID CHWEA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

Introduction:

1. On 02/05/2014, the Appellant herein DAVID CHWEA was jointly charged with MOSES NDASIA KHAGONI before the Senior Principal Magistrate's Court at Hamisi in Criminal Case No. 469 of 2014. They faced the main charge of house breaking and stealing. The Appellant herein faced an alternative count on handling stolen goods.
2. The charges were tailored as follows:-

CHARGE: HOUSE BREAKING CONTRARY TO SECTION 304 (1) AND STEALING CONTRARY TO SECTION 279 (b) OF THE PENAL CODE (.)

PARTICULARS: 1. MOSES NDASIA KHAGONI (2) DAVID CHWEA:- On 19th day of May 2014 at Jivovoli village Shamahe location of Hamisi District within Vihiga County broke and entered the building used as a dwelling house by **CAROLINE ATETWA** and stole, as per attached sheet, the property of the said **CAROLINE ATETWA** all valued at Kshs. 17,720/=.

ALTERNATIVE CHARGE: HANDLING STOLEN GOODS, CONTRARY TO SECTION 322 (10 (2) OF THE PENAL CODE.

PARTICULARS:- DAVID CHWEA:- On the 19th day of May, 2014 at Jivovoli village of Shamakhokho location in Hamisi district within Vihiga County, otherwise than in the course of stealing, dishonestly received and retainedknowing or having reason to believe them to be stolen goods.

They denied both charges and not guilty pleas were entered and hearing dates set. The Accused persons were granted bond.

3. On 04/08/2014 when the case came up for hearing the Appellant herein requested the trial Court to re-read the charges to him and the request was granted. He admitted the main charge. Facts were tendered and when a list of items allegedly recovered from the Appellant's house was read out he only admitted the recovery of flour from his house by the police. The Court convicted him on his own plea and eventually sentenced him to serve 2 years imprisonment for house-breaking and 1 year imprisonment for stealing with sentences running concurrently.

4. It is the conviction and sentences which prompted the filing of this appeal.

The Appeal:

5. On 12/08/2014, the Appellant filed a Petition of Appeal before this Court and raised 6 grounds of appeal which appear as under:-

1. ***The charge sheet on the basis of which the conviction was premised was incurably and fatally defective in substance and incapable of sustaining such conviction.***
2. ***The proceedings leading to the conviction violated the appellant's constitutional right to a fair trial.***
3. ***There is an error on the face of the record.***
4. ***The language used was not well understood by the appellant.***
5. ***There was no legal basis for plea of guilty and conviction as the appellant's response to the facts in terms that "It is flour that was recovered in my house" did not amount to admission of offences of house breaking and stealing of which he was convicted and sentenced.***
6. ***The sentence of three years meted to the appellant was too harsh in the circumstances and disproportionate to the mitigation and the appellant's record.***

In the premises, the appellant petitions this Honourable court for ORDERS THAT

1. ***The appeal be allowed.***
2. ***The conviction and the sentence be quashed and or be set aside.***
3. ***The appellant be set at liberty.***

6. On 08/10/2014, the Appellant through his Counsel, A.B.L. Musiega & Company Advocates filed a Notice of Motion dated 07/10/2014 for the following prayers:

1. ***The application be placed before the judge for perusal and be certified urgent for hearing.***
2. ***The proceedings in Hamisi Senior Principal Magistrate's Court Criminal Case No. 469 of 2014 Republic vs. David Chwea and another be stayed pending the final determination of this application.***
3. ***This Honourable Court do grant the appellant/applicant bail with or without security pending the hearing of the appeal or order the suspension of the sentence until the appeal is heard.***
4. ***This Honourable Court be at liberty to exercise its inherent jurisdiction under Article 165 of the Constitution which is unlimited, together with the jurisdiction conferred by the Criminal Procedure Code either to revise the conviction and sentence of the lower court or allow the appeal summarily and record a plea of not guilty to the charges pending in the lower court and do direct the trial of the appellant thereat in accordance with the law.***
5. ***In the alternative this Honourable Court issues further or other orders that are just for the expedition disposal of the appeal herein.***

7. The said application was confirmed as urgent and fixed for hearing on 13/10/2014. However the

same did not proceed on for hearing due to the absence of the Appellant and the Court asked the Counsels to consider hearing the main appeal instead. The request was acceded to by both parties and the main appeal set for hearing on 26/11/2014.

8. At the hearing of the appeal, the Appellant herein was represented by Mr. Musiega Learned Counsel and the State was represented by Mr. Mailanyi.

Mr. Musiega opted to argue grounds 1 and 5 separately and consolidated the rest of the arguments. On the first ground, it was Mr. Musiega's contention that the charge sheet was fatally defective in that it was duplex since it had two charges brought together being house breaking and stealing. He relied on the case of **Samia –vs- Republic [1974] EALR 83** on this submission. He further attacked the way the particulars were drafted. He submitted that the words used "**broke and entered**" could only support a charge under **section 304 (1) (a)** of the Penal Code and not under **section 304 (1) (b)** under which the Appellant was charged. He further argued that even if the Appellant was charged under **section 304 (1) (a)** of the Penal Code still the charge would be incurably defective for want of the use of the words "**with intent to steal/commit a felony**". He relied on the case of **Terah Mukinya –vs- Republic [1966]EALR 425** on this proposition. Mr. Musiega further submitted that even the alternative charge of handling stolen goods under **Section 322** of the Penal Code was duplex and hence fatal. To this, he argued that under **Section 322** the ingredients ought to be that the Appellant "**received or retained**".

9. On grounds 2, 3, 4 and 5 Mr. Musiega referred to Article 50 (2) of the Constitution in his argument that the Appellant was not accorded a fair hearing in the way the plea of guilty was taken. He took issue with the language used and how the charges were read and presented to the Appellant. It was his argument that the record remained silent on how the Appellant indicated to understand Kiswahili language and that the alleged stolen items were contained on a separate sheet which sheet did not indicate to be the one referred to under the particulars of the charge. He further argued that the words "**it is true**" are not proper or sufficient to constitute proper plea-taking. He referred to the cases of **Adan Vs. R., Nyuki Vs. R. (1990) KLR 334** and **Kisibi Vs. R. (1991) KLR 125** in support of his said arguments.

10. Ground 6 was on sentencing. He argued that by dint of Article 50 (2) (p) of the Constitution, the Appellant was entitled to benefit from the lesser severe sentence like probation or community service orders and not an imprisonment term hence the sentence was harsh and ought to be reviewed. He further argued that if the appeal is allowed, the Appellant ought not to be retried since the initial trial was illegal and defective for it was the prosecution who preferred illegal and defective charges instead. He relied on the cases **of Koome Vs. R. (2005) 1 KLR 575** and **FEDHAHALI MANJI VS. R. (1966) EALR 343.**

11. Mr. Mailanyi responded to the appeal on 01/12/2014 as he had previously sought for time to respond to the Appellant Counsel's submissions. He opposed the appeal.

On ground 1, he submitted that the charges were proper and could be contained in one charge since they were committed in the course of same events and that the charges as drafted complied with Section 137 (a) (iv) of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya (hereinafter referred to as 'the CPC') and Form 9 of the Second Schedule. He emphasized that the charges as drafted are statutorily created and framed and not at the liberty or discretion of the prosecution hence the charges did not vitiate the proceedings. He distinguished the case of **Samia vs. R.** in that the said case contained 3 offences which were not inter-related at all and not statutorily drafted hence not applicable in the present case. He further argued that even if the Court was to find any defect on the charge, the same could safely be cured under Section 382 of the Criminal Procedure Code as no injustice was occasioned upon the Appellant. He also referred the Court to Sections 134 and 135 of the CPC.

12. On the issue of plea-taking, Mr. Mailanyi submitted that the allegation that the Appellant did not understand the charges was false since he had initially been arraigned before the Court and took

the plea in Kiswahili where he denied the same. It is the Appellant who himself requested for the charges to be re-read to him later on and admitted to the recovery of the flour which was part of the items recovered from his home and conviction rightly followed.

On ground 6, Mr. Mailanyi opposed the appeal on conviction since under Section 348 CPC an appeal could only be preferred against the legality of sentence and only on the extent and legality thereof and since the sentences granted are within the law, indeed so lenient, those sentences cannot be said to be harsh or at all. He argued that Article 50 (2) of the Constitution only applied to instances where the law has changed or has been amended and not in the present circumstances of the case. He prayed for the dismissal of the appeal accordingly.

13. On a rejoinder, Mr. Musiega reiterated his earlier submissions and further stated that Section 137 (1) (a) (iv) CPC and the Forms in the Second Schedule were not cast on stone and the police ought to have handled the same appropriately as the Form is just but a guide. He further pointed out that even in those forms the words “with intent” are used hence the omission is fatal. It was his position that Section 134 CPC is subject to Section 135 (2) CPC and the charges remain defective. He submitted that the process had occasioned an injustice to the Appellant who is serving an illegal sentence. To him Section 348 CPC was overtaken by Article 50 (1) of the Constitution on fair hearing and that the Constitution allows an unsuccessful party who has even gone to the highest court of the law to approach the High Court for redress. He reiterated his call for no basis for retrial and that the Appellant be released instead.

Analysis and determination:

14. This being 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 but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

15. I will therefore consider the appeal in the following manner:-

a. On the defectivity of this charges:

16. This Court has already reproduced the charges and the particulars hereinabove.

Section 304 (1) (b) of the Penal Code, Chapter 63 of the Laws of Kenya states as follows:-

“304 (1) Any person who –

- a. *breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or***
- b. *having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks one thereof, is guilty of the felony termed house breaking and is liable to imprisonment for seven years.”***

17. For purposes of certainty as we proceed on further, it is imperative to note that the above section recognizes two instances constituting the offence of house breaking being:-

- i. *Where on having entered any building, tent or vessel used as human dwelling with intent to commit a felony therein such a person breaks out thereof before the commission of any other felony.***

In this case the only offence committed would be house-breaking.

- ii. ***Where on having entered any building, tent or vessel used as human dwelling one actually commits another felony therein.***

In this instance at least two offences would have been committed depending on what actually happens therein.

18. The law therefore recognizes a situation where in the course of committing an offence other offences can be further committed. That is exactly what is provided for under Section 135 CPC which states as follows:-

“135 (1) Any offences, whether felonies or misdemeanors, may be charged together in the same charge or information if the offences charged are founded on the same facts, or form or are part of a series of offences of the same or a similar character.

(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.

(3) Where, before trial, or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of that charge or information.”

19. Under Section 137 CPC, the said statute came up with the rules for the framing of charges or informations and states in mandatory terms that those rules shall apply to all charges and informations and that notwithstanding any rule of law or practice, a charge or information shall, subject to the CPC, not be open to objection in respect of the form or contents if the charge or information is framed in accordance with the CPC.

Section 137 (a) (i), (ii), (iii) and (iv) of the CPC clearly states as follows:-

“137. The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code –

Mode in which offences are to be charged

- a. ***(i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;***
- ii. ***the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;***
- iii. ***after the statement of the offence, particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary:***

Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph shall require more particulars to be given than those so required;

- iv. ***the forms set out in the Second Schedule or forms conforming thereto as nearly as may be shall be used in cases to which they are applicable; and in other cases forms to the same effect or conforming thereto as nearly as may be shall be used, the statement of offence and the***

- particulars of offence being varied according to the circumstances of each case;*
- v. *where a charge or information contains more than one count, the counts shall be numbered consecutively;*”

20. The Second Schedule of the CPC truly provides the forms to be used in charges and informations. Form 9 relates to burglary and is as follows:-

“Burglary, contrary to Section 304, and stealing, contrary to Section 279 of the Penal Code.

PARTICULARS OF OFFENCE.

A.B., in the night of the day of 20 inDistrict within theProvince, did break and enter the dwelling house of C.D., with intent to steal therein, and did steal therein one watch, the property of C.D., the said watch being of the rate of Ksh. 200.”

21. Let us therefore consider the foregone in light of the facts and instances in this appeal.

On the issue of having two offences under one charge, Section 135 (1) CPC has clearly stated that the same can be undertaken as long as the offences charged are:-

- i. ***founded on the same facts; or***
- ii. ***form or are part of a series of offences of the same or a similar character.***

Looking at the particulars as stated in the Charge Sheet, it is alleged the Appellant herein in company of another person broke into and entered the building used as a dwelling house by Caroline Atetwa and stole therein. The offences appearing on the charge sheet are house breaking and stealing therefore. They are indeed founded on the same facts and form a series of offences of similar character. I therefore find that the charge as drafted came within the ambit of Section 135 (1) of the CPC hence is not duplex neither is the same defective. The Appellant could be rightly charged with the offence of house breaking and stealing in the same charge. The case of **Saina Vs. R.** is therefore distinguishable in that the offences therein did not come under the umbrella of Section 135 (1) of the CPC.

22. On the issue of the particulars in support of the charges of house breaking and stealing, I do agree that the words “***with intent to steal therein***” ought to have formed part of the particulars. There is an omission to that extent. What this Court needs to do is to consider if that omission renders the charge sheet defective. This Court fully concurs with the finding of the Court in the case of **Isaac Omambia vs. Republic (1995) e KLR**, where the Court had the following to say:-

“In this regard, it is pertinent to draw attention to the following provisions of section 134 of the Civil Procedure Code which makes particulars of a charge or information an integral part of the charge. Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as the nature of the offence.”

23. In our case, the Appellant pleaded to the charge on two instances. On 02/05/2014 when he denied the same and on 04/08/2014 when he personally requested that the charges be re-read to him. The charge was quite clear and the particulars of the offence were detailed enough. The details of the charge forming the ingredients thereof as stated included the date, the place and manner in which the offence was alleged to have been committed. The Appellant therefore pleaded with full knowledge of the charges he was facing despite the omission of the words “***with intent to steal therein***”. It ought to be noted that the allegation is that Appellant in the first instance gained access into the dwelling house by a break-in. A sight to Section 137 of the CPC is to the effect

that no objection shall be taken to a charge in respect to form or content as long as it is framed under the rules therein. Under Section 382 of the CPC an objection to a charge can only be sustained on appeal or revision if it is demonstrated that the omission, error or irregularity occasioned a failure of justice.

24. I come to the finding that the Appellant was fully aware of the charge and particulars before Court and the omissions of the words **“with intent to steal therein”** in the particulars did not cause any failure or miscarriage of justice and the same is curable under Section 382 of the CPC. I do not find anything which vitiated the proceedings on this aspect neither am I convinced that the constitutional rights to a fair trial to the Appellant were violated by the said omission. The first ground therefore fails in further light to Article 159 of the Constitution.

b. **On the taking of the plea of guilty.**

25. The plea was taken twice before the trial court. The Appellant pleaded not guilty on the first instance. Three months later the same Appellant requested the Court on his own motion to have the charges re-read to him. He then pleaded guilty.

26. On the language used, I do note that the charges were in both instances read to the Appellant in Kiswahili. He did not raise any objection to the use of the Kiswahili but went ahead to plead accordingly. The record is clear that the language used was Kiswahili. Having participated in the proceedings effectively, the Appellant cannot now hide under the auspicious of language barrier to his advantage. That aspect equally fails and as so held by the Court of Appeal in **Simon Kangethe v Republic (2014)eKLR** when it expressed itself as follows:

*‘However, departing from the strict need to write down the language used at trial in order to substantiate whether the accused understood the language at proceedings, this Court in **JACKSON LELEI v R, Cr.A. No. 313 of 2005** and also in **ANTHONY KIBATHA v R, Cr. A. No. 109 of 2005** stated that the issue of whether an accused person understood the language used in his trial is one of fact and so an appellate Court in establishing compliance must examine the record. If the language used is not specifically indicated, in our view, the Court must go a step further and consider the level of the accused’s participation in the proceedings which will clearly show if he/she understood the same.*

In the circumstances of this case it is evident that there was no need of an interpreter as the appellant understood the charge made against him to the extent that he participated fully by cross-examining the prosecution’s witnesses and also was able to defend himself in a long and detailed statement.’

26. The aspect of the plea-taking which this Court wishes to have a greater look at is the manner in which the Court took down the facts of the case. The prosecution read the facts as under:-

“...The 2nd Accused (the Appellant herein) who had earlier been arrested led the police to the 1st accused. Some items were recovered. Both of them were taken to Serem and both charged with offence.

This is the list of the items that was recovered in the house of the 2nd accused.”

The second accused (the Appellant herein) responded as follows:

“It is the flour that was recovered in my house.”

And the Court proceeded as follows:

“Court:- The 2nd accused is convicted on plea of guilty.”

27. 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 fact or raises any question of his guilt in his reply must be recorded and change of plea entered.***
- v. ***There is no change of plea a conviction should be recorded and statement of facts relevant to sentence and the accused reply.***

28. The guilty plea for it to stand in law must be unequivocal. But in this matter, the prosecution having stated that the items in the list (which was part of the main charge) were recovered in the Appellant’s house, the Appellant denied such and clarified that it was only the flour which was recovered therein. The said list contained a total of 19 items with the flour being one of them. In essence, the Appellant denied that the recovery of the rest of the 18 items to have been recovered from his home. The record is also silent on whether the said items were produced for verification by the Court if the same was truly recovered. The Appellant therefore having denied the particulars, did not in essence admit to the charge before Court. The plea can not be said to have been unequivocal, it was not. The Court ought to have raised its head on the Appellant’s denial of the alleged recovery in his house and declined to convict the Appellant on his own plea of guilty. The said conviction therefore is not safe and is hereby quashed and the resultant sentence set aside.

(c) On whether a retrial ought to be ordered:

29. The subject upon which retrial can be considered has been dealt with by Court’s on several instances. The Court of Appeal in the case of **Samuel Wahini Ngugi v. R (2012)eKLR** stated as follows:

“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

‘It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on 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 required it and should not be ordered when it is likely to cause an injustice to an accused person’

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004(unreported) when this Court stated as follows:

‘...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.’

30. In this case, what has led to the quashing of the conviction and setting aside of the sentence was purely on the part of the Court since had the Court properly handled the aspect of the taking of the facts, the conviction would not have resulted. The prosecution only did its duty of laying the facts before the Court but it was not the one which entered the guilty plea the subject of this appeal.

31. This Court is therefore satisfied that this is a perfect case for a retrial more so given that the Appellant's trial had not even begun before the lower Court. The Appellant shall therefore be released into police custody and shall be arraigned before the Hamisi Law Courts for taking a plea within 21 days of this judgment.

Orders accordingly.

DELIVERED, DATED and SIGNED this 14th day of May, 2015.

A. C. MRIMA.

JUDGE.