



**REPUBLIC OF KENYA**

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

**CR.A. NO.161 OF 2014**

**BETWEEN**

**JOHN HOSEA Alias GUGA .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Being an appeal from the original conviction and sentence in Hamisi PMC Cr. Case No.756 of 2014 dated on 28/07/2014 by Hon. J.K Ng'arng'ar, SPM)**

**J U D G M E N T**

**Introduction**

1. The appellant herein, John Hosea alias Guga was arraigned before the Hamisi principal Magistrate's Court on two counts as follows. In Count 1, he was charged with robbery contrary to Section 295 as read with Section 296 (1) of the Penal Code, the particulars being that on the 25<sup>th</sup> day of July 2014 at Iramba village, Tigoi sub location in Hamisi Sub County within Vihiga County robbed PHILISTER EDWARD MUGERA of four cocks, three hens and a big sufuria all valued at kshs.5900/= the property of the said PHILISTER EDWARD MUGERA and immediately before the time of such robbery threatened to stab her with a knife.
2. In Count II, the appellant was charged with burglary contrary to Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code. The particulars were that during the night of 25<sup>th</sup>/26<sup>th</sup> of July 2014 at Iramba village Tigoi Sub location in Hamisi Sub County within Vihiga County broke and entered the kitchen of ELIUD EVUSA OGADA with intent to steal therein and did steal three hens and two cocks all valued at kshs2900/= the property of the said ELIUD EVUSA OGADA.
3. In the alternative, the appellant was charged with handling stolen property contrary to Section 322(1) (2) of the Penal Code. It was alleged that on the 26<sup>th</sup> day of July 2014 at Tigoi Sub location in Hamisi County, otherwise than in the course of stealing, dishonestly retained three hens and two cocks all valued at kshs.2900/= knowing or, having reason to believe them to be stolen.

**The Plea, Conviction and Sentence**

4. When the appellant appeared before the trial Court on 20<sup>th</sup> August 2010, he pleaded guilty to both counts. He was found guilty on his own plea convicted and sentenced to 5 years imprisonment on

Count 1, 2 years imprisonment on the first limb of Count II and 1 year imprisonment on the second limb of Count II. The sentences were to run concurrently.

### The Appeal

5. Being aggrieved by both conviction and sentence handed down by the trial Court, the appellant who appears in person brought this appeal before this Court on grounds:
  1. THAT the learned trial magistrate erred in law and in fact by relying on the evidence of the respondent as such evidence was circumstantial coincidental and lacked evidential/credential validity to justify a conviction.
  2. THAT the trial Court misdirected itself on both points of law and fact by rejecting my alibi defence which sufficiently created a reasonable, considerable amount of doubts as to the strength of the Prosecution case.
  3. THAT had the learned trial magistrate noted the enormous contradictory evidence in this case, he/she would not have reached the disputed verdict.

The appellant therefore prays that the appeal be allowed.

6. A look at the grounds of appeal at once reveals that the person who drafted the same on behalf of the appellant was completely unaware of the fact that appellant pleaded guilty and as such the issue of the trial Magistrate relying on contradictory evidence or failing to consider the defence of alibi did not arise during the trial. The above observation notwithstanding this appeal shall be considered on its own merit.

### Analysis and Findings

7. As an appellate Court of first instance, this Court is under a duty to reconsider and evaluate the whole record in this case afresh with a view to confirming whether a) The plea entered by the trial Court was unequivocal and b) whether if the answer to (a) above is no, this Court should consider ordering a retrial. In **Mwangi vs- Republic [2004] 2KLR 28** it was held, inter alia, that “it is not the function of the first appellate Court, merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate’s findings should be supported. In doing so it should make allowance for the fact that the trial Court had the advantage of hearing and seeing the witnesses.”
8. In the instant case, the appellant’s conviction was based on a plea of guilty and the only issue therefore is to confirm whether that plea was unequivocal. Factors to consider in determining whether the plea was unequivocal include the language used by the Court during taking of the plea so as to determine whether the appellant understood what he was pleading to. The Court should also check to confirm whether the facts constituting the offence were clearly read to the accused and whether he admitted, denied or added to those facts. It is to be noted however that the decision as to whether the plea was unequivocal or not will depend on the circumstances of each case. See **Baya –vs- Republic [1984] KLR 657** and **Ombewa –vs- Republic [1981] KLR 450.** Also see **Adan –vs- Republic [1973] EA 445** which sets out the steps to be followed/taken by the Court taking the plea, which are that:
  - a. **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;**
  - b. **Accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.**
  - c. **Prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;**
  - d. **If the accused does not agree the facts or raises any question as to his guilt his reply must be recorded and change of plea entered;**
  - e. **If there is no change of plea, a conviction should be recorded and a statement of the facts**

**relevant to sentence together with the accused's reply should be recorded.**

9. In the case of **Njuki –vs- Republic [1990] KLR 334**, it was held that a plea recorded in words such as “I admit” “I plead guilty”, “it is true,” “I am guilty or accept” cannot be considered as unequivocal pleas. What this means is that before convicting on a plea of guilty, it is desirable for the trial Court to ensure that every constituent of the charge is explained to the accused and that the accused is asked to admit or deny such constituent and what he says should be recorded in a form which will satisfy an appeal Court that the accused fully understood the charge and pleaded guilty to every element of it unequivocally.
10. In the instant case it is my considered view that the plea taken by the trial Court was not unequivocal, despite the fact that the language used to read and explain, the charges to the accused was Kiswahili which the accused was said to understand. It is noted from the record that on both counts the appellants answer to the charge was “true”. The charges to which the appellant purported to plead guilty were and serious the trial Court needed to exercise more caution than was taken. In brief the taking of the plea in this case did not comply with the holding in the **Adan** and **Njuki** cases (above).
11. Having reached the conclusion that the plea was equivocal, the conviction of the appellant in both counts cannot stand. The appeal must therefore succeed. Accordingly, I allow the appeal, quash the conviction and set aside the 5 and 2 years imprisonment on counts I and II respectively. I see no purpose in considering whether or not I should reduce the sentence meted out to the appellant.

**Should the appellant be released or sent for retrial**

12. After carefully considering the facts of the case and the date of the alleged offence, I am satisfied that this is a proper case for retrial. The facts are such that if properly presented to the Court the same could result into a conviction of the appellant. I am also satisfied that there would be no prejudice occasioned to the appellant if the case goes back to the trial Court for retrial. In any event, the Prosecution will not be filling in any gaps in its evidence.

**Conclusion**

13. In conclusion, the appeal is allowed. The conviction is quashed and the sentence is set aside. The appellant shall be retried by a Court other than the trial Magistrate who took the plea namely Hon J.K. Nga'ng'ar Senior Principal Magistrate of Hamisi law Courts.
14. Orders accordingly

**Judgment delivered, dated and signed in open Court at Kakamega this 29<sup>th</sup> day of September 2015.**

**RUTH N. SITATI**

**J U D G E**

**In the presence of .....**

**Present in person for appellant**

**Mr. Omwenga for Respondent**

**Mr. Lagat - Court Assistant**