



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
(CRIMINAL DIVISION)
CRIMINAL REVISION NUMBER 153 OF 2014

RepublicProsecutor

VERSUS

Julius Mwangi Wachira.....Accused

RULING

This is a revision pursuant to the provisions of Section 362 of the Criminal Procedure Code.^[1] The power of the High Court under Section 362 of the Criminal Procedure Code^[2] is for the High Court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.

The accused was convicted of the offence of stealing by servant contrary to Section 281 of the Penal Code^[3] and sentenced to serve five years imprisonment on 8.7.2013.

The Community Service Officer, Nyeri Central submitted a sentence review report received in court on 21.1.2015. I find it rather disturbing that it has taken almost one year for the revision to be heard. I find it inappropriate such a matter can last this long. It is an affront to justice and an indication of malfunctioning systems and the necessary steps should be taken to avoid such delays.

The pre-bail report shows that the accused pleaded guilty 'to avoid suffering in remand'. This raises a fundamental legal issue on the said plea and whether it was unequivocal and if the conviction can be allowed to stand.

Section 281 of the Criminal Procedure Code provides that an accused person may plead not guilty, guilty or guilty subject to a plea agreement. The section however does not set out the steps to be followed by a court when taking plea. In *Adan Vs Republic*^[4], the Court of appeal set out the steps to be taken in recording plea as follows:-

“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 or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional 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.

The court went on to explain the purpose of the statement of facts that it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal. It assists the court to confirm if the accused really understood the position when he pleaded guilty. In *Njuki V. Republic*^[5] the court, while citing *Hando S/o Akunaay V. R.*^[6], re-emphasized the need for caution in recording a guilty plea. It 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.

The proceedings before the lower court show that the accused were arraigned in court on 8th July 2013. When charges were read to him, he replied "*it is true I stole these items belonging to.....*"

COURT: Plea of guilty entered.

COURT PROSECUTOR: narrated the facts.

Accused : Facts are correct.

COURT: Accused convicted on own plea of guilty

MITIGATION: I have a wife and two children. I have no parents. I am the only bread winner.

For a guilty plea to be unequivocal the steps set out in the *Adan*^[7] it must be followed. Further the record must be such that it leaves no doubt as to whether or not the accused understood the charges and confirmed the facts as true. Where an accused person pleads guilty for fear of remaining in custody as in the present case, then the plea is not unequivocal. The charge sheet shows the accused was arrested on 6.7.2013 and was in custody for two days before he was produced in court. It was incumbent upon the court to ascertain why the accused was held for two days, whether the two days were working days and even ascertain why he was held in excess of the period provided for under the constitution.

The Supreme Court of India in *Gulabrao Baburao Deokar v. State of Maharashtra and Others*^[8] cited its previous decision in *Masroor v. State of Uttah Pradesh and Anor*^[9] where it stated as follows as follows:-

“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts....”

There is nothing on record to show that the magistrate sought an explanation from the prosecution why the accused was not presented to court within 24 hours as provided for under Article 49 (f) of the Constitution. In my view where it is evident that an accused person has been held in custody longer than the constitutionally permitted period, courts have a legal duty to make inquiries from the prosecution and put it the explanation on record otherwise we risk having beautiful constitutional provisions on paper but not in practice.

recommends the accused is a family man and that the victim of the offence was his wife and that the accused and the wife had a thorny relationship. From the record, the wife left him with two children of the marriage and went to live with another man. That the accused is remorseful and his ex-wife has forgiven him and that the community has nothing against him. The report recommends that he be committed for community service.

I have considered the said report and the circumstances under which the offence was committed and I am persuaded that while sentencing, it is important for the court to bear in mind the circumstance under which the offence was committed. I have also considered the purpose of sentencing and the principles of

sentencing under the common law^[10] which are:-

- i. To ensure that the offender is adequately punished;
- ii. To prevent crime by deterring the offender and other persons from committing similar offences;
- iii. To protect the community from the offender;
- iv. To promote the rehabilitation of the offender;
- v. To make the offender accountable for his or her actions;
- vi. To denounce the conduct of the offender
- vii. To recognize the harm done to the victim of the crime and the community.

The above list is not exhaustive, but is a guide and each case depends on its peculiar circumstances. Here is a man who had a stormy marriage, he was left with two minor children by his wife, the wife went to live with another man, he sent for her to come for the children and amid all these tribulations, he committed the offence. The act is wrong, but a sentence of 5 years is in my view harsh considering the aggravating circumstances that may have driven him to commit the offence.

Having considered the propriety of the said sentence and the sentence review report and principles of sentencing, I hereby reduce the sentence of 5 years imposed on the accused to the period already served. Accordingly, I order that the accused be released forthwith unless otherwise lawfully held.

Orders accordingly

Dated at Nyeri this **14th** day of **December** 2015.

John M. Mativo

Judge

^[1]Cap 75, Laws of Kenya

^[2] Ibid

^[3] Cap 63, Laws of Kenya

^[4] {1973} 445

EA

^[5] {1990} KLR 334

^[6] {1951} 18 EACA 305

^[7] Supra

^[8]Criminal Appeal 2113 of 2013

^[9](2009) (14) SCC 286

^[10] Regina vs MA {2004}145A