REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 179 OF 2011

LESIIT, J

AYALA ABDI AYALA ……..….. APPLICANT

VERSUS

ATTORNEY GENERAL THROUGH

STATE COUNSEL ……..….RESPONDENT

(Being an appeal against Judgment of Mr. Adet V. (DM II PROF) in Moyale Criminal Case No. 133 of 2011 dated 16th May, 2011)

JUDGEMENT

This appeal was heard fully by Apondi J. however, he the Appellant Ayala Abdi Ayala was charged with 3 counts of offences. Count 1 Malicious Damage to property contrary to section 339 of the Penal Code. Count 2 stealing from a locked room contrary to section 279(g) of the Penal Code. Count 3 threatening to kill contrary to section 223(1) of the Penal Code.

The offences were committed on 16th March, 2011 and the complainant was the father of the Appellant. The Appellant ultimately pleaded guilty to the three counts and was convicted and sentenced to 2 years imprisonment on each count the sentences were to run concurrently.

The Appellant was aggrieved by the conviction and sentence and therefore filed this appeal. He then filed an application for bail pending appeal which was granted nine months after his sentence.

The Appeal has more grounds of appeal in his Petition as follows;

1. **That |I pleaded guilty to the charges against me.**
2. **That am Kenyan citizen and resides at Manyatta Burji Location in Moyale Distrit in Marsabit County in Eastern Province.**

3. **On 24thMarch, 2011 I broke our TV and threaten my father to kill if he dares to complain about this.**

4. **On 3/5/2011 at around 6.00 am I was arrested by the police and I was taken to the Moyale**

Law Courts on 5/5/2011 to face the full force of the law at the law courts of Moyale.

5. **That am sick and suffering from psychiatric disorders which sometimes ignite me with violent behavior when I cease to take the medication.**

6. **On 5/5/2011 I accepted the charges before the learned magistrate due to poor drug administration of which I missed the medication for almost five days.**

7. **That due to this my deteriorating health status on acute psychosis I was referred to Meru District Hospital by the MOH Moyale District on the 13/9/2011.**

8. **On 20/10/2010 I joined Islamic teachers training College which I am supposed to finish the course on 5/9/2012.**

9. **That the learned magistrate sentenced me to 2 years sentence while not considering my statement on my health status and defence.**

The facts of the case are that the Appellant was seated watching Television with his father when two elders entered. The two elders discussed with Appellants father the relationship between the Appellants father the relationship between the Appellants mother and father, after the discussion the elders and Appellants father resolved that the father should divorce his wife, who was Appellants mother that annoyed the Appellant who stood up and broke down the television set in the sitting room. He also proceeded to break into his father's bed room few days later and took a brief case in which was cash in which was cash 150,000/- and Ethiopian Birr 500/- and other properties thereafter he started to sent threatening messages to his father including threats to kill him. Eventually the Appellant was arrested and charged with this offence.

Mr. Isaboke represented the Appellant in this appeal and Mr. Motende, learned State Counsel represented the State. The State did not opposed the appeal. Mr. Isaboke challenged the manner in which the plea of guilty was taken and urged that since the language used to take the plea was not indicated, the plea was equivocal. That ground is however, untenable as in support of the bail application one of the Appellants grounds were that he is a college student. Surely to reach college status, the Appellant must be literate. The record of proceedings shows that the language used throughout was English and Kiswahili. Nothing turns on this point.

Mr. Isabode urged that the plea was not properly taken since the record does not show that any plea was entered to the second and third counts after the charge was read to the Appellant. Likewise after the facts of the case were led by the prosecution on a subsequent date, a composite guilty pleas on all counts. Mr. Isaboke also urged that the learned trial magistrate considered extraneous matter before sentence but ignored the appellant's mitigation.

Mr. Isaboke urged that SMS'S that formed the basis of conviction in one of the counts were not printed out by the service provider and that the court had no opportunity to see same.

Mr. Motende on his part urged that he wondered whether the exhibits were produced in the case. He also urged that since the complainant was father of the Appellant he should have referred the case for a Probation Report to be better informed before sentence.

I have carefully considered this appeal. I have evaluated afresh the facts of the case as read out by the Prosecution during the plea in which the Appellant admitted the charge.

The taking of a proper plea has been discussed several cases and in order to do justice to all concerned, the pleas should be properly taken in **KARIUKI VS REPUBLIC 1984 KLR 809**

> **"The word "do" recorded by the trial court as the accused persons answer to the facts of the offence meant nothing and was neither an admission nor a denial of the facts.**

2. The manner in which a plea of guilty should be recorded is

(a) The trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understand;

(b) He should then record the accused's own words and if they are an admission, a plea of guilty should be recorded;

(c) The prosecution may 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 to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused's reply – Adan v. Republic [1973] EA 445.

3. The statement of offence in the second count and the particulars revealed at least three charges against the Appellant and one could not tell to which one he was alleged to have pleaded guilty.

4. The irregularities and omissions committed by the subordinate court resulted in the Appellant not having a satisfactory trial.

5. The fairest and proper order to make where the accused person has not had a satisfactory trial is an order for a retrial.

6. The Court of Appeal has authority and jurisdiction on a second appeal to remit the case, together with its judgment or order thereon, to first appellate court or to the subordinate court for determination whether or not by way of rehearing, with such directions as the court of Appeal may think necessary Criminal Procedure Code Cap 75 section 361(2)"

ADAN VRS REPUBLIC 1973 EA 445

"(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 state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

(iv) If the accused does not agree the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

(v) 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."

In the instant case, the Appellant's answer to the facts presented by the prosecution was inadequate to form a basis for conviction. The Appellant merely said **"it is true".** However, that reply did not adequately answer to the charge neither was it sufficient to satisfy the all important requirement that the court must be convinced that the Appellant knew what he was pleading to. That answer was not sufficient for court to find that the Appellant understood the facts of the charge, that he knew what he was admitting to and that the plea was unequivocal. I find that the plea was equivocal. There is another concern. The Appellant maliciously damaged his father's property, stole from him and then sent envisaries to warn him that he "soul" was in danger. Just on considering the manner in which the offence

was executed, the learned trial magistrate should have doubted the mental capacity of the Appellant and should have investigated it before convicting the Appellant.

I know that the Appellant's counsel did not raise mental capacity. However I noted that at the time of applying for bail, medical reports and notes on the Appellants mental state were produced. Clearly the Appellant had a history of mental ailment. He should have been examined before plea to confirm his capacity to plead to the charge and more importantly his mental status at the time of offence. I must comment on the manner in which the learned trial magistrate proceeded after entering a plea of guilty. The learned trial magistrate proceeded to take submissions from the prosecution titled "**Accused antecedents**" such remarks as Appellant siding with his mother and not father; and such chauvinistic derogatory remarks as suggesting Appellant forgot his mother alone could not bear him were dangerous remarks. They were inadmissible at that stage. The evidence Act. Section 57 makes it clear where Appellants antecedents are admissible. Further all the prosecutor should have done is to disclose if the Appellant had any previous record, how many convictions he had and whether they were similar and or relevant to the present charge. Any other statement besides that was inadmissible, prejudicial to the Appellant and resulted in depriving the Appellant a fair trial.

Having considered the appeal. I find the proceedings were defective and the conviction null and void ab initio. I quash the conviction and set aside the sentence.

The Appellant had served 9 months in jail, more than half the sentence imposed against him. I am satisfied that the interests of justice do not require this court to order a retrial of this case. Accordingly I decline to order a retrial.

Consequently the Appellant's Appeal is allowed and Appellant set free.

READ AND DELIVERED AT MERU THIS 20TH DAY OF JUNE 2013.

LESIIT, J

JUDGE.

ORDER: The Appellant cash bail deposited in this court be refunded to the depositor.

LESIIT, J

JUDGE.