REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRA 4 OF 2012

MICHAEL MAWIRA MBAABU…………………………APPELLANT

VERSUS

REPUBLIC …………………………………………..RESPONDENT

JUDGMENT

The Appellant MICHAEL MAWIRA MBAABU was charged with house breaking and stealing contrary to section 304(1) and 279(b) of the Panel Code. In the alternative count the Appellant faced one count of handling stolen goods contrary to section 322(2) of the Panel Code.

The charges were read to the Appellant who admitted them. The facts of the case were then led by the prosecution which the Appellant also admitted.

A plea of guilty was entered and the Appellant sentenced to five years imprisonment on each limb of the charge. Being aggrieved by the conviction and sentence the Appellant filed this appeal. In his grounds of appeal, he raises the following nine grounds.

When the appeal came up for hearing, the applicant urged the court to reconsider his sentence. He urge that he was 21 years at time of sentence, that he has learnt his lesson and has reformed since imprisonment and would not repeat such offence.

Mr. Makori for the sate conceded the appeal. Counsel urged that the Appellant was found with stolen things listed in the alternative count, which were also produced as exhibits.

He urged that none the less the learned trial magistrate did not indicate for which count the applicant was convicted. He urged that the state will not be seeking a retrial since the Appellant had served 1 ½ years imprisonment of the sentence.

I have carefully considered this appeal and the submission by the Appellant and the learned state counsel, Mr Makori.

The Appellant pleaded guilty to the charge. However there is a problem with the manner in which the plea was taken. The Appellant faced one main count of burglary and stealing and an alternative count of handing stolen property. The facts led by the prosecution are as follows:

I have above named Appellant was convicted and sentence on 16-12-2011 by Chuka Law Court to serve 10 year imprisonment on offence of house breaking and stealing contrary to section 304(1) and 279(b) of

the Panel Code wish to submit my mitigation to the honorable court to be thought of under the following grounds

1. **That I am first offender in this matter.**
2. **That I pleaded guilty as I was coached by police officer at police station to go and plead guilty as they were making arrangements with the complainant to solve the mater amicably at home if I will not dispute the allegations.**
3. **That I was disoriented by threats of the police who had promised me to suffer double consequence if pleaded not guilty.**
4. **That the plea was unconditional equivocal.**
5. **That the learned trial magistrate did not give me time to reflect on the plea I was about to make.**
6. **That the learned trial magistrate did not at first properly explained to the nature of the offence I was facing and the consequences thereof.**
7. **That I am the sole bread winner of a family of a wife and children who totally depend on me.**
8. **That my parents are elderly old and are living below poverty life and hence need my help with regard to their basic needs together with my kids.**
9. **That I pray for this honorable court to put into consideration the life of my destitute children and need of care and protection from me.**

To the those facts the applicants relied." accused- facts are correct as stated."

The learned trial magistrate proceeded to convict the applicant. He did not indicate the offence for which the applicant was convicted. Then he passed the following sentence.

I order that he serve (5) five years imprisonment on each limb of the charge herein.

Sentence to run concurrently.

Right of appeal 14 days explained.

The manner in which a proper plea ought to be taken was been the subject of many count cases. In **MOSE VERSUS REPUBLIC [2002] EA** the court of appeal held:-

> "**The procedure for calling upon an accused to plead required that the accused admit to all the ingredients constituting the offence charged before a plea of guilty could be entered against him. The words "it is true" standing on their own did not constitute an unequivocal plea of guilt. It was desirable that every constituent of the charge he explained to the accused that he should be required to admit or deny every constituent (Kato vs Republic [1971] EA 542, Republic v Yonasani Egalu [1942] 9 EACA 65 and Wanjiru v. Republic [1975]EA 5 followed). In this instance, though the Appellant's responses to the three counts were insufficient, his subsequent full admission of the facts on both the 18th October and 19 November cured the insufficiency of his response to the courts and confirmed that he understood the charges and intended to admit to them unequivocally.** Similarly in **Kariuki versus Republic 1984 KlR 809** the court of appeal observed.
>
> **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 raise 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)"

In the instant case, the facts led by the prosecution revealed at least two offences. It revealed Appellant was found with certain goods which had been stolen from the complainant house on the same day of the theft. The mention of the goods found with the Appellant were pegged to the alternative count of handing. The prosecutor stated that the goods the Appellant had were the ones visited in the handling charge. The actual goods recovered from the applicant were not mentioned by the prosecutor even though they were produced as exhibits.

Given these facts, it is not clear to which charge the Appellant was pleading to. It was important for the trial court to satisfy itself whether the Appellant was admitting to have broken into and stolen from the couple or whether he received the goods and therefore was admitting handling them. The facts by the prosecution were confusing as the made reference to both counts of offences charged.

If the Appellant was admitting receiving the goods he was found to be in possession of, the court should have required the Appellant to explain how he came by the goods. If satisfied had with the explanation the court may either have entered a plea of not guilty or discharged the Appellant.

There was another issue with the case. The learned trial magistrates did not indicate for which offence he was convicting the Appellant. Looking at his statements, the learned trial magistrate convicted the Appellant for the main count. In that case, he should have stated on record that he was entering no finding on the alternative count. Failure to make such a finding is a serious omission and goes to the very substance of the charge against the Appellant.

All in all, the plea was not properly taken and it is not clear for which offence the Appellant was convicted. More importantly due to the duplex facts by the prosecution, no one can tell to which of the two counts the Appellant admitted the offence. Furthermore, it was imperative for the court to state for which charge the Appellant was convicted.

The Appellant did not get a fair trial. On whether to order for retrial I find that the interests of justice will not be required a retrial since the Appellant had served substantive part of the sentence by the time his appeal was heard.

In the result, trial proceedings were defective and I quash the conviction and set aside the sentence. The Appellant should be set free unless he is otherwise lawfully heard.

DELIVERED AT MERU THIS 11TH DAY OF JULY 2013.

LESIIT J.

JUDGE