No. 163

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO. 159 OF 2012

SIMON MAYORE MANENO ……..…… APPELLANT

VERSUS

REPUBLIC …….…….. RESPONDENT

(Being an appeal from the conviction and sentence of the PrincipalMagistrate's Court at Kilgoris, Hon. B. O Ochiengin Criminal Case No. 524 of 2012 dated 9th July, 2012)

JUDGMENT

1. The appellant herein, Simon MayoreManeno (hereinafter referred to only as "**the appellant**") was convicted and sentenced on his own plea of guilty for the offence of stealing contrary to **section 275** of the **Penal Code** and malicious damage to property contrary to **section 339 (1) ofthe Penal code**. The particulars of the offence with which he was charged on the first count were that,on the 6th day of July 2012 at 11.00pm at Oldonyo Senya area in Transmara District of Narok County, the appellant and his then co-accused, one James NyabochaOmboto jointly stole six copper wires and eight copper tapes all valued at kshs. 50,000/= the properties of Safaricom Limited. On the second count, the particulars of the offence were that, on the 6th day of July 2012 at 11.00pm at Oldonyo Senya area in Transmara District of Narok County, appellant and his then co-accused, the said James NyabochaOmboto willfully and unlawfully damaged electric copper wires and copper tapes all valued at kshs.150,000/= the properties of Safaricom Limited.
2. The substance of the charge and every element thereof were stated by the court to the appellant and his co-accused in a language that they understood namely, Kiswahili. On being asked as to whether they admit or deny the truth of every element of the charge, the appellant and his co-accused pleaded guilty on both counts. After their plea of guilty, the facts that led to the charges that were preferred against them were read to them. The appellant and his co-accused told the trial court that they understood the said facts and that the facts were true. The trial court then entered a plea of guilty and convicted the appellant and his co-accused on both counts.
3. The appellant and his co-accused were thereafter given time to mitigate which they did. After considering their mitigation, the court concluded that the offence with which they were charged had serious economic implications in that it resulted in great inconvenience to the complainant and the public. The trial court also noted that the offence was rampant in the country and needs deterrence. Due to the foregoing reasons, the trial court sentenced the appellant and his co-accused to serve 3 years imprisonment on count 1 and 5 years on count 2. The trial court ordered the sentences run concurrently.
4. Being dissatisfied with the conviction and sentence of the trial court, the appellant filed an appeal in person on 18th July 2012. The appellant's petition of appeal which was filed on that day was

withdrawn and substituted with a petition of appeal dated 19th July 2012. In the said petition dated 19th July, 2012, the appellant laid down the following grounds:-

> **"1. The learned trial magistrate erred in law and fact in convicting and sentencing me in a plea that was not unequivocal.**
>
> **2. The learned trial magistrate erred in law and in fact in conducting the proceedings in a language I did not understand thereby occasioning miscarriage of justice.**
>
> **3. The learned trial magistrate erred in law and in fact in failing to explain to me the charge and the particulars in Ekegusii language which I do understand thereby occasioning failure of justice.**
>
> **4. That the maximum sentence awarded to me was excessive, harsh and not based on the known principles of sentencing.**
>
> **5. That the proceedings before the honourable court were unlawful and against the Criminal Procedure Code."**

5. When the appeal came up for hearing on 16th October, 2013, **Mr.Ombachi**appeared for the appellant while**Mr. Majale** appeared for the State. In his submission in support of the appeal, **Mr. Ombachi** argued grounds 1, 2 and 3 togetherthen ground 4 and 5 separately. He argued that the plea of guilty entered on the 9th July 2012 was not unequivocal and that for a plea of guilty to be unequivocal the same must comply with the guidelines that were set in the case of,**Aden vs. Republic (1973) E. A 445,** namely,that:

i. The charge and the ingredients of the offence must be explained to the accused in his own language or in a language that he understands.
ii. The accused's own words must be recorded and if they are an admission, a plea of guilty shall be recorded.
iii. The prosecution should thereafter state the facts and the accused should be given an opportunity to dispute the facts or to explain the facts or to add any relevant facts.

6. **Mr. Ombachi** submitted that the aforesaid guidelines are in accordance with **sections 207 (2) and 281 of the Criminal Procedure Code**. Counsel submitted that the proceedings before the trial court were in a language that the appellant did not understand and that for a plea to be unequivocal the language used by the court must be understood by the accused person and where interpretation is required, this fact should be recorded together with the name of the interpreter and the language used. He submitted further that the purpose of this is to enable the appellate court if the matter proceeds to appeal like in the instant case to satisfy itself that the procedure of recording a plea of guilty was followed. Counsel submitted further that the proceedings of the trial court did not satisfy the foregoing criteria and that the omission makes the plea of guilty not unequivocal. He submitted that the answer that was given by the appellant to both counts namely, "**it is true**" does not mean guilty. On this submission he cited the case of **Oremo vs. Republic (1990) KLR 290** where OmolloJ. (as he then was) held that, the sentence, it is true, does not amount to a plea of guilty which as provided for under**section 207 (2) of the Criminal Procedure Code**.
7. **Mr. Ombachi** argued further that the court is not bound to accept the accused's admission to the charge if there appear indications to the contrary which includes unusual circumstances which the court should look for before accepting the admission. He submitted that in this case, there were unusual circumstances namely that; the accused had incurred injuries that required treatment. Counsel pointed out further that the copper wires that were alleged to have been stolen were not found in the possession of the appellant.Counsel cited the case of **Ndede vs. Republic (1991) KLR 567** where the court held that the court is not bound to accept the accused's admission of the truth of the charges and to proceed to convict him if there appears sufficient cause to the contrary. He added that in such cases, the trial court should try that cause before proceeding further. Counsel submitted that the trial court accepted the appellant's plea without having regard to the

foresaid guidelines which are intended to ensure that the accused is not prejudiced while taking a plea.

8. Counsel submitted that the trial court should have sought an explanation from the prosecution about the appellant's injuries and why the appellant was arrested on 6th July, 2012 and brought to court on 9th July, 2012 which was an infringement of the appellant's right under **Article 49 (1) of the Constitution of Kenya**.
9. On ground 5 of appeal, counsel submitted that the proceedings of the trial court did not accord with the provisions of **section 207 (2)** of the **Criminal Procedure Code** with regard to taking a plea of guilty. He submitted further that **article 50 (1) (g) of the Constitution of Kenya** requires that the appellant be informed of his rights to be represented and that the record of the proceedings of the trial court does not show that the accused was informed of this right or that he was so accorded the right.
10. On ground 4 of appeal, counsel for the appellant submitted that the trial magistrate did not take into account the age of the appellant and his mitigation and that the object of the sentencing is not only to punish the offender but also to ensure the offender is rehabilitated and assimilated back to the society. He submitted that the appellant was a first offender and a young man who had just finished "O" level and hehad pointed out to the trial court that he did not have parents and that he struggled to pay his school fees. Counsel submitted that the trial court should have taken into account these factors in sentencing the appellant. He submitted that in the circumstances the sentence of 5 years imprisonment was harsh. **Mr. Ombachi** submitted in conclusion that if the court finds the plea not to have been unequivocal a retrial would not be possible as the exhibits were returned to the complainant after the conviction and sentencing of the appellant and his co-accused by the trial court. He submitted that the appellant would in the circumstances not pray for a retrial. He urged the court to allow the appeal.
11. **Mr. Majale** for the state conceded to the appeal. He acknowledged that there was failure on the part of the trial court at the time of taking the plea to follow the requisite guidelines for such exercise. He submitted that it is clear from the record that the plea was not unequivocal and thus he was persuaded by the authority of **Oremo vs. Republic** cited by the appellant that the sentence "it is true" does not amount to a plea of guilty.
12. On the issue of language that was used during the plea, he submitted that the appellant had informed the court that he understood Kiswahili language and it is clear from the record that there was a Kiswahili interpreter although his name is not indicated in the record. On the issue raised by the appellant about the delay of bringing him to court, he submitted that from the charge sheet, it is clear that the appellant was arrested at 11.00pm on 6th July, 2012 which was a Friday. **Mr. Majale** submitted that itwas not possible for the appellant to be taken to court until Monday 9th July 2012. He submitted that due to the anomaly noted earlier regarding the manner in which the plea was taken, he would have sought a re-trial. He admitted however that a re-trial may not be possible because the court made an order that the exhibits be released to the complainant. **Mr.Majale** submitted that from the appellant's mitigation, it is clear that he committed the offence which should not go unpunished. He submitted that instead of releasing the appellant and letting him go free, the appellant should be given a non-custodial sentence so that he may realize the consequences of his unlawful acts.
13. **Mr. Ombachi** for the appellant in reply submitted that in the event that the court comes to the conclusion that the conviction of the appellant was proper, the appellant would have no objection to a non-custodial sentence being imposed against him.
14. This being the first appellate court, it is mandated to reconsider the evidence if any that was adduced before the trial court, evaluate the same and draw its own conclusion in deciding whether the trial court's judgment should be upheld. The court should however warn itself of the fact that it did not have the opportunity to see the demeanor of the witnesses as they testified before the trial court and should therefore make due allowance for that.
15. From the court record it is clear that the appellant told the court that he understood Kiswahili. The substance of the charge and every element thereof having been stated to the appellant in Kiswahili he must be taken to have understood the same before he pleaded guilty to the same.In the circumstances, I find no merit in the appellant's complaint that the charge was read to him in a language that he did not understand. On the issue whether or not the appellant's plea of guilty was unequivocal, the following is my view. Having perused the record of the trial court, I am satisfied

that the learned magistrate complied strictly with the principles that were set out in the case of **Adan vs. Republic (supra)**that was cited by the appellant in support of his submission that his plea of guilty was equivocal. From the record, the charge and every element thereof was read to the appellant in Kiswahili which is the language that he told the court that he understood. The appellant and his co-accused both pleaded guilty by admitting the truth of the charge. In this regard, the appellant stated, "it is true". After this plea was recorded, the learned magistrate before convicting the appellant and his co-accused caused the facts upon which the charge was founded to be read to the appellant and his co-accused. After the facts were read out, the appellant and his co-accused once again told the trial court that the facts were true and that they understood the same. It is after this that the learned magistrate proceeded to convict the appellant and his co-accused on their plea of guilty on both counts. I am not in agreement with the submission by **Mr. Ombachi** that any time a charge is read to an accused person and he responds with the words **"itis true",** a plea of not guilty should be entered because such a plea is not unequivocal. This I don't think was the *ratio decidendi* in the judgment of Omolo J. In the case of **Oremo vs. Republic** (supra). In my view, the point the judge put across in that judgment which I am fully in agreement with was that a trial court should not take every plea of **"it istrue"** as a plea of guilty even where the accused's explanation of the circumstances under which the offence was committed or his subsequent response to the facts on which the charge is based negates his admission of the charge. In such a case, even if the accused pleads **"itis true"** to the charge when read to him, a plea of not guilty must be entered. In the **Oremo** case, the appellant was charged with being in possession of *cannabis sativa*. He told the magistrate that it was true but he added that he did not know that what he was carrying was bhang. It is clear here that this explanation that was given by the accused negated his earlier admission of the charge and as such it was wrong for the trial court to have entered a plea of guilty. In the present case, the appellant admitted the charge and every element thereof. The facts on which the charge was based were also read to him and he again admitted the same. He did not say anything that was inconsistent with his admission of the truth of the charge. I must add that even his statement in mitigation was consistent with a plea of guilty. There was no basis therefore upon which the trial court could have been expected to enter a plea of not guilty. It is therefore my finding that the plea of guilty entered herein was unequivocal. This ground of appeal although conceded by the state in my view lacks merit.

16. This leaves the last ground of appeal that was on the sentence that was imposed by the trial court. I am persuaded by the submissions by the appellant's advocate that in the circumstances of this case, the sentence of 5 years that was imposed upon the appellant was excessive. The trial court imposed against the appellant maximum sentences on both counts without an option of a fine or any other form of non-custodial sentence. The trial court should have considered the fact that appellant was a first offender as a mitigating factor. Generally a sentence of imprisonment should not be imposed on a first offender except where the offence is particularly grave, aggravated or widespread in a particular area of which there was no evidence in this particular case.And even in such a case, maximum sentence is imposed only in exceptional case which again I don't think this was one. It is therefore my finding that the appellant's appeal on sentence has merit. I hereby set aside the sentence of 3 years imprisonment on the first count and 5 years imprisonment on the second count that were imposed against the appellant and substitute the same with a sentence of 1 year imprisonment on the first count and 1 year imprisonment on the second count both sentences to run concurrently.

Delivered, Dated and Signed at Kisii this 6th day of December 2013.

S.OKONG'O

JUDGE

In the presence of;

Mr. Ombachi for the appellant

Mr. Shabola for the state

Mobisa court clerk

S.OKONG’O

JUDGE