REPUBLIC OF KENYA

High Court at Kericho

Criminal Revision 181 of 2012

WELDON KIPRONO NGENO.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

REVISION

WELDON KIPRONO NGENO was charged in Sotik Criminal Case No. 1988 of 2012 with the offence of House breaking contrary to **Section 304 (1) (b)** and stealing contrary to **Section 279 (b)** of the **Penal Code**. He pleaded guilty to the charge, was convicted and sentenced to seven (7) years imprisonment.

JAPHET KOSKE counsel for the applicant now seeks revision on the following grounds:-

1. **THAT** the trial Magistrate erred in law by not following the due process of taking plea as outlined in the case of Aden V/S Republic (1973) EA hence failing to inquire the language the applicant understand.

2. **THAT** the trial Magistrate erred in law and fact by convicting the applicant without noting the facts of the case and by relying on personal information provided by the prosecution.

3. **THAT** the learned trial Magistrate erred in sentencing the accused person to serve a term of seven years and did not address her mind to principles of sentencing by failing to take into account that the applicant was a young man of 17 years, was first offender, remorseful and ought therefore to have called for a social inquiry report before sentencing.

4. **THAT** trial Magistrate erred in law by convicting the appellant on a defective charge sheet. Your ladyship, the offences charged and particulars are all mixed up in the charge sheet instead of arranging the charges per count; thus the charge sheet is fatally defective.

5. **THAT** the trial Magistrate erred in law for sentencing a minor for seven years in normal jail instead of referring him to correctional juvenile centre.

6. **THAT** the trial Magistrate erred in law by handing down a harsh sentence of seven years to minor instead of giving him an option of a fine or non-custodial sentence and having in mind the applicant was of tender age and first offender.

Pursuant to the provisions of **Section 362** of the **Criminal Procedure Code Cap 75 (K)** I have perused proceedings in the Sotik SRM's Court, Criminal Case No. 1988 of 2012 with a view to satisfy myself as to the correctness, legality and propriety of the proceedings and sentence thereof made by the Hon. N. Barasa, Resident Magistrate.

A court taking plea must establish the language of the accused. **(See Adan –Vs- Republic (1973) EA.**

445).

A perusal of the court record indicate as follows:

"Interpretation – Kiswahili

Court- The substance of the charge and every element thereof has been stated by the court to the accused person in the language that he understands who being asked whether he admits or denies the truth of the charge replies:-"

The accused's own language is not stated.

It is common knowledge that the language of the subordinate court is Kiswahili but not all people understand Kiswahili. Therefore, it was incumbent upon the court to inquire into which language the accused was conversant with. Without ascertaining the language the accused understood, it cannot be said with certainty that he understood the charge in question.

Looking at the charge itself. The accused is charged with two (2) offences namely:

1. Housebreaking contrary to Section 304 (1) (b) of the Penal Code.

2. Stealing contrary to Section 279 (b) of the Penal Code.

First and foremost I wish to point out that the second limb of the charge is perse defective. It ought to read as follows:

"Stealing from a dwelling house contrary to Section 279 (b) of the Penal Code."

Section 135 (2) of the **Criminal Procedure Code** stipulates as follows:

"(2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."

The two (2) offences are distinct therefore each offence should have been described differently in its paragraph or a 'count'.

Section 134 of the **Criminal Procedure Code** is in regard to what should be specified in the charge. There must be particulars of the offence. The section states as follows:-

"134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

Looking at the particulars of the offence as framed it lacks some ingredients of the two (2) offences stated which makes the charge defective.

The facts as presented in my view raise doubts as to the accused's guilt.

After the accused purportedly admitted the facts as presented the learned Magistrate did not convict him.

For reasons known to the Magistrate not recorded she caused the case to be mentioned some five (5) days later.

When it came up on 5/11/2012 the accused informed the court that he had not availed the money. He was then given an opportunity to mitigate to enable the court inform itself of what sentence to pass. He had

nothing to state. He was then sentenced to serve seven (7) years in prison. A conviction must precede a sentence in case of an adult.

It has been stated that the accused is a minor aged 17 years. The trial Magistrate who had an opportunity of seeing him should have made an informed decision regarding the age of the accused.

From the foregoing it is apparent that there was a miscarriage of justice. I therefore set aside the sentence imposed. The accused shall be released forthwith.

It is so ordered.

DATED at **KERICHO** this 3rd day of December, 2012.

LILIAN N. MUTENDE

JUDGE