REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE 11 OF 2003

LESIIT J.

CHARLES MWIRIGI…….....…….APPELLANT

VERSUS

REPUBLIC …….....….RESPONDENT

JUDGMENT

The appellant CHARLES MWIRIGI pleaded guilty to a charge of HOUSE BREAKING AND COMMITTING A FELONY CONTRARY TO SECTION 304(1) and s.279(b) of the Penal Code. He was convicted and sentenced to two years imprisonment on each limp with two strokes of the case on each limb. The appellant was aggrieved with the conviction and sentence and therefore filed this appeal.

There are seven grounds of appeal on the filed Memorandum of Appeal. However, Mr. Nyenyire who urged the appeal on behalf of the Appellant urged on two grounds.

One that the learned trial magistrate erred in convicting the appellant yet the alleged stolen items which were recovered were not produced as exhibits; and Two, that the sentence was excessive.

Mr. Nyenyire urged that the learned trial magistrate ought not to have convicted without the items recovered in the case were produced as exhibits. Counsel also urged that corporal punishment is illegal.

Mr. Mungai learned counsel for the state opposed the appeal. Counsel urged that the appellant pleaded guilty to the charge; that the substance of the charge and every element was stated to him in a language he understood and that he admitted the facts.

I have considered this appeal. The appellant pleaded guilty to the charge. The facts were led by the prosecution to which he pleaded. "**Facts true**"

I have looked at the facts as led by the prosecution they were as follows:

Prosecutor 9/2/2003

"On 9/2/2003 the complainant left his house at 11 am to attend church. He left his house securely locked. At 7 pm he came back and found one window pane smashed. He entered the house and found 500, a belt a piece of soap. When he inquired he was told the accused was the suspect."

These facts disclose following facts:

One that the complainant locked his house, and went to church at 11am, on material day;
Two, the complainant returned home at 7. Pm to find one windowpane smashed and Ksh.500, a belt and a piece of soap stolen;
Three, the complainant inquired from the undisclosed persons who said the accused was **suspect;** and
Four, the complainant and villagers apprehended the appellant and recovered "the belt" Five the appellant was taken to police and charged"

In the case of **Wanjiru versus Republic 1975 EA 5**
"**The words "it is true" may not amount to plea of guilty;"**

The facts as led by the prosecution in this case do not disclose the offence that the appellant broke into the complainant's house and stole items in particulars of the charge. All the facts disclose is that the appellant was a suspect. It is not disclosed what the appellant was suspected of. There are many offences which can form charges from these facts e.g. Smashing of window can support charge of malicious damage to property. Entry to steal would form the offence charged depending on the time offence is alleged to have been committed.

When the appellant said the "facts were true" that cannot be considered to constitute an admission to the offence because the facts do not disclose the offence as stated earlier. In the circumstances the conviction entered herein is null and void and cannot be allowed to stand. I quash the conviction and set aside the sentence.

The issue now is whether to order a retrial. The principles which should be determined before a retrial can be ordered and set out in several decisions including the following:

In **Richard Omollo Ajuoga Vs. Republic** H.C. Criminal Appeal No. 223 of 2003. They are as follows:-

"**In the case of Ahmend Sumar Vs. Republic (1964) E.A. 481, at page 483, the predecessor to this court stated as follows:-**
"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered.

The Court continued at the same page at paragraph II and stated further:-

"We are also referred to the judgment in Pascal Clement Braganza Vs. R. [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.

Taking the queue from that decision, this Court in the case of Bernard Lolimo Ekimat Vs. Republic Criminal Appeal No. 151 of 2004 (unreported) had the following to say:-
"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

The court has considered that the appellant was a form 4 student at the time he was charged with this offence. This court recognized as much and granted him bail pending appeal 7 days after he was sentenced. He was released on his personal bond and on a personnel bond signed by his mother.

I considered the fact the complainant in the case was the father of the appellant. I see an element of exaggeration and intolerance on the complainant's part. The complainant almost ruined his son's

education by having him arrested for allegedly stealing 500/- a piece of soap and a belt. This truly was an abdication of parental responsibility and the court ought not to have allowed its powers to be abused.

I find that the interest of justice do not require that a retrial be ordered in this case. I decline to order the same.

Those are the orders of this court.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF DECEMBER, 2011

LESIIT, J.
JUDGE