



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Criminal Appeal 81 of 2004

Arising from Bungoma SPM's Cr. Case no.3161 of 2004

JACKSON NAMUKOA MUNYASI.....APPELLANT

VS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, Jackson Wamukoya Munyasi, pleaded guilty to a charge of Burglary contrary to Section 304 (2) and stealing contrary to section 279 (b) of the Penal code. The particulars of the offence were that on the 10th day of November 2004 at Blue waves estate, Township Location in Bungoma District within Western Province, jointly with others not before the court, broke and entered the dwelling house of one Harrison Odera with intent to steal from therein and did steal one bicycle make Neelam S/NO. 352 10 valued at Ksh.4,000/= the property of the said Harrison Odera.

The learned Senior Resident Magistrate then convicted the appellant on his own plea of guilty and proceeded to sentence him to serve 7 and 3 years imprisonment for burglary and theft respectively. Being aggrieved he appealed against both the conviction and sentence.

The appellant put forward four main grounds on appeal. First he argues that the plea was equivocal hence the trial magistrate should not have convicted him. It is said that the record does not state which language the prosecutor used when reading the facts to the court and to the appellant. Mr. Onderi, the learned senior state counsel did not bother to respond to this ground which was argued by Mr. Onchiri on behalf of the appellant.

I have perused the record of appeal and it is clear that the charge was read and explained to the accused person in Kiswahili language. However when the facts were read to the court and the appellant the language used by the prosecutor was not specified. There is therefore doubt whether the appellant understood the language of the court. In both occasions there is no mention of the language used by the appellant when pleading. It is imperative for courts when recording a plea of guilty to ensure that before an accused person is convicted the charge and all the ingredients of the offence are explained to the accused in his own language or in a language which such an accused understands. It is therefore important for the language used and the translator to be shown.

The second ground agitated on appeal is to the effect that the appellant was convicted on a charge which was fatally defective. The appellant pointed out that the charge did not disclose the time when the alleged offence took place. The appellant further argued that the facts read out did not disclose the offence the accused was charged with and convicted for. The learned senior state counsel conceded to this ground. He agreed that the facts put to the appellant did not disclose the offences he was convicted for. He however pleaded for a retrial in view of the defects. Mr. Onchiri the learned advocate for the appellant opposed the prayer for a retrial in view of the defects.

The offence of Burglary is committed by breaking into or out of a dwelling house at night in order to commit a felony. I will adopt the definition of the word night given in **BLACKS LAW DICTIONARY 7TH EDITION** that it is the time from sunset to sunrise or thirty minutes after sunset and thirty minutes before sunrise. In this matter the charge and the particulars of the offence read to the appellant do not mention the time. The word night was not used at all. The facts which were put to the appellant only mentions that the offence took place at 2.30 a.m. The facts however did not disclose any breakage having taken place. The charge was therefore fatally defective in the absence of above mentioned particulars. There was no evidence whether the bicycle alleged to have been stolen was inside the house or not. I think the learned senior state counsel correctly conceded to this appeal. Plea for a retrial cannot be granted because the charge the appellant pleaded to was fatally defective.

The 3rd and 4th grounds of appeal may be combined. In short the appellant argued that the trial senior Resident Magistrate failed to consider his mitigation thus tendering an excessive and harsh sentence. The record shows that the appellant did not mitigate however the prosecutor did indicate that the appellant was a first offender: It would appear the trial magistrate did not take into account that fact before sentencing. This entitles this court to interfere with the discretion on sentence.

This appeal arose out of a conviction on the basis of a plea of guilty. The court of appeal for East Africa laid down the guidelines to court recording pleas of guilty in the case of **ADAN VS REPUBLIC 1973 E.A. 445** when it held as follows:

- (i) That the charge and all the essential ingredients of the offence should be explained to the accused in his language or in the language he understands.*
- (ii) That the accused's own words should be recorded and if they are an admission, 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 acts.*
- (iv) If the accused does not agree with the facts or raises any questions of his guilty his reply must be recorded and change of plea record and*
- (v) If there is no change of plea, a conviction should be recorded and a statement of facts relevant to sentence together with the accused reply should be recorded.*

The final result in this appeal is that the plea was equivocal and the trial court should not have convicted. Consequently this appeal is allowed with the resultant order that the conviction is quashed and the sentence is set aside. The appellant is set free forthwith unless lawfully held.

DATED AND DELIVERED THIS 18th DAY OF February 2005

J.K. SERGON

JUDGE