



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Criminal Appeal 72 of 2005
**(From original conviction and sentence of the Principal
Magistrate's Court at Nyahururu in Criminal Case No. 1072 of
2005 –Kathoka Ngomo –SPM)**

SAMUEL WAINAINA KARANU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Samuel Wainaina Karanu, was charged with the offence of burglary and stealing contrary to **Sections 304(2) and Section 279(b) of the Penal Code**. The particulars of the offence were that on the night of the 7th of March 2005 at Rironi Village in Nyandarua District, the appellant broke and entered into the dwelling house of Peter Karanu Wainaina with the intent to steal therein and did steal therein Kshs 15,000/=, the property of the said Peter Karanu Wainaina. When the appellant was arraigned before the trial magistrate, he pleaded guilty to the charge. He was convicted on his own plea of guilty and sentenced to serve three years imprisonment on each limb of the offence. The sentences were ordered to run consecutively. The appellant was aggrieved by this conviction and sentence. He filed an appeal to this court.

In his petition of appeal, the appellant raised several grounds faulting the decision of the trial magistrate in convicting and sentencing him. He was aggrieved that he had been convicted on his own plea of guilty on a charge that he did not understand. He was further aggrieved that his mitigation had not been considered before he was sentenced to a custodial sentence that was too harsh in the circumstances. The appellant stated that the court had failed to consider the fact that he was under the age of eighteen years when he was convicted and therefore ought to have been sentence to serve an appropriate sentence according to the law.

At the hearing of the appeal, I heard the submissions made by Mr Simiyu, Learned Counsel for the appellant and Mr Koech Learned State Counsel. The thrust of the appellant's appeal, is that he was convicted on his own plea of guilty on a plea that was equivocal. Mr Simiyu submitted that the language by which the plea was taken had not been stated. He further submitted that the appellant had not understood the charge facing him and thus he could not have been convicted on his own plea of guilty. Mr Simiyu further submitted that the trial magistrate had not followed the established law on the taking of plea of guilty and which fact had thus vitiated the appellant's conviction.

Mr Simiyu urged the court to allow the appeal, set aside the appellant's conviction and the sentence imposed. On his part, Mr Koech opposed the appeal, he submitted that the plea of guilty which was recorded was unequivocal. He further submitted that the appellant had understood the proceedings and therefore the plea of guilty as recorded was proper in law. He stated that the facts of the case were read to the appellant who confirmed the facts to be true. Mr Koech submitted that the sentences meted out on the appellant were neither excessive nor harsh. He urged the court to dismiss the appeal and confirm the sentences imposed on the appellant by the trial magistrate.

Having read the proceedings of the trial magistrate and also considered the submissions made before me

by the Counsel for the appellant and Mr Koech on behalf of the State, the issue for determination by this court is whether the plea of guilty by the appellant recorded by the trial magistrate was unequivocal. The procedure to be followed by a magistrate when taking a plea of an accused person is provided for by Section 207 of the Criminal Procedure Code. In *Adan –vs- Republic* [1973] E.A. 445 the Court of Appeal held at page 446 that:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence.

The statement of facts and the accused’s reply must, of course, be recorded.

The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence.

It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction”.

In the instant appeal, I have carefully read the proceedings of the trial magistrate.

Although it was advisable for the language in which the plea was taken to be stated, in the circumstances of this case, the appellant was not prejudiced by the fact that the said language used was not stated. From the proceedings it is clear that the appellant understood the charge which he pleaded guilty to. The facts in support of the charge were explained to him. He confirmed the facts to be correct after which he was convicted on his own plea of guilty. The appellant cannot now be heard when he submits that the recording of the said plea of guilty was equivocal. The trial magistrate followed the procedure laid down in the case of ***Adan –vs- Republic (supra)*** and ***Section 207 of the Criminal Procedure Code***. I find no merit in the appeal by the appellant against conviction. Having re-evaluated the proceedings of the trial magistrate, I do dismiss the appeal against conviction.

On sentence, I have noted that the appellant was charged with the offence of breaking and stealing Kshs 15,000/= from a dwelling house. The appellant is a first offender. In the circumstances of this case, the sentence of three years imprisonment meted out on the appellant on each limb of the offence was harsh and excessive in the circumstances. From the proceedings, I do not see any aggravating facts of the case that would have made the trial magistrate sentence the appellant to serve the two sentences consecutively instead of concurrently. In the premises therefore, I will set aside the said sentences and substitute it with an appropriate sentence of this court. The appellant is ordered to serve one year imprisonment on each limb of the offence which he pleaded guilty to. The said sentences are ordered to run concurrently. They shall take effect from the 29th of March 2005 when the appellant was convicted by the trial magistrate.

It is so ordered.

DATED at NAKURU this 11th day of November 2005.

L. KIMARU

JUDGE