Kiburi v Republic (Criminal Appeal E025 of 2024)
[2025] KEHC 10645 (KLR) (Crim) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10645 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ISIOLO

CRIMINAL

CRIMINAL APPEAL E025 OF 2024

SC CHIRCHIR, J

JULY 17, 2025

BETWEEN

PETER KOBIA KIBURI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgement of Hon. Lucy K. Mutai (CM) delivered on the 9th of October, 2024 in Isiolo MCCR/E503/2024)

JUDGMENT

1. The Appellant herein was charged with stealing contrary to Section 268(1) as read with Section 275 of the *Penal Code*. The particulars of the charge were that on the 10th day of July 2024 at Tamasha Liquor depot, at Isiolo township area, in Isiolo North sub-county stole cash monies Ksh. 224,000 the property of GeoffreyThuranira. The Appellant pleaded guilty to the charge and was convicted on his own plea. He was fined Ksh. 250,000 or to prison term of 2 and a half in default.

2. He was dissatisfied by the outcome and filed the present Appeal.

Petition of Appeal

3. The Appellant has set out the following grounds:

    a. That the learned Magistrate erred in law and fact in treating the Appellant's mitigation perfunctorily.

    b. That the trial Magistrate erred in law in sentencing the Appellant to Two and a half years imprisonment or to a fine of Ksh. 240,000 (sic), a sentence which was extremely excessive in the circumstances.

c. That the trial Magistrate erred in law and in fact in passing an illegal sentence.

d. That the trial Magistrate misdirected herself in law and fact by relying on her own speculation.

e. That the learned Magistrate erred in law and fact in dealing with the matter before her arbitrarily, casually and on whim rather than on analysis of evidence as required by law.

4. The Appeal proceeded by way of written submissions.

Appellant's Submissions

5. The Appellant has filed two sets of submissions through different Advocates. The submissions dated 18/4/2025 are filed by Kiogora Mugambi & Co. Advocates. The 2nd one is undated and was filed on 28/4/2025 by the Firm of Wario Minishi Advocates.The firm of Kiogora Mutai filed the Petition of Appeal. I have not seen any Notice of Change of Advocates filed by Wario Minishi & Co. Advocates. Wanio Minishi's & Co. Advocates' submissions filed on 28/4/2025 have therefore been irregularly filed. Consequently, the same are hereby expunged from the record.

6. In his submissions dated 18/4/2025, the Appellant has submitted that the sentence was excessive yet he had refunded the Complainant his money; That the loss purportedly suffered by the Appellant was mitigated by the said refund; That the Magistrate failed to consider this aspect when sentencing the Appellant.

7. While setting out objectives of sentencing, the Appellant submits the plea of guilt must count for something. It is further submitted that the trial court did not indicate how she arrived at the sentence of two and a half years; that there is no indication of what mitigating and aggravating factors the trial magistrate considered before arriving at the sentence . The Appellant further argues that the trial Magistrate ought to have also indicated what the sentence would have been, had the case went through a full trial. It is finally submitted that, in arriving at the sentence the trial court took into consideration irrelevant matters, wrong principles of law on sentencing, and other issues extraneous to the judgement.

Respondent's Submissions

8. The Respondent has submitted that the guilty plea was unequivocal. However it is the respondent's submission that it was not properly taken as the Appellant was not warned of the consequences of pleading guilty. In this regard, the decision in the case of *Bernard Inyendi vs. Republic* (2017) e KLR has been relied on. In the circumstances, the respondent has urged the court to order for a retrial.

Analysis and Determination

9. The Appeal to this court is by way of a retrial and this court is under a duty to review the evidence, evaluate it and arrive at its own conclusion (Ref *Abok James Oderot/a Odera & Associates patrick Machira* (2013)e KLR) .

10. I have considered the grounds of Appeal, the trial Court record and submissions of the parties, and I have identified two issues for determination; Firstly is whether the Appellant has a right of Appeal against the conviction, and secondly ,whether the sentence was excessive.

Whether the Appellant is entitled to An Appeal against the conviction.

11. The last two grounds of Appeal, that is, ground 4 and 5, though subtly stated, is an Appeal against conviction. However, in his submission, the Appellant has not addressed these grounds. I will therefore consider that these two grounds have been abandoned.

12. However, even if this court was to consider the two grounds, the Appellant herein was convicted on his own plea, and in accordance with section 348 of the *criminal procedure code*, he has no right of Appeal. Section 348 of the *Criminal Procedure Code* provides as follows:

> "No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent of legality of the sentence".

13. However, an accused person can challenge a conviction based on a guilty plea if the manner in which the plea was taken was irregular or if it was unequivocal. However, the manner of plea-taking has not been raised by the Appellant and therefore I decline the respondent's offer to address it .

Whether the sentence was excessive

14. The Respondent has not addressed the court on the issue of the sentence. In the circumstances, this court will only rely on the submissions of the Appellant.

15. I have looked at the proceedings during sentencing. On mitigation, the Appellant told the court: "I plead for leniency. I worked for the Complainant for long. I had debt. I also bought land". The sentencing hearing was then adjourned, and the matter next came up , the prosecutor told the Court, "The Accused is to make the refunds," and the Appellant affirmed this position. However, there was nothing on record showing that a refund had been made. The Appellant's assertion that he had refunded the money therefore has evidential basis.

16. In passing the sentence, the trial Magistrate stated:

> "The accused mitigation duly considered. He is a first offender. The offence he committed is indeed serious. He breached the trust the employer has on him leaving him (the Complainant) to suffer uncalled for loss. To date no recovery has been made. A deterrent punishment is called for ,Accused fined Ksh.250,000 and in default to serve 2 and a half years imprisonment".

17. On his first ground of Appeal the Appellant faults the trial Court for treating the Appellant's mitigation, in a perfunctory manner. According to Mirriam- webster dictionary the word perfunctorily means,

> "characterized by routine or superficially; lacking in interest as enthusiasm" According to oxford it is "an action done as a duty or habit, without real interest, attention or feeling".

18. The "perfunctory "assertion has been made without any explanation by the Appellant. How did the Appellant, for instance, ascertain that the trial Court was being perfunctory? Going by his submission, the Appellant was quite brief in his mitigation. In my view, the only material for consideration in the Appellant's submissions was his plea for leniency, which I equate to remorse. The fact that he was in debt, had worked long for the Complainant or used the money to buy land was immaterial. Why would the court be expected to write an elaborate ruling in the face of such a short mitigation? Failure to consider all the mitigating factors cannot equate to being perfunctory.

19. However, the Appellant has further submitted that the plea of guilt should have counted for something. I agree, as admission of guilt within the earliest time possible is a mitigating factor and this should have been considered by the trial court. The Appellant's submission in this regard is valid.

20. The Appellant has stated that the trial Court passed an illegal sentence. Section 275 of the *Penal Code* which provides the punishment for theft prescribes a sentence of 3 years. The Section does not provide for an option of a fine. This does not, however, bar the court from imposing a fine, the express provision notwithstanding. Where a particular section of the *Penal Code* does not specify a fine, a court is supposed to be guided by the guidelines provided under Section 28(2) of the *Penal Code*.

21. In terms of section 28(2) where a fine is in excess of 50,000, the period of imprisonment must not exceed 12 months. I agree with the Appellant therefore that the imprisonment of 2 and a half years in default of Ksh.240,000 was illegal.

22. The Appellant has further argued that the fine was in any event excessive. To revisit the mitigation, it is my finding that the trial Court failed to consider that the Appellant pleaded guilty at the earliest opportunity. However, the allegation that the money was refunded is unfounded as there was no evidence of such a refund as at the time of sentencing.

23. In view of all the aforegoing, I hereby set aside the sentence of the trial Court and substitute it with a fine of Ksh. 200,000, and in default, to serve 12 months imprisonment.

24. The 12 months imprisonment will run from 25/9/24 being the date when the Appellant was first arraigned in court.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 17TH DAY OF JULY 2025

S. CHIRCHIR

JUDGE

In the presence of ;

Roba Katelo- Court Assistant

Peter Kobia- The Appellant

Mr. Ngetich for the Respondent.