



**Maina v Republic (Criminal Appeal E049 of 2024)
[2024] KEHC 13152 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E049 OF 2024
DKN MAGARE, J
OCTOBER 24, 2024**

BETWEEN

DANIEL OTIENO MAINA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon.
M. Lubia (SRM) in Nyeri CMSO Case No. E727 of 2022)*

JUDGMENT

1. This is an appeal from the sentence given by Hon. M. Lubia (SRM) in Nyeri CMCR E727 of 2022. The Appellant pleaded not guilty at the first instance. After some adjournments, the Appellant who was the second accused wished to change plea. Facts were read to him. He later complained that charges including those for the co-accused were read to him. The court ordered that the charges be read again. He pleaded guilty to counts 1-4. He qualified count 4. The court held that the alteration of the facts did not alter the substance of the charge. Plea of not guilty was entered in respect of count 5. The court stated that facts remain as read on 7/12/2022. The court convicted the Appellant on his own plea of guilty. The court then fined the Appellant a sum of Ksh. 50,000/- in default one year imprisonment. Count 2 he was sentenced to 2 years imprisonment. Count 3 he was fined Kshs. 50,000/= .Count 4 he was fined 50,000/= in default one year imprisonment. This translated to Kshs. 250,000/= in default 5 years imprisonment. Hearing for count five was fixed. There does not appear to have been a hearing for count 5 since the 1st accused absconded and the court is dealing with the warrant.
2. The charges that the Appellant was charged with were as follows: -
 - a. House breaking contrary to section 304(1) of the Penal Code. The particulars were that on 21/8/2022 at Ruringu area within Nyeri County, jointly with others not before court broke



and entered into a building used as a dwelling house by Enock Ngenda Mbevi with intent to commit a felony therein. The felony is not named.

- b. Stealing contrary to section 279(b) of the Penal Code. The particulars were that on 21/8/2022 at Ruringu area within Nyeri County, entered into a building used as a dwelling house by Enock Ngenda Mbevi and stole properties as per the attached list all valued at Ksh. 379,000/= the property of the said Enock Ngenda Mbevi.
 - c. Preparation to commit a felony contrary to section 308(2) of the Penal Code. The particulars were that on 8/09/2022 at Nyeri Township, having been detained by CI Joyce Maluki as a result of powers conferred by Section 26 of the Criminal Procedure Code, had in your possession a Samsung Galaxy Tablet IMEI No. 3534XXXXXX 5990/6/01 and ACER laptop S/No. NXM8WA0073XXXX reasonably suspected of having been stolen.
 - d. Count 5 was in relation to the co-accused, though the court indicated that the trial of count 5 remained.
 - e. Count 6 was not read to the Appellant.
3. The first count was under Section 304 which provides for housebreaking and burglary. It provides as follows: -
1. Any person who-
 - (a) breaks and enters any building, tent or vessel dwelling with intent to commit a felony therein; or
 - (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.
4. The second count was stealing contrary to Section 279 of the Penal Code. The same provides as follows: -
- “279(b)” if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;
- The offender is liable to imprisonment for fourteen years.
5. The fourth count was contrary to Section 323 of the Penal Code. The said section provides as follows:
- Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code (Cap. 75) and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.
6. Section 26 of the Criminal Procedure Code, referred above Provides as follows: -
- (1) A police officer, or other person authorized in writing in that behalf by Inspector-General of the National Police Service, may stop, search and detain-
 - (a) any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or



- (b) any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the Penal Code (Cap. 63); or
 - (c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.
- (2) No person shall be entitled to damages or compensation for loss or damage suffered by him in respect of the detention under this section of an aircraft, vessel or vehicle.
- (3) For the purposes of this section, "aircraft", "vessel" and "vehicle", respectively, include everything contained in, being on or attached to an aircraft vessel or vehicle, as the case may be, which, in the opinion of the court, forms part of the equipment of the aircraft, vessel or vehicle.
7. The 4th count was contrary to section 308(1) of the Penal Code. The said section provides as follows: -
2. Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.
8. The Appellant was thus convicted on all counts that were brought against him. He appealed to this court and set forth the following grounds of appeal:-
- 1. That the learned trial magistrate erred in law and fact by imposing a harsh and excessive sentence yet never looked in the circumstances of the case.
 - 2. That the learned trial magistrate erred in law and fact by convicting the Appellant without considering his remorsefulness.
 - 3. That the learned trial magistrate erred in law and fact by failing to order that the 5 years to run concurrently instead of consecutively.
9. The Appellant sought, during the oral arguments that he wanted the court to make his sentence concurrent instead of consecutively. There is no appeal on the conviction and for good measure. Under Section 348 of the Criminal Procedure Code, there is no right of appeal on a plea of guilt except as far as to the extent of legality of the sentence. The said section provides as doth:
- No appeal on plea of guilty, nor in petty cases 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 or legality of the sentence.
10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
11. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 as follows:-
- “On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it



may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”

12. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the court on a first appeal:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

13. A plea of guilty is a plea like any other. However, when one is offered, that extra caution needs to be taken in the case of undefended defendants who plead guilty. Justice Ngugi J (as he then was) stated as follows in *Simon Gitau Kinene v Republic* Criminal Appeal 9 of 2016 [2016] eKLR:

“19. Finally, courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. I have previously held that where an Accused Person is unrepresented, the duty of the Court to ensure the plea of guilty is unequivocal is heightened. In *Paulo Malimi Mbusi v R Kiambu Crim. App. No. 8 of 2016* (unreported) this is what I said and I find it relevant here:

In those cases [where there is an unrepresented Accused charged with a serious offence], care should always be taken to see that the Accused understands the elements of the offence, especially if the evidence suggests that he has a defence.....To put it plainly, then, one may add that where an unrepresented Accused Person pleads guilty to a serious charge which is likely to attract custodial sentence, the obligation of the court to ensure that the Accused Person understands the consequences of such a plea is heightened. Here, the Court took no extra effort to ensure this. In these circumstances, given the seriousness of the charge the Court was about to convict and sentence the Accused Person for, it behoved the Court to warn the Accused Person of the consequences of a guilty plea.”

14. The court is satisfied on the legality of the plea of guilty. The second question turns on the legality of sentence. Sentence was given upon conviction without mitigation. The sentences were without the benefit of mitigation. In *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)*



(Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment), the apex court guided as follows on mitigation:

Mitigation was an important congruent element of a fair trial. The fact that mitigation was not expressly mentioned as a right in the Constitution did not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to article 50(2) of the Constitution were not exhaustive.

15. In the case of Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015) (supra) [the Supreme Court continued as follows:-
 6. The right to fair trial was not just a fundamental right. It was one of the inalienable rights enshrined in article 10 of the Universal Declaration of Human Rights, and in the same vein article 25(c) of the Constitution elevated it to a non-derogable right which could not be limited or taken away from a litigant. The right to fair trial was one of the cornerstones of a just and democratic society, without which the rule of law and public faith in the justice system would inevitably collapse.
16. The court proceeded to convict the Appellant without the benefit of the mitigating circumstances. In the absence of any evidence or factors compelling more serious punishment, then the court is obligated to give punishment without losing sight of the nature of the offence. The Appellant in this case asked for forgiveness, the first time he pleaded guilty. The same was not read to him after pleading guilty. The guiding principles for sentencing guidelines provide for sentencing as follows: -
 - a. Proportionality: The sentence meted out must be proportionate to the offending behaviour meaning it must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behavior is weighted in view of the actual, foreseeable, and intended impact of the offence as well as the responsibility of the offender.
 - b. Equality/Uniformity/Parity/Consistency/Impartiality: The same sentences should be imposed for same offences committed by offenders in similar circumstances.
 - c. Accountability and Transparency: The reasoning behind the determination of sentence should be clearly set out and in accordance with the law and the sentencing principles laid out in these guidelines.
 - d. Inclusiveness: Both the offender and the victim should participate in and inform the sentencing process.
 - e. Totality of the Sentence: The sentence passed for offenders convicted for multiple counts must be just and proportionate, taking into account the offending behavior as a whole.
17. The net effect of the 5 counts was disproportionate to the individual charges, where the Appellant was charged with related counts. Count 1 cannot be read independently of count 2. The Appellant did not just prepare to commit a felony but went ahead and committed. Convicting for the 2 offences separately alters disproportionately the weight of each of the offences.
18. Count 3 and 4 were committed on the same day. The offences in count 4 relate to possession of suspected stolen property. The said counts are misdemeanors. Count 2 was a felony. Count 2 therefore should have been the most serious. The court gave 1-year imprisonment. The fine was completely unnecessary. Count 1 attracted one year. The offence for count 1 was completed in count 2. It is unnecessary to have both in the same charge sheet, when the felony was completed. In the circumstances, I set aside the sentence given and substitute with 6 months imprisonment. Count 1 and 2 shall run concurrently. Count 3 were misdemeanors. The sentence for one year is proper. A



fine, however was not appropriate. In the circumstances, I set aside the sentence in counts 3 and 4 and substitute therewith a one-year sentence. Sentences in counts 3 and 4 shall equally run concurrently given that they were both committed on the same day.

19. Nevertheless, the sentences in counts 1 and 2 shall run consecutively with counts 3 and 4. There being no other grounds, the appeal is allowed to that extent.
20. In the circumstances, there is no appeal on conviction. The sentence herein is set aside and substituted as aforesaid.

Order

21. The consequence upon the foregoing is that I make the following orders:
 - a. The appeal on sentence is allowed. Sentence in the lower court is set aside and in lieu thereof, I substitute the same as follows: -
 - i. Count 1 – 6 months imprisonment.
 - ii. Count 2 – 1 year imprisonment.
 - iii. Count 3 – 1 year imprisonment.
 - iv. Count 4 – 1 year imprisonment.
 - b. Sentences in count 1 and 2 shall run concurrently to each other but consecutively with counts 3 and 4.
 - c. Sentences in counts 3 and 4 shall run concurrently to each other but consecutively with counts 1 and 2.
 - d. Right of appeal on points of law – 14 days.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 24TH DAY OF OCTOBER, 2024.

Judgment read physically in open court.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the State

Appellant – present

Court Assistant – Jedidah

