



REPUBLIC OF KENYA



**Gisore v Republic (Criminal Appeal E042 of 2023)
[2024] KEHC 15439 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E042 OF 2023
WA OKWANY, J
DECEMBER 5, 2024**

BETWEEN

HILLARIOUS SAGINI GISORE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon. W. C. Waswa – SPM dated and delivered on 11th July 2023 in the original Nyamira CMC CR Case No. E424 of 2023)

JUDGMENT

1. The Appellant was charged, jointly alongside one Vincent Pengo Arani, with the offence of Stealing a motor cycle contrary to Section 278A of the *Penal Code*. The particulars of the charge were that on 3rd April 2023, at Geteri Village in Timi Sub-location of Keera location in Nyamira South Sub-County within Nyamira County, they jointly stole one Motor Cycle make Tv-STAR Red in colour, Registration No. KMFC 708, Engine Number 0F5KK1200545, Frame Number MD625GF58K1L00042 valued at Kshs. 127,000/=, the property of Dennis Change Masira.
2. They also faced the alternative charge of Handling stolen property contrary to Section 322(1) as read with Section 322(2) of the *Penal Code*. The particulars of the Charge were that on 3rd April 2023, at Geteri Village in Timi Sub-location of Keera location in Nyamira South Sub-County within Nyamira County, otherwise than in the course of stealing, they jointly dishonestly retained one Motor Cycle make Tv-STAR Red in colour, Registration No. KMFC 708, Engine Number 0F5KK1200545, Frame Number MD625GF58K1L00042 valued at Kshs. 127,000/=, knowing or having reason to believe it to be stolen property.
3. The Appellant is alleged to have pleaded guilty to the main charge and was consequently convicted and sentenced to compensate the complainant in the sum of Kshs. 100,000/= or in default, to serve 2 years' imprisonment.



4. Aggrieved by the trial court's decision, the Appellant filed the instant appeal and listed the following grounds of appeal in the Petition of Appeal: -
 1. That he pleaded guilty to the offence thus asking this Court to consider him for a more lenient sentence considering his dominated (sic) poverty back at home.
 2. That he was the only sole breadwinner in his family caring for his grandmother aged 86 years and always sick (sic).
 3. That he was a total orphan with no parents as his mother died while he was barely seven months with the care of his grandmother who was now aged and vulnerable.
 4. That the long incarceration will cost his family dearly thus asking this Court to consider his plea for a more lenient term.
 5. That his young family (wife) and his young (three) children were seriously suffering outside due to his absence thus asking the court to kindly extend a hand of leniency and consider his mitigation.
 6. That six years is extremely harsh and the trial magistrate maliciously (sic) towards him by pronouncing the sentence to run consecutive for the four counts of stealing each (1) year and burglary 2 years totalling to six years thus asking the Court with such powers to review the findings and remedy me with more favourable term (sic).
5. The Appeal was canvassed by written submissions.

The Respondent's Submissions

6. Mr. Chirchir, Learned Counsel for the Respondent, submitted that the trial court's record was not clear on when the Appellant changed his plea from not guilty to guilty and whether the facts of the case were ever read out to him. He submitted that there was a miscarriage of justice and that the proceedings ought to be declared a mistrial. He cited the *Black's Law Dictionary* 10th Edition on the definition of a mistrial and the decision in *Ahmed Sumor v. Republic* (1964) EALR 483 where the Court of Appeal discussed what amounts to a mistrial. He added that there was a procedural error, on the part of the trial court, when recording the plea, and noted that the Prosecution was not to blame for any prejudice that would be occasioned to the Appellant should this court order for a retrial.
7. The Appellant, on the other hand, stated that he was remorseful for the crime and that he was a first offender. He submitted that, because he pleaded guilty to the charges, the Court should consider reducing his sentence or in the alternative direct that the sentences run concurrently.
8. I have considered the record of appeal and the parties respective submissions. I find that the main issue for determination is whether there was a mistrial and the consequences thereof.
9. A perusal of the trial court's proceedings reveals that plea was recorded as follows: -

27/4/2023

Before Hon. C Waswa SRM

Prosecutor/State Counsel- Mwangi

Court Assistant- Brenda

Accused – 1 Present



2 Present

English/Kiswahili/Ekegusii

The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies in Kiswahili.

Main Count

A1- It is not true

A2- It is not true.

Court- A plea of guilty is entered for Accused 1 and 2.

Alternative Count

A1 – It is not true

A2- It is not true

Court- A plea of guilty is entered for Accused 1 and 2.

A1 – I have the statements

A2- I have the statements

Court

Pre-Bail Report, Mention 30/5/2023, Hearing 20/6/2023

HON C. WASWA SRM

27/4/2023

30/5/2023

Before Hon. C Waswa SRM

Prosecutor/State Counsel- Mwangi

Court Assistant- Brenda

Accused – Absent

Interpretation - English/Kiswahili/Ekegusii

Court

Internet is down

Bond for Accused 2 is set at Kshs. 100,000/= with 2 sureties. Case bail at Kshs. 50,000 with a contact person.

Hon C Waswa SRM

30/5/2023

Court

Sentencing for Accused 1 on 21/6/2023

Hon C. Waswa SRM

30/5/2023



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11/7/2023

Before Hon. C Waswa SRM

Prosecutor/State Counsel- Mwangi

Court Assistant- Brenda

Accused – 1 Present

2- Present

Interpretation - English/Kiswahili/Ekegusii

Sentence (Accused 1)

This Court has considered the mitigation by the accused 1, the nature of the offence and the time accused 1 has spent in custody. The accused 1 is to compensate the victim with the sum of Kshs. 100,000/= in default to serve 2 years' imprisonment. Right of Appeal within 14 days.....

Hon C. Waswa SRM

11/7/2023

10. The above extract of the proceedings confirms the position stated by counsel for the Respondent that it was not clear how the Appellant's plea changed from not guilty to guilty, and the reasons why the trial court set a date for sentencing after the Appellant pleaded not guilty to the charges. The main issue for determination is whether the plea was properly recorded and whether the Appellant was accorded a fair trial.
11. The principles of a fair trial are stated under Article 50 of the Constitution as follows:
Article 50 (2) (b) of the Constitution as follows: -
 - (2) Every accused person has the right to a fair trial, which includes the right-
 - (b) to be informed of the charge, with sufficient detail to answer it.
12. The law governing the procedure to be adopted when recording plea is captured under encapsulated in Section 207 of the Criminal Procedure Code which reads, in part, as follows: -

207. Accused to be called upon to plead

 - (1) The substance of the charge shall be stated to the accused person by the Court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to plea agreement;
 - (2) If the accused person admits the truth of the charge otherwise than by plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary;

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.
13. The import of the above provisions is that an accused must be informed of the charges and the attendant law on which the alleged offence is premised, in a language that he understands. The Accused's response must also be recorded in, as nearly as possible, the words that he used before the



court. Where an accused person pleads guilty to a charge, it is expected that the court will direct the Prosecution to read over the facts of the case, once again in the language that the accused understands, and the court must satisfy itself that the accused has been made fully aware of the charges he is facing. The court is further called upon to explain to an accused person the consequences of a guilty plea before entering a plea of guilty. (See *Adan v. R* [1973] EA 45).

14. In the present case, it is discernible that plea was taken on 27th April 2023 when the Appellant pleaded not guilty to the charges. It was therefore expected that the matter would proceed to a full trial. It is therefore not clear to this court when the plea changed to a guilty plea even though the Appellant's grounds of appeal and submissions tend to suggest that he pleaded guilty to the charges before the trial court. It is my finding that the plea was not properly recorded.
15. Having regard to the errors that are apparent on the proceedings taken during plea taking, I find that the plea cannot be said to have been unequivocal. I further find that the subsequent conviction and sentence was also flawed.
16. It is also noteworthy that the trial court's proceedings show that the court irregularly moved from granting the 2nd Accused bond, to entering a plea of not guilty and setting a date for the Appellant's sentencing even before the court recorded that the Appellant had been convicted. It is trite that sentence follows a conviction and it was therefore imperative for the trial record to indicate that the Appellant had been convicted in order to justify the pronouncement on sentence.
17. It is my finding that the proceedings before the trial court were fatally flawed and amounted to a mistrial. Consequently, this court cannot hesitate to quash the conviction and set aside the sentence. [*Black's Law Dictionary*](#) (9th Edition), defines a mistrial as follows: -

“a trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings.”

18. The issue for determination is whether, in the circumstances of this case, the court can order for a retrial. Courts are replete with decisions outlining the principles to be considered when determining whether or not to order for a retrial. In the English case of *Reid v. R* (1978) 27 WIR 254, the court held that the main consideration in determining whether or not to order a retrial was the interest of justice. The court outlined some of the factors to be considered thus: -

“The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury... It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. Among the factors to be considered in determining whether or not to order a new trial are: -

- (a) the seriousness and prevalence of the offence;
- (b) the expense and length of time involved in a fresh hearing;
- (c) the ordeal suffered by an accused person on trial;
- (d) the length of time that will have elapsed between the offence and the new trial;
- (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial;



- (f) the strength of the case presented by the prosecution, but this list is not exhaustive.”

19. Similarly, in the case of *Jason Akboya Makhokha v. Republic* [2014] eKLR the Court of Appeal outlined the following principles governing an order for a retrial: -

“The question we have to ask ourselves now is whether this is a proper case for a retrial. In the case of *Mbae Morison and Another v. Republic* (Nyeri Cr. Appeal No. 306 & 305 of 2006) it was held, inter alia, that a retrial should only be ordered where interests of justice require it. In *Kanyeki v. Republic* [2004] 2 KLR 164 there is the proposition that a retrial will be ordered where witnesses could be easily traced. In *Sinaraha & Another v. Republic* [2004] 2 KLR 328, the proposition is that a retrial will be ordered only when the original trial was illegal or defective but not for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. In the case of *Ekimat v. Republic* [2005] 1 KLR 182 there is the proposition that a retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence, a conviction might result and should not be ordered where it is likely to cause an injustice to an accused person.

In *M’Obici & Another v. Republic* [2006] 2 KLR 166, the Court ruled that a retrial should not be ordered unless the appellate Court was of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. See also the case of *Kedisia v. Republic* [2009] KLR 604 for the proposition that regarding an order for a retrial, the Court of Appeal is entitled to look at all the circumstances surrounding the case, taking into account the admissible or potentially admissible evidence available for determination as to whether a conviction was likely to be obtained or not; save that each case must depend on its own peculiar circumstances.”

20. In the instant case, I note that the Appellant has been in custody, following the sentence, for over one year from 11th July 2023 to date. I have also considered the manner in which the trial record was prepared and I find that it is completely incomprehensible and therefore defective. The error in the recording of the plea should not be visited on the Appellant who has suffered as a consequence thereof due to no fault on his part. I find that the justice of this case militates against an order for a retrial. I place reliance on the decision by the Court of Appeal at Nairobi in *Pius Olima & Another v. Republic* [1993] eKLR wherein it was held thus: -

“Before we conclude, however, there is the case of *Wilson Otieno and another v Republic, Criminal Appeal No 55 of 1987 (unreported)* decided by this Court, which learned counsel for the appellants drew to our attention in support of his argument that the appellants having already served twelve months imprisonment, the order or retrial would cause prejudice and injustice to them and should therefore be set aside, since in the Otieno case this Court set aside an order of retrial even though only one month of the sentence passed had been served. But this is not the reason why this Court refused to support the order of retrial made by the High Court in the Otieno case. This Court, as is clear from its judgment in the Otieno case, held that an order for retrial may only be made where the original trial was, in the first place, as in the case before us, illegal or defective and not as in the Otieno case, where the High Court when hearing the appeal was faced with a “gibberish and utterly incomprehensible record. The appeal in the Otieno case was allowed by this Court with no retrial ordered, because: ‘It was the record of the magistrate which turned out to be defective in the sense that it is gibberish and utterly incomprehensible’.”



And not the trial itself.”(Emphasis added)

21. In the final analysis, the appeal finds merit and is hereby allowed. I therefore quash the conviction and set aside the sentence. I direct that the Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.
22. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 5TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE

