REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI COURT

CRIMINAL APPEAL NO.E059 OF 2020

VIVIAN KALEKYE NGILA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from the original conviction and sentence in Criminal Case No. 2569 of 2020

at Chief Magistrates Court Makadara by Hon. H. M. Nyagah – CM on 17th December 2020)

JUDGMENT

1. **Vivian Kalekye Ngila**, the Appellant, was charged with the offence of stealing contrary to **Section 268(1**) as read with **Section 275** of the Penal Code. Particulars of the offence being that on the 19th day of November, 2020, she stole one Techno Camon pro mobile phone, one B-bird Mobile phone, one jacket, two ATM cards, cash Ksh.15000/- items valued at Ksh.45,994/- the property of George Kiilu Nzangi.

2. Upon arraignment in court she pleaded guilty to the charge, was convicted and sentenced to eighteen months imprisonment.

3. Aggrieved, the Appellant appeals against the conviction and sentence on the grounds that: charges were read in English, a language that she did not understand; particulars read out were different from the charge; the charge was defective; the Appellant was not given the opportunity to mitigate; the sentence was harsh and excessive, and in meting out the sentence the trial court took into account extraneous matters.

4. The appeal was canvassed through written submissions. It was urged by the Appellant that the plea of own guilty entered was appealable as the judgment was not final. That the Appellant was convicted and sentenced on a charge that she did not understand as it was read in English, a language that she did not understand.

5. The Appellant faulted the court for having not specified the language used and an interpreter having not been provided which was in contravention of **Article 50(2) (m)** of the Constitution. She cited the case of ***Gabriel Owang Otila & Another v Republic (2009)eKLR*** where the Court of Appeal delivered itself thus:

> ***"The issue of interpretation in criminal trials is also provided for in section 198 of the Criminal Procedure Code which states as follows:-***
>
> ***"Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands."***
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> ***This Court has in the past had several occasions to deal with similar matters and has been consistent in its judgments that the need to comply with the requirements of section 77 (2) (b) and (f) of the Constitution as well as with the provisions of section 198 of the Criminal Procedure Code, is a matter that the Court has no option but to accept and ensure. In the case of Patrick Kubale Wesonga Criminal Appeal No. 204 of 2005 heard at Kisumu this Court stated:-***
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> ***"As the Court did not state the language used at the trial apart from English, one cannot state for certain that the appellant understood the language that was used to conduct the entire trial. Section 77 (2) (b) of the Constitution, which we have cited above, emphasizes that the offence is explained to an accused person in a language that he understands. Section 77 (2) (f) goes further and states that an accused person is entitled to have an interpreter if he cannot understand the language used in trial. Thus, the need for the trial court to indicate the language in which the trial proceeded cannot be waived even if an accused***

person has an advocate. As we have stated, there is nothing in the proceedings except one day when the case was not for hearing, to show the language in which the proceedings were conducted. That omission would also vitiate the trial before the subordinate court."

6. That facts presented were not part of the particulars of the offence; the prosecution did not prove that the complainant owned phones, had bank accounts and was in possession of ATM cards. Arguing that the charges were defective to the extent that they were inconsistent with the particulars and evidence he cited the case of ***Victor Mwai Wangeci & Another v Republic (2017) eKLR*** where the court stated that:

"…On the first issue, the 2nd Appellant argued that the charge was defective as the offence of stealing was not supported by the evidence that was presented by the Prosecution. The Court of Appeal in Yongo vs Republic [1983] KLR, 319 did hold that a charge that is not disclosed by evidence is defective and stated as follows in this regard:

"In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:

(a) It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or

(b) It does not, for such reasons, accord with the evidence given at the trial; or

(c) It gives a misdescription of the alleged offence in its particulars."

7. On sentencing, the Appellant urged that the court was influenced by extraneous factors in exercise of its discretion. That the court observed that the Appellant used drugs to stupefy the complainant, but, there was no such evidence.

8. The appeal was opposed by the State/Respondent. Learned Counsel, Mr. Ishmael Kiragu submitted that charges were read to the Appellant in a language that she understood; the interpretation was in both English and Kiswahili and the court noted that the language was understood by the Appellant. He cited the case of ***Adan v Republic (1973) EA 445*** where the court set out the procedure on recording a plea of guilty. That the Appellant was given a chance to mitigate but she remained silent; the court did not convict the Appellant for stupefying in order to commit a felony but stealing where evidence of Mpesa statement was tendered; and that considering the sentence provided for, the sentence imposed was not harsh.

9. This being a first appellate court, it must reconsider and re-evaluate afresh what transpired at trial and reach its own considered conclusion.

10. It is urged that the Appellant did not understand the charge as it was read in a language she did not understand. Looking at the record of the lower court, it shows that the interpretation was in English/Kiswahili. And it is recorded that:

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

It is true."

The prosecutor presented facts of the case as required by Section 207 of the Criminal procedure code and the Appellant stated thus:

"The fact is true"

This was followed by a conviction on the Appellant's own plea.

11. Section 348 of the Criminal Procedure Code provides as follows:

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.

12. In ***Wandete David Munyoki v Republic [2015] eKLR*** the Court of Appeal stated that:

"It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed in Ndede v R [1991] KLR 567, this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there have been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed."

13. Therefore in determining whether the trial court misdirected itself as alleged I am guided by the case of ***Adan v Republic [1973] EA 445,*** where the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the

steps which should be followed; thus:

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

14. In the case of ***David Nyongesa Okwatenge -V- Republic [2010] eKLR***, Muchemi J, stated thus:

> ***"It is clear that instant case the record does not indicate it was indicated the language used to read and explain the charge to the appellant. The indication of….English/Kiswahili is ambiguous and does not show which of the two languages between Kiswahili and English the court used. There is no record of whether the court inquired from the appellant what language he understood. Such an enquiry would have assisted the court to determine the language of reading and explaining the charge."***

15. In the instant case it is apparent that the trial court did not enquire from the appellant the language that she was conversant with. It is not clear as to what language the Appellant preferred and used in answering the charges. Therefore, it cannot be discerned whether the Appellant understood the charges.

16. The Appellant also faults the lower court for acting upon a defective charge on grounds that it was not supported by particulars of the offence. **Section 134 of the CPC** provides as follows:

> ***Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information.***

17. In the case of ***Kipkurui Arap Sigilai & another v Republic [2004] eKLR***. It was stated that:

> ***"The principal of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principal of the law has a constitutional under pinning. (See section 77 of the Constitution of Kenya)."***

18. In the cited case of ***Yongo v R, [198] eKLR*** the Court of Appeal stated that:

> ***"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:***
>
> ***(i) When it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,***
>
> ***(ii) When for such reason it does not accord with the evidence given at the trial."***

19. In the case of ***Peter Sabem Leitu v R, Cr. App No. 482 of 2007 (UR)*** the Court held thus:

> ***"The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant."***

20. The Appellant faced a charge of stealing which is provided for under the provisions of **Section 275** of the penal code. **Section 268** of the Penal Code defines stealing and its element as follows:

> ***(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.***

21. Particulars of the offence indicated what was taken from the complainant, whose identity was disclosed; and their value. Therefore, the charge sheet was not defective.

22. Before passing sentence, the court is required to grant an accused person the opportunity to mitigate. The record shows she was given the opportunity but she had nothing to state.

23. As to whether the sentence was harsh and excessive, the sentence provided for is up to three years imprisonment. Prior to passing sentence a judicial officer is expected to consider the nature of the offence, circumstances in which it was committed, the effect on the society at large and the vulnerability of the victim amongst other factors. The trial magistrate made an observation as to the notoriety of stealing after inducing or drugging victims. This having emanated from facts as presented, it cannot be concluded that the trial court considered extraneous matters.

24. From the foregoing, failure to indicate the language used and understood by the Appellant was prejudicial and impermissible. It vitiated the trial. The error having been made by the court, the question would be whether a retrial should be ordered?

25. In ***Fatehali Manji Vs Republic [1966] EA 343*** the Court of Appeal when dealing with the same issue, gave the following guidelines:

> ***"In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for a retrial should only be made where the interests of justice require it."***

26. The mistake having been occasioned by the court, justice would demand for a retrial to be ordered to ensure that the complainant gets justice. I have taken into account time spent in custody and I find that in the premises the Appellant shall not be prejudiced.

27. The upshot of the above is that the appeal succeeds to the extent that the conviction is quashed and the sentence set aside. The Appellant shall be produced in court for a retrial before a court of competent jurisdiction presided over by a different judicial officer within 7 days of today.

28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 15TH DAY OF JULY, 2021.

L. N. MUTENDE

JUDGE