REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 53 OF 2019

SETH HAMARA GLIZA .....APPELLANT

-VERSUS-

REPUBLIC .....RESPONDENT

(Being an appeal from the conviction and sentence of the Principal Magistrate Court at Mpeketoni by Hon PS NABWANA (RM) delivered on 17th July 2019 in Criminal Case No.113 of 2019)

CORAM: Hon. Justice Reuben Nyakundi

Appellant in Person

J. Mwangi for the state

JUDGEMENT

The Appellant, **Seth Hamara Gliza** was convicted and sentenced on his own plea of guilty in Mpeketoni Principal Magistrate's Case No. 113 of 2019 for the offences of burglary and stealing contrary to Sections 304 and 279 (b) of the Penal Code respectively. There was also an alternative charge of handling stolen goods contrary to Section 322 (1), (2) of the Penal Code.

The particulars of the offences of burglary and stealing were that on 7th July 2019 at around 2300hrs at Mpeketoni township, Mpeketoni division, Lamu West subcounty within Lamu county, the accused had jointly with others not before court broke and entered the hotel of **Jane Wambui** with intent to steal therein and did steal from therein foodstuff the property of the said **Jane Wambui** valued at Ksh. 9,775/=.

For the offence of handling stolen goods, the particulars of the offence were that on 7th July 2019 at around 2300hrs at Mpeketoni township, Mpeketoni division, Lamu West subcounty within Lamu county, the accused had jointly with others not before court otherwise than in the course of stealing dishonestly retained foodstuff knowing or having reason to believe them to be stolen goods.

The Accused was presented to court on 15th July 2019 whereupon the substance of the charge(s) and every element thereof were stated by the court to the accused in Kiswahili. Upon being asked whether he admits or denies the truth of the charges the accused replied, '*Ni ukweli'*. A plea of guilty was then entered in the main count. As a result, the charges in the alternative count were not read out to him. The facts of the offence were read out to the accused person, which facts he accepted as true by responding , '*Ni ukweli'*.

Upon conviction, the learned trial magistrate sentenced the accused to a fine of Ksh. 250,000/= in default to serve 5 years imprisonment for the offence of burglary. The accused was further fined Ksh. 200,000/= in default to serve 4 years imprisonment for the offence of stealing.

Aggrieved by the conviction and sentence, the accused by a Memorandum of Appeal filed on 3rd October 2019 sought to overturn the trial court's decision on eight grounds that really boil down his remorsefulness for his actions and a plea of leniency and a non-custodial sentence. The Court is urged to allow the appeal and the sentence be substituted to non-custodial.

Submissions on Appeal

The Appellant in his submissions essentially reiterates his remorsefulness for the offence and readiness to embrace the straight and narrow should he be given a second chance. He explains the circumstances that led to his commission of the offence, pointing out that he is the sole breadwinner for his mother, wife and two young children.

Mr. Mwangi for the DPP urges the court to uphold both the conviction and sentence. He submits that the accused was convicted on his own plea of guilty and that the pre-sentencing report by the probation office recommended a custodial sentence especially on account of the Appellant having been a repeat offender since he had previously been charged, convicted and sentenced to a custodial sentence which was subsequently commuted to a non-custodial sentence. That the Appellant committed the offences he was charged with while still serving his community service sentence for the previous offences.

Counsel for the DPP noted that the guilty plea was unequivocal having been taken fully in compliance with **Section 207 of the Criminal Procedure Code** as well as the principles for recording a guilty plea expressed in **Ombena vs. R [1981] eKLR.** Citing **Section 348 of the Criminal Procedure Code** and **Alexander Lukoya Maliku vs. R [2015] eKLR,** Mr. Mwangi contended that the record bore witness that the guilty plea had been properly entered hence the court ought to uphold the decision of the lower court.

Analysis and Determination

For a first appeal the role of this court is well settled. The court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that. See **Pandya v R {1957} EA 336.**

As the Appellant was convicted on his own plea of guilty, the matter did not proceed on for trial, thus the trial court did not have the advantage of observing the demeanor of the witnesses and hearing them give evidence.

While **348 of the Criminal Procedure Code** provides that where a plea of guilty is entered, one may only appeal against the extent or legality of the sentence and not the conviction, in **Wandete David Munyoki v Republic [2015] eKLR** the Court of Appeal **(Makhandia, Ouko & M'inoti, JJ. A)** settled that the section is not an absolute bar to challenging such a conviction on any other ground.

My point of departure in finding a resolution is establishing whether the guilty plea was unequivocal. On plea taking, **Section 207 of the Criminal Procedure Code** provides:

> **'207 (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.'**

Courts have had occasion to elaborate on the procedure and the manner in which a guilty plea ought to be recorded by the trial court. See **Adan -vs- R (1973) EA 445** and **Kariuki –vs- R (1954) KLR 809.** I further associate myself with the sentiments regarding an unequivocal plea of guilty–especially where the accused person was unrepresented and the charges facing them attracted a custodial sentence– as expressed by **Ngugi J** 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:**
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> **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 behooved the Court to warn the Accused Person of the consequences of a guilty plea."**

From my reading of the record, the charges were read out to the Appellant in Kiswahili and the elements thereof explained to him in the same language. As intimated in the anterior, upon being asked whether he admits or denies the truth of the charges the accused replied, '*Ni ukweli'* (it is true) which statement was recorded by the court verbatim. A plea of guilty was then entered in the main count.

The facts of the offence were read out to the accused person, which facts were that on 6th July 2019 between around 2300hrs to 0000hrs at Mpeketoni town in a hotel known as "*Bobo's Café*" the accused, an employee of Jane Wambui was at work. That on 7th July 2019 the complainant did not go to the hotel. She went to church on that day. On 8th July 2019, she went to open the hotel and found the hotel was in a mess with foodstuff strewn all over. She found: one bundle wheat flour, 7kgs of rice, 5kgs of beans, ½ sack of potatoes, 1/4 sack of avocadoes in a sack, 5 liters cooking oil, half a net of onions, 3/4 crate of soda, ½ dozen bottled water, a dozen of long life milk, a dozen of yoghurt milk of 500ml each, a dozen of yoghurt milk of 300ml, twenty (20) plastic apple drinks of each 300ml and a tray of eggs were missing.

The complainant called the accused person's brother who informed her that he had not been seen since the 6th July 2019. The brother also

informed her that he had been earlier on arrested. She suspected that the accused had committed the crime since he had the keys to the hotel and the door had not been broken into but opened using keys.

The complainant talked to a night guard of a nearby school called Good Shepherd Academy. The guard said that he saw the accused with another person carrying goods after 2300hrs and did not suspect anything since the accused worked there. The said watchman however was surprised at the number of trips. While at it, a probox driver saw the accused and his friends and asked him to stop. Upon the driver's insistence they dropped some of the goods and started running away. The guard raised alarm but the accused and his friend managed to escape. The probox driver managed to recover:

i. Four plastic bottles of 500ml Rayan ice water produced as P.Exhibit 1 A, B, C and D.

ii. 5 Azam energy drink plastic bottles produced as P. Exhibit 2A-E.

iii. Two 300ml sodas. The Fanta black current soda 300ml produced as "P.Exhibit 3A" and the Fanta Orange bottle of soda as "P. Exhibit 3B".

iv. A yellow sack as P. Exhibit 4.

The probox driver took the recovered exhibits to Mpeketoni police station. The police launched an investigation after the complainant reported at the police station and after two days, the complainant was in her shop at around 11a.m. She left briefly towards Istanbul side where she is constructing rentals. She managed to see the accused and called her father and masons working at the construction site and informed them of where she had seen the accused. They ambushed the accused and took him to the police station at Mpeketoni on a motorcycle on 11th July 2019 where he was booked and later charged with the offences herein.

Once these facts had been read out to the accuse he accepted them as true by responding , *'Ni ukweli'* (it is true). The Accused person, even on appeal as in his mitigation, concedes his guilt and accepts responsibility for the offence. I am of the conviction that the laid-out process for recording a plea of guilty per **Adan -vs- R (1973) EA 445** was followed to the letter. I am thus satisfied that the guilty plea was properly entered and thus the conviction was safe.

As for the sentence, the powers of the High Court in an appeal are found in section 354 of the CPC *and include;*

(3)

The learned trial magistrate considered the pre-sentence report prepared by the probation officer and concluded that the accused did not seem remorseful. The trial magistrate also appreciated that the accused was a repeat offender who was serving a non-custodial sentence when he committed the offences he was convicted of. On this basis, the court sentenced the appellant to a fine of Ksh. 250,000/= in default to serve 5 years imprisonment for the offence of burglary and Ksh. 200,000/= in default to serve 4 years imprisonment for the offence of stealing.

The role of the Court in reviewing sentences passed by the trial court on appeal was subject in the Court of Appeal decision in **Benard Kimani Gacheru v Republic [2002] KLR** where the court held:

"…sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

The learned trial magistrate imposed fines in default of which the Appellant was to serve prison sentences. Per **Section 28 of the Penal Code** the fine fixed by the court should not be excessive as to render the offender incapable of paying thus liable to imprisonment. See **R v Mureto Munyoki 20 [KLR] 64** in which it was stated,

"it is a first principle in inflicting fines that the capacity of the accused to pay should be considered"

Additionally, since the learned trial magistrate fined the appellant Ksh. 250,000/= and Ksh. 200,000/= respectively, per **Section 28 (2) of the Penal Code,** the length of the prison sentence ought not to have exceeded one year since the fines were above Ksh.50,000/=.

It is clear therefore that the learned trial magistrate erred by acting on a wrong principle of the law to sentence the accused. Additionally, I am of the view that the sentence was manifestly excessive in the circumstances. The accused stole foodstuff worth Ksh. 9,775/=. Per his mitigation at the lower court, he accepted responsibility for his crime and asked for mercy. The Complainant expressed no hard feelings toward the accused. All these mitigating factors ought to have been considered in arriving at a just sentence that was proportional to the offence and balanced between the rights of the offender and his or her possible rehabilitation, against the rights of the complainant.

In the premises, I am inclined to interfere with the sentence of 17th July 2019 by setting it aside. I substitute it with fine of Ksh. 50,000/= in default to serve 1-year imprisonment for the offence of burglary and Ksh. 50,000/= in default to serve 1-year imprisonment for the offence of stealing.

I am alive to the fact that the appellant has been incarcerated since 17th July 2019. Two years have since passed. As such, it is my finding

that the Appellant shall be set free unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 15TH DAY OF SEPT, 2021

…….

R. NYAKUNDI

JUDGE.

In the presence of:

1. The Appellant

2. Mr. Mwangi for DPP