REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

HCCRA NO 48 OF 2019

JOSEPHAT WEKESA WAFULA .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

[An appeal from the conviction and sentence by Hon LG Ruhu (RM) in original Bungoma Law Courts Case No. 242/2019 delivered on 12th April, 2019]

JUDGEMENT

1. The Appellant, **JOSEPHAT WEKESA WAFULA**, was charged and convicted on his own plea of guilty on the following three counts as follows:

> Count I: Breaking into a building with intent to commit a felony contrary to **section 307** of the **Penal Code**. Particulars being that on the 18th day of March, 2019 at Lukhokwe village in Bungoma North Sub-County, Bungoma County, jointly with others not before court he broke into a dwelling house belonging to PHOEBE MGHOI MWANYUMBA with intent to steal therein.
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> Count 2: Preparation to commit a felony contrary to **section 308(1)** of the **Penal Code.** Particulars being that on the 18th day of March 2019 at Lukhokwe village in Bungoma North Sub-County, Bungoma County, jointly with others not before court Were found armed with offensive weapons namely hammer, rungu, iron bar, panga and a sack in circumstances that indicate that they were so armed with intent to commit a felony namely burglary.
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> Count 3: Assault causing actual bodily harm contrary to **section 251** of the **Penal Code**. The particulars being that Josephat Wekesa Wafula on the 18th day of March 2019 at Lukhokwe village in Bungoma North Sub-County, Bungoma County assaulted MIKE CHEKATA SUKAI thereby occasioning him actual bodily harm.

2. The Appellant pleaded guilty and was subsequently convicted and sentenced to 4 years imprisonment on the first count, 7 years imprisonment on the second count and 1 year imprisonment on the third count, all to run concurrently.

3. The Appellant, despite being convicted on his own plea of guilty, was nonetheless aggrieved by both the conviction and sentence imposed upon him by the trial Court. He appealed his conviction and sentence on the grounds that;

> **i. He did not plead guilty to the charges**
>
> **ii. He was convicted based on insufficient and fabricated evidence**
>
> **iii. The sentence was harsh and excessive**

4. I have perused the court record and considered submissions of both parties herein and find the issues for determination to be whether the plea was unequivocal and whether the sentence imposed was harsh and excessive.

5. On the first issue, this court is tasked with determining whether the Appellants plea was properly taken and whether a plea of guilt was actually entered and also whether the Appellant understood the consequences of his plea. The procedure and guideline for plea taking is well articulated in **Section 207** of the **Criminal Procedure Code** and the principles therein were affirmed in the case of ***Adan -Vs- Republic (1973) EA 445***, where the courts reiterated the requirements of a plea of guilty as follows;

i. The charge and all essential ingredients of the offence should be read out to the accused in his language or in a language he understands.

ii. The accused's own word should be recorded and if they are in admission a plea of guilty should be recorded

iii. The prosecution should immediately state the facts and the accused should be given an opportunity to dispute to explain the facts or ad any relevant facts

iv. If the accused does not agree with the facts or raise any questions as to his guilt, his reply must be recorded and a charge of plea entered.

v. If there is no charge of plea, a conviction should be recorded and a statement of facts relevant to the sentence together with the accused's reply should be recorded.

6. In articulating the importance of plea taking, the court in ***Obedi Kilonzo Kavevo -Vs- Republic (2015) eKLR*** stated as follows;

> The importance of the statement of facts is that it enables the trial court to satisfy itself that the plea of guilty was really unequivocal and that the accused understood the facts to which he was pleading guilty and has no defence. The facts as read to the accused must disclose the offence. A plea is considered unequivocal if the charge is read to an accused person and he pleads guilty, thereafter, the facts are narrated to the accused person and he/she is once more asked to respond to the facts. It is important that both the statement of offence as contained in the charge sheet as well the facts as narrated by the prosecution must each disclose an offence. Otherwise, the plea is not unequivocal.

7. Contrary to his first ground of appeal, the Appellant in his submissions admits to having committed the offence. He has expressed remorse and begs for leniency stating that he is a first-time offender. He contends that he is a layman and is illiterate, and that the trial court did not inform him of the consequences of his plea.

8. It is also his submission that having been convicted on his own plea of guilty, and being illiterate and a first offender, the seven (7) years sentence was harsh. Further that his entire family depends on him.

9. The Respondent, through prosecution Counsel M/S Mukangu, submits that the plea of guilty was unequivocal. She relies on the case of ***Adan -Vs- Republic (1973) E.A 445*** and contends that the Appellant had earlier on pleaded not guilty after all the charges were read and explained to him. About a month later, he changed his plea to that of guilty after the charges were read to him once more. She further submits that the charges were interpreted into Kiswahili to ensure that the Appellant understood. Further that the appellant pleaded guilty and did not offer any explanation, or qualify his guilt.

10. By the Appellant's own admission, he committed the offences and also pleaded guilty to all the charges preferred against him. He has however raised concern on the implication of such a plea; in view of illiteracy. He submits that he did not take into consideration the consequences of his plea, which he deems to be harsh, that the trial court did not at any point, explain to him the consequences of plea of guilty.

11. Court record shows that the charges were read and interpreted to the Appellant in Kiswahili. On 21st March 2019 the Appellant is recorded to have answered as follows;

Count I: Si kweli (it is not true)

Count II: Si kweli (it is not true)

Count III: Si kweli (it is not true)

Following which a plea of not guilty was entered.

12. On 9th April 2019, the record indicates that the court read the charges afresh to the Appellant took who responded as set out below:

9/4/19

Before I.G. Ruhu – RM

Pros: Oduor

C/A: Alung'at

Accused: Present

Accused: I intend to change my plea

Court: Charges read afresh

Count I

Accused: NI kweli (it is true)

Court: Plea of guilty entered

Count II

Accused: Ni kweli (it is true)

Court: Plea of guilty entered

Count III

Accused: Ni kweli (it is true)

Court: Plea of guilty entered

The learned Prosecution Counsel then proceeded to read the statement of facts to which the Appellant responded as follows:

Accused: Maelezo ni ya kweli *(the facts are true)*

13. From the record as set above, it is clear that the Appellant pleaded guilty to the charges laid against him. According to section 348 of the Criminal Procedure Code, no appeal lies against a conviction on an accused's own plea of guilty. That section 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 or legality of the sentence.**

14. In ***Kisumu Criminal Appeal No.581 of 2010, Alexander Likoye Malika versus Republic (2015) eKLR*** the Court of Appeal made reference to this section and stated as follows:

> "May we by way of commentary only remind that there is ordinarily no appeal against conviction resulting from a plea of guilty-see section 348 of the Criminal Procedure Code which only permits an appeal regarding legality of sentence. A court may only interfere with a situation where an accused has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused to which he has pleaded disclosed no offence known to law. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged…
>
> "…the record then shows that the charge was read out in English language and translated to the Kiswahili language and the appellant admitted the charge and the facts when they were read out in some detail by the court prosecutor.
>
> "Although the record does not indicate whether English language in the first appellate court was translated to the appellant we noted that the appellant addressed us in Kiswahili language when the appeal came for hearing before us."

15. From the above it is clear that, no appeal lies against a conviction arising out of an accused's own plea of guilty. However, if the plea is tainted in any of the ways to which the Court of Appeal made reference, a conviction on such a plea cannot stand and the accused convicted on its basis is entitled to feel aggrieved and be heard on appeal.

16. That being said, this court is alive to the duties of a court as far as plea taking goes which not only entails reading out the plea to the accused in a language they understand but also explaining the consequences of a plea to an accused person especially when a plea of guilty is entered.

17. Courts have always held that extra caution needs to be taken in the case of undefended defendants who plead guilty. Thus, to complete the test of an unequivocal plea, this court ought to look at the manner in which the proceedings were conducted and determine whether the Appellant understood the consequences of his plea. The court in ***Bernard Injendi vs. Republic [2017] eKLR***, ***Sitati, J*** found that:

> "Finally, the learned trial Magistrate failed to warn the appellant of the consequences of the plea of guilty and this was particularly critical because of the long sentence which awaited the appellant upon pleading guilty to the charge facing him. In the Paul Matungu case (above) the Court of Appeal quoted from Boit vs- Republic [2002] IKLR 815 and stated that a trial court which accepts a plea of guilty must clearly warn the accused person of the consequences of a plea of guilty and further that an accused must be made to understand what he is pleading guilty to and after the warning the court should again read the charge to the accused person and thereafter record the response by the accused in words "as nearly as possible in his own words". I am convinced that if the appellant in this case had been appropriately warned about the twenty years term of imprisonment, he would have reconsidered his plea of guilty."

18. Similarly, in ***Samuel Gitau Kinene -Vs- Republic (2016) eKLR,*** it was held that:

> "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 a 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."

19. Nothing from this record indicates that the trial court discharged its duty as far as explaining the consequences of the plea of guilty to the Appellant is concerned. This, in addition to the probation report in which it was reported that the Appellant is a class 3 drop out, persuades this court that the Appellant may not have fully grasped the consequences of his guilty plea. It was his submission that he is illiterate and did not appreciate the gravity of the offence and consequences of his plea. The court did not inform him. The prosecution counsel did not refute these submissions by the Appellant.

20. Criminal justice is however not only concerned with the rights of the accused but also the rights of the victims. This is to say that an accused person has to be procedurally tried and sentenced for the offence committed if found guilty. Where a plea of guilty is not unequivocal, the conviction resulting therefrom cannot stand. The conviction ought to be quashed and the sentence set aside.

21. A new and fair trial may be instituted depending on the circumstances of each case. The law as to when a retrial should be ordered has long been settled. In the case of ***Fatehali Manji Vs Republic [1966] EA 343*** the court when dealing with the issue of retrial, gave the following guideline: -

> "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."

22. These principles have been reiterated in several subsequent cases including the cases of ***Sospeter Mwangi Vs Republic, CA No. 164 of 2005*** and **Muiruri Vs R [2003] KLR 552**. In **Muiruri Vs R [2003] KLR 552**, this Court added:

> "retrial will only be made where the interests of justice require it and if it is unlikely to cause injustice to the appellant. Some factors to consider would include, but are not limited to, illegalities or defects in the original trial. (See **Zedekiah Ojuondo Manyala Vs Republic (Criminal Appeal No. 57 of 1980)**; the length of time which has elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's."

23. From the above authorities, it is clear that in deciding whether or not to order a retrial, the court must strike a balance between the interest of justice on the one hand and those of the accused person on the other.

24. In the instant case, the Appellant did not succeed in stealing anything from the house that they broke into, and he has already served 2½ years in prison. As such, I find that a retrial will not be in the interest of justice.

25. In the interest of justice, the Appellant's sentence is reduced to the period served. He is therefore set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 13TH DAY OF OCTOBER, 2021

…….

L. A. ACHODE

HIGH COURT JUDGE

In the presence of..……...Appellant in Person.

In the presence of……..State Counsel.