



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J

CRIMINAL APPEAL NO. 49 OF 2016

(Being an appeal from the original conviction and sentence in criminal case number 1636 of 2016 of the Chief Magistrates court at Naivasha, (E. Kimilu - SRM)

DAVID MAKORI MOGUSU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant David Makori Mogusu was charged together with another person with housebreaking and stealing contrary to **section 304 (1) (b)** as read with **section 279 (b)** of the **Penal Code**. The particulars were that on 16 October 2016 at Maai Mahiu in Naivasha Sub-County, he broke and entered the building used as a dwelling house by John Ngige Murimi and stole from therein one bamba TV decoder, Sony Bravia 22 inch TV, YT326a radio, Panasonic speakers, one Safari boot and two T-shirts all valued at Kenya shillings 32,600/= the property of John Ngige Murimi.

In the alternative charge, he was charged with Handling stolen goods contrary to **Section 322 (1) (2)** of the **Penal Code**, in that on the 28th day of October 2016 at Maai Mahiu Township in Naivasha Sub-County within Nakuru County otherwise than the course of stealing dishonestly, he retained one bamba TV decoder and one Sony Bravia TV 22 inches knowing or having reasons to believe them to be stolen goods.

2. In addition he is charged with house breaking and stealing contrary to **Section 304 (1) b** as read with **Section 279(b)** of the **Penal Code**. The particulars were that on the 25th day of October, 2016 at Maai-Mahiu Township in Naivasha Sub-County within Nakuru County, he broke and entered the building used as a dwelling house by Peter Kahihia Kamau and he did steal from therein of GLD TV 17 inches, one Sony AC/DC DVD Decoders, and solar lamp all valued at Kshs 12,650/=.

In the alternative charge, he was charged with Handling stolen goods contrary to **Section 322 (1) (2)** of the **Penal Code**, in that on the 28th day of October 2016 at Maai Mahiu Township in Naivasha Sub-County within Nakuru County otherwise than the course of stealing dishonestly, he retained one LG TV 17 inches, and Sony AC/DC DVD knowing or having reasons to believe them to be stolen goods.

3. The appellant was also charged with two other counts of burglary and stealing contrary to **section 304** as read with **section 279 (b)** of the **Penal Code**. The particulars were that on 20th day of October, 2016 at Maai Mahiu Township in Naivasha Sub-County, he broke and entered the building used as a shop by James Kimani Wairimu and stealing 6Kg of rice, 6Kg of sugar, 6Kg of maize flour, 10 packets of milk, 6Kg complete gas cylinder and coins of Kshs 500 cash all valued at Kshs 8,000/=. He was also charged in alternative charge of handling stolen goods contrary to **section 322 (1) (2)** of the **Penal Code**. The particulars being that on the 28th day of October, 2016 at Maai Mahiu Township in Naivasha Sub-County within Nakuru county otherwise that the course of stealing dishonestly he retained one 6Kg super gas cylinder knowing or have reasons to believe them to be stolen goods.

4. In Count IV the Appellant was charged having suspected stolen goods contrary to **section 323** of the **Penal Code**. The particulars were, On 28th day of October, 2016 at Maai-Mahiu Township in Naivasha Sub-County within Nakuru County having been detained by No. 82278 PC Jim Muriithi and No. 96768 PC Nicholas Mwangola and designation police officers as a result of the exercise of the powers conferred by Section 26 of the Criminal Procedure Code, he had in his possession one LG TV 19 inches, one complete Tosha gas, max power woofer and pen knife reasonable suspected to have been stolen or unlawfully obtained.

5. The appellant was convicted on his own plea of guilty on 31 October, 2016, and on the same day was sentenced to serve two years imprisonment in Count 1 and 2. In Count 3 and its alternative, and Count 4, the Criminal Case is still active in the Naivasha Chief Magistrate's Court in Criminal Case No. 1636 of 2016.

6. Aggrieved by the conviction and sentence, the appellant has appealed against both and seeks a re-trial. His grounds are as follows:

“1. That, I pleaded guilty to the above stipulated charges as based in the charge sheet.

2. That, during the court first plea reading and mention to me I did not hear it well due to hearing problems since I was tortured by the police and my ears could not hear well.

3. That, the sentence imposed on me is too harsh and excess.

4. That, I would wish to take/reverse this case into re-trial stages for my side to be heard clearly and that my liberty could be restored.

5. That, the High Court could facilitate the right to fair trial according to Section 50 Sub-section 2 of the Kenyan Constitution.

6. That, I am a poor man from a single parent family and solely breadwinner to my family.

7. That, I am suffering from leukemia hence beg leave of the High Court to consider my appeal in good time.

8. That, I would like to be present before the honourable High Court during and on the final verdict of my appeal.

9. That, all what I have deposed herein is true to the best of my belief, knowledge and understanding.”

7. On 15 February 2018 he filed written submissions which he relies upon in the appeal. In them, he alleges he was framed; that he was a trusted employee at his place of work, a lodge; that he has never broken into anyone's house; that the Accused No 1 is the one who hid the stolen items in a room that he had booked at the lodge; that police investigations were impartial.

8. The state opposes the appeal on the ground that it is premised on a plea of guilty, and that **section 348** of the **CPC** disallows pleas of guilty unless there is illegality of the sentence. The state further argues that the maximum sentence for each offence for which the appellant was convicted is seven years imprisonment, and that there was nothing illegal or irregular about either the conviction or the sentence. The State Council highlighted the plea-taking procedure that was conducted by the London magistrate and urged the court to dismiss the appeal.

9. It is important to consider the process under which the plea was taken to identify if there was anything improper or un-procedural. The court is mindful of the *locus classicus* case of **Adan v Republic [1973] EA 445** which sets out the minimum standards or criteria for the taking of a plea.

10. The court has perused the proceedings of the lower court. The record shows that each of the counts were read out and on each count the Appellant, who was the 2nd Accused, was asked to state whether he admitted the truth thereof. On Counts 1 and 2 the Appellant state it was “True”. On Count Nos. 3 and 4 and also on the alternative charges thereof, he replied “Not True”. A plea of guilty was then entered in respect of counts 1 and 2 and a plea of not guilty entered in respect of Counts 3 and 4. There is no indication that the alternative to count 2 was read to the Appellant.

11. Thereupon, the following facts were read out to the appellant after the charges had been read out and explained:

“On 25 October 2016 Peter Kahihia locked his house and went to feed his cattle. When he came back he found his house broken into and several items missing. They include:

– GLD TV 17 inches

– one sunny AC/DC DVD decoder

– solar lamp

all valued at Kenya shillings 12,650. He reported and investigations were commenced. On 20 October 2016 James the money went to his mother's shop and found it had been broken into and several items missing namely:

– 6 kg rice

– 6 kg sugar

– 6 kg maize flour

– 10 packets of milk

- 6 kg complete gas cylinder
- coins are worth Kenya shillings 500

all valued at Kenya shillings 8000.

On 16 October 2016 John a resident of Maai Mahiu was called by his mother who notified him his house it been broken into and several items stolen therein namely:

- Bamba TV decoder
- Sony Bravia TV22 inches
- YT 326a radio
- Panasonic speakers
- one pair of Safari boots
- two T-shirts

all valued at Kenya shillings 32,600/=.

On 28 October 2016 John Ngige, James Kimani received information that (the) person who broke into their houses had been spotted within Maai Mahiu Township. They met 1st accused and began to interrogate him. 1st accused led them to CIS – Mara area in the house of the 2nd accused (caretaker). Inside the 2nd house the found he had hidden several items inside the ceiling boards. They recovered the following:

- Sony Bravia 22 inch identified by John Ngige as one stolen in his house – P Exhibit 1
- Bamba TV decoder positively identified by John Ngige – P exhibit 2
- 6 KG complete super gas cylinder for James Kimani – P Exhibit 3
- speaker and home theatre Sony for Karanja Nderitu – P exhibit 4
- GLD 17 inch TV identified by Peter Kahihia Kamau – P Exhibit 5

There were other properties not positively identified. They were arrested and escorted to Maai Mahiu police station. They were charged accordingly.”

12. After the facts were read to the Appellant by the State Counsel, the following is recorded:

“Court: Each accused is convicted on plea of guilty accordingly”

13. In **Adan v R**, it was held that once an accused pleads guilty, the facts should be read out to him and he should be given an opportunity to respond. The Court of Appeal per Spry V.P., laid the procedure at page 446 in the following terms:

“When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence.. The statement of facts and the accused’s reply must of course be recorded.” (Emphasis supplied).

14. This case was followed by **Kariuki v R(1984) 809** where the Court of Appeal reiterated those steps as follows:

“a. the trial magistrate or Judge should read and explain to the accused the charge and all the ingredients in the accused’s language or in a language he understands;

b. he should then record accused’s own words and if they are an admission, a plea of guilty should be recorded;

c. the prosecution may 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;

d. if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and a change of plea entered but if there is no change of plea, a conviction should be recorded together with a statement of the facts relevant to sentence and the accused reply.” (emphasis supplied).

15. In the present case, the Appellant having pleaded guilty to the charges at first instance was not given an opportunity to respond to the statement of facts as set out by the state counsel. Instead, the learned magistrate proceeded to pronounce the conviction on the plea of guilty, took mitigation immediately thereafter, and proceeded to sentence the Appellant.

16. In **Adan’s case**, the rationale for the statement of facts was explained at page 447 as follows:

“The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really an equivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that accused, after hearing the statement of facts disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts precede the conviction”

17. In his ground 2 of his grounds of appeal, the Appellant states:

“That, during the court first plea reading and mention to me I did not hear it well due to hearing problems since I was tortured by the police and my ears could not hear well.”

18. The court notes that four counts were read to the accused, and he pleaded guilty to the first two. In Count 1, the Appellant was charged with housebreaking. This was in respect of the house of John Ngige Murimi on the 16th October, 2016 and stealing therefrom. In Count 2 the Appellant was charged with breaking into the house of Peter Kahihia Kamau and stealing therefrom on 25th October 2016, with an alternative charge of handling stolen goods on 28th October, 2016. As earlier noted, it is not on record whether the alternative to Count 2 was read to the Appellant or whether he pleaded to it at all, and this un-clarity lingers.

19. The offences for which the Appellant apparently pleaded guilty are under sections 304(1)(b) read with section 279(b) and alternative charges of handling stolen goods under section 322(1)(2); and are all subject to different penalties. The Appellant denied Count 4 which was the charge indicating the four items he was allegedly found with in his house or possession, yet the statement of facts lists five items and there is a slight discrepancy. When sentenced, the Appellant was sentenced to serve two years on each count.

20. In my view it would be imprudent to rely on the plea of guilty entered for the Appellant given: first, the discrepancy in respect of the items with which he is alleged in the statement of facts to have been found with which he denied; second, the failure to allow the Appellant to respond to the statement of facts read out in court, which contained more items recovered than were in the charge; and finally the un-clarity as to whether the Appellant was pleading guilty to Counts 1 and 2 only or also the Alternative Charge to Count 2 which is not indicated as having been read.

21. The DPP urged that section 348 CPC disallows an appeal except on sentence where a plea of guilty is entered. However, that provision has not been interpreted by the courts to be an absolute bar to an appeal where the Appellant has pleaded guilty. In **Wandete David Munyoki v Republic [2015] eKLR** the Court of Appeal: Makhandia, Ouko & M’noti, JJ.A. stated:

“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 has 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.” (emphasis added).

22. The Appellant stated in his grounds of appeal that he did not hear the charge well when first read out. I am inclined to err in his favour given all that I have already stated. With the inconsistencies as between the charge sheet and the statement of facts, I am prepared to set aside the conviction and order re-trial together with the other counts which are pending trial in the lower court.

23. Accordingly, the appeal succeeds, the conviction is hereby set aside and the matter is remitted back to the trial court for fresh plea taking and hearing as regards the Appellant.

24. Orders Accordingly.

Dated and Delivered at Naivasha this 6th Day of November, 2018

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. David Makori Mogusu – Appellant in person
2. Mr. Koima for the State
3. Court Clerk – Quinter Ogutu