REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 03 OF 2017

BETWEEN

EVERLYNE MUSAVI SHIKANDA……………APPELLANT

AND

STATE…………………..……………………..RESPONDENT

(**Being an appeal arising from the decision of M.L Nabibya, SRM, on 23.12.2016 in Butali PMC Criminal Case No. 1425 of 2016)**

J U D G M E N T

Introduction

1. The appellant herein was the first of 4 accused persons in Butali PMC Criminal Case No. 1425 of 2015 in the said case, the appellant and her co-accused were charged with the offence of entering in a national Reserve contrary to Section 102(11)(a) of the wildlife Conservation and Management Act 2013. The particulars of the offence are that on the 18th day of December, 2016 at around 1630hours at Lusero area in Kakamega Forest National Reserve, Kakamega East Sub-County within Kakamega County were jointly found inside the said Reserve without authority.

2. On 19.12.2016, the appellant and her co-accused appeared for plea before Hon. T. K. Kwambai, Resident Magistrate at Butali Law Courts and they all pleaded guilty to the charge and were accordingly convicted on their own plea. The appellant and her second co-accused were each fined Kshs.200,000/= or serve an imprisonment term of 2 years. The sentencing Magistrate noted while sentencing the appellant that the sentence/fine quoted was in mandatory terms in the relevant Act. The trial court also noted that the appellant and her 2nd co- accused were repeat offenders who deserved no mercy. The 3rd and 4th co-accused were said to be first offenders and were sentenced to serve CSO for a period of 24(twenty four) months. It was also noted that the appellant and the 2nd co-accused committed the offence while they were s till serving CSO for a similar offence.

The Appeal

3. Being dissatisfied by both conviction and sentence, the appellant filed this appeal through her counsel M/S J.J. Mukavale. In the Petition of Appeal dated 04.01.2017, the appellant prays that her appeal be allowed on grounds;-

1.) THAT the learned trial Magistrate erred in fact and in law in imposing mandatory sentence as against the appellant.

2.) THAT the learned trial Magistrate erred in law and in fact in failing to explain the consequences of the Probation Officer's Report to the appellant before imposing the sentence.

3.) THAT the failure of the trial Magistrate to explain the consequences of the Probation Officer's report denied the appellant [the opportunity] to explain her medical predicament to the court to consider before sentencing.

Hearing of the appeal

4. At the hearing of this appeal, counsel for the appellant reiterated the grounds of appeal as above stated, and added that the appellant did not have the opportunity to properly state her mitigation to the court before sentencing. Counsel showed to the court a medical report which had formed part of the supporting documents for her application for bail pending appeal.

5. Mr. Jamsumba Onyango, Senior Deputy Prosecution Counsel conceded the appeal but on totally different grounds:-

1.) That the plea of guilty entered against the appellant and her co-accused was not unequivocal especially because the record does not show that the facts of the case were read out to the appellant for same to be admitted or refuted by her.

2.) That mere reference to "facts as per charge sheet" does not show that the appellant was provided with a copy of the charge sheet to enable her see what those facts were;

3.) That the record does not show that the trial court informed the appellant of her right to be represented by an advocate as provided under Article 50(2)(g) of the Constitution of Kenya 2010.

Duty of this Court

6. As the first appellate court, this court is under a duty to carefully reconsider the issue of the plea and to determine whether that plea was unequivocal. Authorities abound on what amounts to an unequivocal plea. In the case of **Baya-vs- Republic [1984] KLR 657,** the court held that a plea is considered unequivocal if the charge and all its essential ingredients are read out and explained to the accused in a language that he understands. Usually such a language would be the accused person's vernacular or could be Kiswahili or English depending on the level of education of the accused or the choice of language. Once the charge is read out and explained to the accused, his/her own words in reply should be correctly translated into English and carefully recorded. Thereafter, the facts should be read to the accused and the accused must be shown to have understood the facts and that he/she knows what he/she was admitting to. It is only then that plea of guilty can be said to be unequivocal.

7. In the case of **Ombewa- vs – Republic [1981] KLR 450**, the court held inter alia, that "the decision as to whether the plea was unequivocal or not depends on the circumstances of each case," and in **Boit –vs – Republic [2002]IKLR 814,** it was held, inter alia that "the courts have always been concerned that before a plea of guilty to a charge is accepted and relied upon, certain vital safeguards must be strictly complied with and it must appear on the record of the court taking the plea that those safeguards have been strictly complied with." It was further held in the same case that. "the person should understand the consequences of his plea of guilty."

Analysis and Determination

8. Applying the above principles to the present case, I find and hold that the plea was not unequivocal and was therefore unsatisfactory. In particular, no facts were given and the mere reference to "facts as per the charge sheet." does not mean that those alleged facts were read out to the appellant and explained to her

as to make her understand the same. In any event, there is nothing on record to show that the trial court explained to the appellant the consequences of her pleading guilty to the charge. This court saw the appellant during the hearing of the appeal, and concluded that she had no proper understanding of the goings in the court. It was therefore critical for the trial court to have warned the appellant that if she pleaded guilty to the charge, she would have to raise a fine of kshs.200,000/= or spend one year in Prison. This court is of the considered view that if the appellant had understood those consequences, she would most likely have reconsidered her plea.

Conclusion

9. In conclusion, this court finds that the plea taking before the trial court was flawed and the plea of guilty was entered without proper caution on the part of the trial court. What this means is that this court agrees with the submissions made by counsel for the respondent that the plea of guilty was not unequivocal. The conviction cannot therefore stand. Accordingly, the appeal is allowed. The conviction is quashed and the sentence imposed upon the appellant by the trial court is set aside. Unless there is any other lawful reason for holding the appellant in custody, she is to be set free forthwith.

10. Before I sign off this judgment, the appellant was charged alongside Florence Hoka, Millicent Atieno and Joan Ayieko who were all found guilty, convicted and sentenced by the same process of a guilty plea. Having found in favour of the appellant, the same advantage is extended to the other three co-accused persons who should unless otherwise established, forthwith be released from custody as their convictions are quashed and their respective sentences set aside.

It is so ordered.

Judgment delivered, dated and signed in open court at Kakamega this 7th day of February, 2017

RUTH N. SITATI

JUDGE

In the presence of:

M/S Shirika (Present)……………………...….for Appellant

Mr. Jamsumba (present)………………………for Respondent

Mr. Polycap…………………………………....Court Assistant