REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 133 OF 2015

JAMES KIIGE NJOROGE.....APPELLANT

VERSUS

REPUBLIC.....STATE

(Appeal from the Sentence of the Chief Magistrate's Court at Molo

Hon. J. Wanyanga - Resident Magistrate delivered on the 30th April, 2015

in CMCR Case No. 1144 of 2015)

JUDGEMENT

The appellant has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at the Molo Law Courts. The appellant was charged with the offence of **PREPARATION TO COMMIT A FELONY CONTRARY TO SECTION 308(3)(b) OF THE PENAL CODE**. The particulars of the charge were that

> ***"On the 30th day of April, 2015 at Molo town in Molo District within Nakuru County, was found on a building, mpesa shop of John Kasino at night with intent to commit a felony thereon to wit house breaking and had with you one pair of scissors, one pliers and a bunch of keys thereon"***

The appellant pleaded guilty to the charge at the first instance. The facts were then read out to him. The appellant maintained his plea of guilty and was thereafter convicted. He was later sentenced to serve seven (7) years imprisonment.

Being aggrieved by both his conviction and sentence the appellant filed this appeal.

MR. GATONYE Advocate argued the appeal on behalf of the appellant. **MS OUNDO** appearing for the State vehemently opposed the appeal.

Despite the fact that under Section 384 of the Criminal Procedure Code, the appellant having pleaded guilty to the charge is not entitled to appeal as against his conviction, this being a court of first appeal I am obliged to determine whether the appellant's plea of guilty was unequivocal.

The principles of plea taking are to be found in Section 207 of the Criminal Procedure Code. This provision of the law was explained and given life in the oft cited case of **ADAN Vs REPUBLIC [1973]**

E.A 445, where the Court held as follows-

> ***"(i) The charge and all the essential ingredients of the offence should be explained to the accused in the 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 questions of his guilt his reply must be recorded and the change of plea entered***
>
> ***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded"***

In this case the record shows that the charge was read out to the appellant. The translation was from English to Kiswahili. The accused in response to the charge said

> ***"True"***

Thereby indicating the correctness of the charge. Thereafter the prosecutor read out the statement of facts to the accused. The appellant responded

> ***"The facts are true"***

The accused thereby confirmed his plea of guilty by conceding to the correctness of the facts as read out to him. The trial magistrate proceeded (correctly in my view) to enter a plea of Guilty and convict the appellant.

After conviction the appellant was allowed an opportunity to mitigate. In mitigation he said

> ***"I pray for forgiveness. It was my first time. I will not repeat again"***

The fact that the appellant's promises not to repeat the deed, the fact that he asked for forgiveness all serve to reiterate his guilty plea. The appellant was finally sentence to serve seven (7) years imprisonment.

From my perusal of the record, I am satisfied that the appellant's plea was procedurally recorded in line with Section 207. The language used was Kiswahili which the appellant clearly understood given that he was able to respond succinctly to the charge as well as to the facts. Therefore I do hereby confirm the appellant's conviction by the trial court.

The court prosecutor indicated that the appellant was a first offender. The trial magistrate nevertheless proceeded to sentence him to serve a term of seven (7) years imprisonment with no option of a fine. Given that the appellant pleaded guilty, saving the court from an unnecessary trial, given that nothing was stolen from the premises, given that the appellant was a first offender and taking into account that the maximum sentence for this offence is five (5) years as per Section 308(4) of the Penal Code, I find that the sentence was excessive.

I am of the opinion that the trial magistrate ought to have considered a non-custodial sentence. I do agree that the sentence imposed was in the circumstances harsh and excessive. I set aside the 7 year sentence imposed by the trial court. Having been sentenced on April, 2015 the appellant has already spent about 1½ years in custody. This I feel is sufficient punishment for his offence. I reduce the sentence to time already served.

This appeal against sentence succeeds. The accused is therefore to be set at liberty unless he is otherwise lawfully held. It is so ordered.

Dated in Nakuru this 10th day of February, 2017

Mr Gatonye

Mr Chigiti for State

Maureen A. Odero

Judge