REPUBIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 22 OF 2017

(From original conviction and sentence Criminal Case NO. 326 of 2017 of the CM's Court at Meru on 23/2/2017 by J.W. WANGANGA - RM

JASON KAAI ARIMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged with the offence of negligence act causing harm contrary to section 244 of the Penal Code. The particulars of the offence were that the appellant on the 20th day of January 2017 at ……

The appellant pleaded guilty to the charge and was sentenced to serve three months imprisonment. Mr. Mugambi appeared for the appellant and relied on the grounds as stated in the petition of appeal. It is stated in the petition that the sentence is excessive and given the circumstances of the case, an uncustodial sentence was ideal. It is also stated that the appellant's mitigation was not considered. Counsel further submitted that the plea was not unequivocal as the language used in court is not indicated. This occasioned serious miscarriage of justice. Counsel relies on the case of SIMIYU & ANOTHER –VS- REPUBLIC KISUMU CRIMINAL APPEAL NO.243 OF 2005 (Court of Appeal). Mr. Namiti, prosecution counsel, considered the appeal. Counsel submitted that the plea was not unequivocal.

The appellant was brought to court on 20th February 2017. The record of the court indicate that either English or Kiswahili was used. The charge sheet was read over to the appellant and his response was "true". The plea of guilty was entered. The facts were read over to the appellant but it is not indicated in which language those facts were read. The appellant responded that it was true. The appellant was called upon to mitigate and the record has only one word "leniency". The next step as per the record reads as follows;

Court

Three months imprisonment.

From the record of the trial court it is clear that after the facts were read there is no indication that the appellant was convicted on his own plea of guilty. It is procedural that even if an accused pleads guilty to the charge and a guilty plea is entered, the accused must also plead guilty to the facts and a final plea of guilty is recorded. The trial court took a short cut and there is no indication that the appellant was convicted on his own guilty plea. Counsel for the appellant maintains that the language used is not known. The record shows that it was either English or Kiswahili. The appellant heard the charge read over to him and he said that the charge was true. He must have understood what was read to him. The facts of the case were that the complainant went to the appellant's shop to buy airtime when she was attacked by the appellant's three dogs. She got rabies, injuries on the face, both hands and legs. The appellant responded that the facts were true. I do find that the appellant either understood English or Kiswahili. Further the petition of appeal does not raise the issue of language as one of the grounds of appeal.

Mr. Namiti submit that the plea was not unequivocal. I do agree with that admission as the record of the trial court does not disclose much of what happened during the taking of the plea. There is no indication that the appellant was convicted of his own plea of guilty. The trial court did not indicate that it had taken the mitigation of the appellant in consideration when passing the sentence. It is not clear whether the appellant simply uttered one word during mitigation. The record only indicate the work "leniency". I do find that the plea was not properly taken. The alleged incidence occurred on the 20th January 2017. The plea was taken on the same date. The occurrence book gives an OB Number 18/21/1/2017.

It is submitted that the appellant also ought to have given the option of a fine. The record of the trial court does not indicate whether there were past records of the appellant. It is not clear whether he was treated as a first offender. An option of a fine could have been sufficient. The plea does not capture all the required steps in plea taking. It is advisable for trial magistrates to specifically state the language in which the charge is read over to the accused. Should the accused plead guilty then the language used to read over the facts should also be indicated. It is advisable for the trial magistrate to simply ask the accused which language he/she understands. The court should record the language the accused understands. If the accused understands English or Kiswahili then the court should note that on the record. The charge should then be read over to the accused in the language which accused understands. In that way appeals based on the language used during the taking of the plea will be avoided. Although article 7 of the Constitution provides that the official languages of the Republic of Kenya are Kiswahili and English, it is clear that not all Kenyans understands those two languages. Article 50(1) (b) of the constitution requires that an accused has a right to be informed of the charge with sufficient detail to answer it. That can only be done if the charge is read and explained to the accused in a language which he/she understands.

Given the record of the trial court, I do find that the plea was not unequivocal. The mitigation by the appellant was not considered. The appellant was also entitled to an option of fine. The appeal is hereby allowed. The three months imprisonment sentence imposed by the trial court is set aside. I find no need for a retrial. The appellant shall be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF JULY 2017

SAID CHITEMBWE

JUDGE