



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.56 OF 2015

(An appeal from original conviction and sentence of Kilgoris PM Criminal Case No. 767 of 2015 by Hon. A. k. Mkoross – SRM dated 2nd July, 2015))

KEFA NYAKIYA OSORO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein **KEFA NYAKIYO OSORO** was charged with the offence of stealing contrary to **Section 275** of the **Penal Code**.

The particulars of the charge were that on 21st June 2015 at Nyabite village in Kiobegi sub-location, Nyamache District within Kisii County stole (i) one shelf valued at Kshs. 2000/= (ii) three arm chairs valued at Kshs. 6000 (iii) one three seater arm chair valued at Kshs. 2500 (iv) eighteen cushions valued at Kshs. 6300/= (v) three sufurias at Kshs. 650/ (vi) one basin at Kshs. 150/= (vii) one table at Kshs. 2400/= all totaling Kshs. 20,000/= the property of **JOSHUA SINDIGA MASESE**.

2. The accused also faced the alternative charge of handling suspected stolen property contrary to section 322 (2) of the Penal Code.

The particulars of the alternative charge were that on 21st June, 2015 at Nyabite village in Kiobegi Sub-location in Nyamache District within Kisii County otherwise than in the course of stealing, dishonestly retained (i) one shelf (ii) three arm chairs (iii) one three seater chair (iv) three sufurias (v) 18 cushions (vi) one basin (vii) one table, all valued at Kshs. 20,000/= having reason to believe them to be stolen.

3. The accused pleaded guilty the main count of stealing contrary to Section 275 of the Penal Code was subsequently convicted and sentenced to serve 2 years imprisonment.
4. The appellant has now appealed against both the conviction and sentence and has in his petition of appeal listed the following grounds of appeal:
 1. **THAT the Learned Trial Magistrate erred in law and fact by convicting and sentencing the Appellant to 2 years imprisonment without option of fine.**
 2. **THAT the Learned Trial Magistrate erred in Law and fact by failing to accord the appellant a fair trial as the plea was unequivocal.**
 3. **THAT the Learned Trial Magistrate erred in Law and fact by handing to the appellant a sentence of 2 years which was excessive in the circumstances.**

4. **THAT the Learned Trial Magistrate erred in Law and fact by not taking into account that the appellant was a first offender and therefore deserved a non-custodial sentence.**
5. **THAT the Learned Trial Magistrate erred in Law and fact by convicting and sentencing the appellant without any exhibits shown and produced in court.**
5. At the hearing of the appeal, Mr. Nyambati Counsel for the appellant submitted that the appellant's plea of guilty was not unequivocal as the appellant was not accorded a fair trial within the meaning of article 50 of the constitution. Appellant's counsel added that the language and exact words used by the appellant when pleading guilty were not recorded. Mr. Nyambati also submitted that the alleged stolen items were not produced/presented before the court as exhibits for the accused's own identification and that this amounted to failure to comply with a mandatory requirement of the law.
6. Mr. Nyambati submitted that **Section 348 of the Criminal Procedure Code** which bars appeals in instances where there is a plea of guilty is not applicable where there has been a violation of an accused person's constitutional rights.
7. Mr. Nyambati further submitted that the sentence of 2 years imposed on the appellant was excessive taking into account the circumstances of the case and that in any event, the trial court did not comply with Section 169 of the Criminal Procedure Code when he failed to indicate the section of the Penal Code under which the appellant was convicted.
8. Mr. Nyambati relied on the following authorities:-
 1. **Adan –vs- Republic 1973 E.A 445.**
 2. **Republic –vs- Peter Muiruri & Another [2014] eKLR**
 3. **Albanus Mwasia Mutua CRA NO. 120/2004.**
9. Mr. Muhindi opposed the appeal on behalf of the state and submitted that the appellants plea of guilty was unequivocal since the charges were read to him in Kiswahili language which he understood and that the facts were similarly also read to him in Kiswahili language which facts the appellants stated were true.
10. Mr. Muhindi further submitted that the list of stolen items were read out to the accused and he never objected to any of the items and therefore, the fact that the items were stated to be outside the court did not deny the appellant the chance to have access to them.
11. According to Mr. Muhindi, Section 348 of the Criminal Procedure Code bars any appeal where a plea of guilty has been recorded except an appeal as to the extent and legality of the sentence.
12. Mr. Muhindi argued that no Constitutional right of the appellant had been violated and that the 2 year sentence imposed on the appellant was legal and appropriate taking into account the circumstances of the case.
13. Mr. Muhindi concluded by stating that the failure by the magistrate to comply with section 169 of the criminal Procedure Code was not fatal to the conviction since Section 275 under which the appellant was charged contains the applicable penalty.
14. This being a first appeal, the court is still under an obligation to peruse the lower court record in order to arrive at its own independent conclusion if the conviction by the lower court was sound and the sentence lawful. See *Pandya –vs- R* [1957] E.A 336.
15. In this appeal, the appellant was convicted on his own plea of guilty meaning that a full trial was not conducted. I will therefore scrutinize the lower court record to see whether or not the plea was unequivocal.

16. In the case of Adan –vs- Republic (supra) the procedure to be adopted by the courts when recording a plea of guilty was laid down as follows:

“When a person is charged, the charge and the particulars should be read out to him so far as possible in his 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 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.”

17. In the Adan case (supra) quoted above, the court explained that the purpose of the statement of facts is to enable the magistrate to satisfy himself that the plea of guilty was really unequivocal as the statement of facts assists the court to confirm that the accused really understood the position when he pleaded guilty.

18. In Njuki –vs- Republic (1990) KLR 334, the court, while citing Hando S/O Akunaay, VR (1951) 18EACA 305, re-emphasized the need for caution in recording a guilty plea. It held that the court must satisfy itself that the accused understood every element of the charge and pleaded guilty to every element of it unequivocally.

19. The proceedings before the lower court run as follows:

(“The substance of charge (s) and every element there or has been stated by the court to the accused person, in Kiswahili language that he/she understands, who being asked whether he/she admits or denies the truth of the charge replies:-

Main charge

Accused: - it is true.

Prosecutor:- the facts are that on 2nd June 2015 the accused went to the house of the complainant Joshua Sindiga and he found assorted items household goods. The complainant does not usually stay in that house. He has another house at Mogonga where he also owns a shop. On that day he was called by a neighbor and told that the accused had taken items from his house and sold them in the village. The complainant rushed to his house and confirmed the theft. The following day accompanied by police officers they went to the house of the accused person and arrested the accused. The accused showed them the house to which he had sold the goods. The police recovered the stolen items on proper identification by the complainant. The items are as follows:

- 1. 1 shelf**
- 2. Three arm chairs**
- 3. One three seater arm chair**
- 4. A black basin**
- 5. Eighteen cushions**
- 6. One table**
- 7. Three sufurias**

The person who bought the goods was also arrested but was released when found to be bona fide buyer.

The items recovered are outside the court and we wish to produce them as Pexh. 1s-f in the order listed.

Accused; the facts are true.

Court- Accused convicted on his own plea of guilty.

Prosecutor: I have no previous record.

Accused- I plead for leniency I will not repeat the offence.

Court:- Having considered the fact that the accused is a first offender and also having considered his mitigations and weighing it against the nature and gravity of the offence I sentence the accused to suffer imprisonment for a period of two years.

14.years right of appeal.”)

20.In the instant case, the charge was read over to the appellant and the substance of the same explained to him in a language he confirmed he understood and his reply was. “it is true”.

After the facts were read out to the appellant he again confirmed. “The facts are true.” The trial magistrate then proceeded to convict the appellant.

21.In his mitigation the accused stated:

“I plead for leniency. I will not repeat the offence.”

22.I am satisfied that the plea of guilty was unequivocal and was properly taken.

The appellant’s counsel Mr. Nyambati, however took issue with the fact that the alleged recovered items were never produced before the court but were marked as Pexhibits 1a-f. The said recovered items were reported by the prosecution on reading the facts to have been “outside the court”- The question which therefore arises is, was the failure to produce the exhibits in court fatal to the prosecution’s case? My answer to this question is to the negative.

I find that even though the recovered items ought to have been produced before the court to be properly identified by the appellant, the failure to produce them was not fatal to the case. The appellant admitted the offence of stealing and was the one who led the police to the person he had sold the stolen items to before they were recovered. I do not think that there was failure of justice arising from the omission to tender the exhibits in court. The appellant did not object to their production or being outside the court.

23.In the case of **Peter Kihia Mwaniki vs Republic [2010] eKLR**, the Court of Appeal held that it would have been proper to avail the exhibits, but the failure to produce them was not fatal to the prosecution’s case. The court observed that no injustice arose due to failure to tender those exhibits.

24.In the case of **John Wachira Mutheke vs Republic [2014] eKLR**, the court held that failure to produce exhibits is not necessarily fatal to prosecution case and that each case depends on its own particular circumstances.

25.I similarly hold the view that failure to produce the items did not occasion injustice to the appellant.

26.On sentence, I note that Section 275 of the Penal Code under which the appellant was charged provides for a maximum sentence of 3 years imprisonment. In the instant case, the appellant was sentenced to 2 years imprisonment. I therefore find that the sentence was lawful and see no reason

to interfere with it.
27. In conclusion, I find that the appeal on conviction and sentence have no merit and consequently the said appeal is dismissed

Dated, signed and delivered in open court this 4th day of May, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Miss Moguche for Mr. Nyambati for the Appellant

Omwoyo court clerk