



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 58 OF 2016

EVERLYNE KEMUNTO..... APELLANT

VERSUS

REPUBLIC..... RESPONDENT

*(An Appeal from the Judgment of the Principal Magistrate Honourable S. N. TELEWA in
ELDORET Criminal Case No. 1148 of 2016, dated 1st March, 2016)*

JUDGMENT

1. The appellant *Everlyne Kemunto* was charged with the offence of child stealing contrary to **Section 174 (1) (a)** of the **Penal Code**.
2. The particulars of the offence allege that on the 21st January of an undisclosed year at [Particulars withheld], Eldoret West District within Uasin Gishu County, she fraudulently took *I B* a child aged four months with intent to deprive *M I* of his possession.
3. On 1st March, 2016, the appellant was convicted on her own plea of guilty. She was sentenced to serve two years imprisonment.
4. She was aggrieved by her conviction and sentence. She filed an appeal to this court through a petition of appeal dated 25th April 2016 in which she in the main complained that her conviction was unsafe as her plea of guilty was equivocal.
5. At the hearing of the appeal, the appellant was represented by learned counsel *Mr. Momanyi* while learned prosecuting counsel *Ms. Oduor* appeared for the state. In his submissions, *Mr. Momanyi* contended that the appellant's plea was not unequivocal as the language used by the court was not disclosed in the proceedings and the appellant was not given an opportunity to respond to the facts supporting the offence as outlined by the prosecutor. He urged the court to allow the appeal and order a retrial.
6. The state conceded to the appeal. *Miss Oduor* agreed with *Mr. Momanyi* that the appellant's conviction was unsafe as she had not been given a chance to respond to the facts narrated by the prosecutor. She urged the court to order a retrial.
7. I have considered the grounds of appeal and the submissions made by both parties. I have also read the record of the lower court. Having done so, I am unable to agree with *Mr. Momanyi's* submission that on

the date that the appellant took her plea, the language of the court was not disclosed on the record. The proceedings of the lower court confirms that the language of the court on 1st March 2016 was English interpreted into Kiswahili. The appellant appears to have understood the Swahili language as when the charges were read to her, she responded in Swahili saying “Ukweli”. There is therefore no doubt that the appellant was conversant with one of the languages that was used by the court and that she understood the charges that were read to her.

8. The record however confirms both learned counsels’ submissions that after the appellant pleaded guilty to the charge, the court prosecutor stated the facts of the case but the appellant was not accorded an opportunity to respond to those facts. This was a departure from the procedure set out in *Section 207 of the Criminal Procedure Code* for the recording of plea of guilty from accused persons. This procedure was re-iterated in the case of **Adan V Republic (1973) E.A 445** which was quoted with approval by our Court of Appeal in **Kariuki V Republic (1984) KLR 809.**

9. For a plea of guilty to be unequivocal, the plea court must take the following steps in recording the plea;

(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language that 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 change of plea entered.

(v) If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused’s reply should be recorded.

10. It is clear from the proceedings before the lower court that the learned trial magistrate omitted the second step when recording the appellant’s plea of guilty and this automatically made the plea to be equivocal as the appellant was not accorded a chance to admit or deny the facts supporting the charge. Her conviction was therefore unsafe.

11. For the foregoing reasons, I find merit in the appeal and it is hereby allowed. The appellant’s conviction is quashed and sentence set aside. Since this is a fairly recent case and the appellant’s conviction has been vitiated by a procedural defect in plea taking, I agree with counsel on record that this is a suitable case to order a retrial.

12. Consequently, the appellant shall be escorted to the Chief Magistrate’s court at Eldoret on 10th October 2016 for plea and further orders. In the meantime, she shall be held in police custody at the Eldoret police station.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 6th day of October, 2016.

In the presence of:

The Appellant

Mr. Momanyi for the appellant

Ms Oduor for the state

Naomi Chonde – Court clerk