REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.253 OF 2012

(An Appeal arising out of the conviction and sentence of D. KINARO - SRM delivered on 27th September 2012 in Makadara CM. CR. Case No.4958 of 2012)

KENNEDY NJOROGE ALIAS BILLY…….…………….APPELLANT

VERSUS

REPUBLIC……………………………………........RESPONDENT

JUDGMENT

Kennedy Njoroge *alias* Billy was charged with the offence of **preparation to commit a felony** contrary to **Section 308(1)** of the **Penal Code**. The particulars of the offence were that on 23rd September 2012 at Gikomba Market in Nairobi County, the Appellant was found with a dangerous or offensive weapon namely a toy pistol and one round of ammunition in circumstances that indicated that he was so armed with the intent to **commit a felony**, namely **robbery with violence**. He was also charged with two (2) counts under the **Firearms Act**, in particular **Sections 4(1) and (2)(a) and 34**. The particulars of the offence were on 23rd September 2012 at Gikomba Market in Nairobi County, the Appellant was found in possession of ammunition and an imitation firearm without a firearm certificate. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. He was convicted on his own plea of guilty on the three (3) counts. He was sentenced to serve seven (7) years imprisonment on each count. The sentences were ordered to run consecutively. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal before this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on a plea of guilty that was equivocal. He took issue with the fact that the trial court had not established the language that he understood before the plea was taken in Kiswahili, a language he claimed he did not properly understand. He was aggrieved by the fact that he had been sentenced to serve a custodial sentence, which in his opinion, was harsh and excessive. He was of the view that there was no justification why he should be sentenced to serve a consecutive custodial sentence yet the three offences for which he was convicted arose from the same circumstance. In the premises therefore, he urged the court to allow his appeal, quash his conviction and set aside the custodial sentence that was imposed on him.

During the hearing of the appeal, Mr. Kinuthia for the Appellant reiterated the contents of the petition of appeal. He submitted that the trial magistrate was not justified to sentence the Appellant to serve a consecutive sentence instead of a concurrent sentence in view of the offences that the Appellant is alleged to have committed. He submitted that the custodial sentences imposed on the Appellant were contrary to **Section 14(3)(a)** of the **Criminal Procedure Code**. It was his view that the fact that the term of imprisonment imposed on the Appellant aggregated more than the maximum sentence of fourteen (14) years meant that the sentence was illegal. He further submitted that the trial court erred in convicting the Appellant on the basis of a plea of guilty that was not taken in the language that the Appellant understood. In particular he stated that, although the Appellant had attained a Form 2 level of education, plea ought to have been taken in Kikuyu, a language the Appellant properly understood. In that regard, learned counsel relied on the case of **Lusiti –vs- Republic [1976 – 80] KLR 585** and **Elijah Aywa Zedekiah –vs- Republic CA Criminal Appeal No.87 of 2000**. He further submitted that the fact that the Appellant

stated **"true"** in answer to the plea that was read to him meant that his plea of guilty was equivocal. In that regard, he relied on the decision in **Wanjiru –vs- Republic [1975] EA 5** where the court held that where an accused person answers the words "it is true" does not amount to a plea of guilty. He therefore urged the court to allow the appeal in its entirety.

In response to the submission made by counsel for the Appellant, Ms. Njuguna for the State submitted that the sentence imposed on the Appellant was neither illegal nor excessive. The Appellant had been sentenced to serve a minimum sentence on each count. She was of the view that the trial court had properly exercised its discretion when sentencing the Appellant to the custodial sentence. As regard the allegation that the plea taken was equivocal, he submitted that the Appellant understood both English and Kiswahili languages on account of his education level. He had pleaded guilty to the charge and also admitted the facts when they were read to him. The exhibits were produced in court. They were not objected to by the Appellant. She was of the view that the grounds of appeal raised by the Appellant were mere afterthought. She was of the firm view that the plea of guilty that was recorded by the trial magistrate was unequivocal. She asked the court not to interfere with the conviction and sentence of the trial court.

This being a first appeal, it is the duty of this court to re-evaluate and to reconsider the evidence adduced before the trial court before reaching its own independent determination whether or not to uphold the decision of the said court. In doing so, this court is required to always keep in mind the fact that it neither saw nor heard the witnesses as they testified and therefore give due regard in that respect (see **Njoroge –vs- Republic [1987] KLR 19).** The issue for determination by this court is whether the prosecution proved its case on the charges brought against the Appellant to the required standard of proof beyond any reasonable doubt.

Upon re-evaluation of the facts of this case and the grounds of appeal put forward by the Appellant, this court takes the following view of the matter:

The Appellant in this case pleaded guilty to the three (3) charges when he was arraigned before the trial court. When each charge was read to him, he admitted the charge to be **"true".** As the charge was being translated from English to Kiswahili, the word most probably used by the Appellant to answer to the charge is **"Ni ukweli".** It may be important in circumstances similar to the present one for the trial court to record the actual Kiswahili words used when the accused is pleading to the charge. The word **"ukweli"** when translated to English has two meanings depending on the context in which the word is used. The first meaning is **"truth".** This is where a person may be confirming what has been said to be the truth i.e. **"Niliyoyasema ni ukweli".** The second meaning is an answer in the affirmative. Meaning that the person has been asked a question and he/she has answered the question in the affirmative. It is in second context that the Appellant pleaded guilty to the charge and not in the first context of the meaning of the word **"Ukweli"** as counsel for the Appellant attempted to persuade this court.

This court therefore is of the firm view that when the charges were read to the Appellant, he answered the charges in the affirmative. The decision in **Wanjiru –vs- Republic [1975] EA 5** should therefore be considered in the context in which it was made. The two Judges hearing the appeal were English Judges who may not have properly understood the nuances of African languages when word such as **"Ukweli"** is being translated into English, and the double meaning that the word has depending on the context in which the word is used. In the context where plea is being taken in a court of law, the word, **"Ukweli"** while may be translated to the English word **"true"** in actual fact means that the person pleading to the charge has answered the charge in the affirmative. In that regard, the decision in **Wanjiru –vs- Republic [1975] EA 5 in so far as it failed to contextualize the word "true" in translation to English language is bad law.**

The Appellant argued that he did not understand the language in which plea was taken. Counsel for the Appellant told the court that the Appellant had attained Form 2 level of education. For the Appellant to be admitted to secondary school, he must have passed his primary level National Examination. Two of the subjects that he must have passed is English and Kiswahili. It cannot therefore be argued with level of seriousness that the Appellant did not or does not understand the English or Kiswahili languages. This

court agrees with Ms. Njuguna for the State that that ground of appeal is an afterthought and should not seriously be considered by this court. Unlike the decision in **Elijah Aywa Zedekiah –vs- Republic CA Criminal Appeal No.87 of 2000** where it was established to the satisfaction of the court that the Appellant did not understand the particular dialect of the Luhya language when the charge was being interpreted to him, in the present case, it was clear that the Appellant understood both Kiswahili and English languages. If the Appellant had indicated to the court that he preferred the charges to be read to him in Kikuyu, the position would have been different. Since he indicated to the court that he understood Kiswahili, he cannot, at this appellate stage claim that he did not understand the language in which the plea was taken.

Having carefully perused the proceedings before the trial court, this court is satisfied that the plea was taken in accordance with the directions given by the Court of Appeal in **Adan -vs- Republic [1973] EA 445** in that the charge and all the essential ingredients of the offence were read and explained to the Appellant in Kiswahili, a language he understood; the trial court recorded the words the Appellant used in answer to the charge, he answered in the affirmative; the facts supporting the charges were read to the Appellant; he confirmed the facts to be correct and finally, after the Appellant was convicted on his own plea of guilty, the Appellant was given an opportunity to mitigate. This court formed the view that indeed the plea of guilty that was recorded by the trial court was unequivocal. The appeal against conviction lacks merit and is hereby dismissed.

As regards sentence, the Appellant is on firmer ground. There was no justification for the Appellant to be sentenced to serve consecutive custodial sentences taking into consideration that the Appellant was a first offender. The sentences imposed on the Appellant by the trial court is hereby set aside and substituted by a sentence of this court. The Appellant is sentenced to serve five (5) years imprisonment on each of the three (3) counts that he was convicted. The sentences are ordered to run concurrently with effect from 27th September 2012 when the Appellant was convicted by the trial court. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF MARCH 2015

L. KIMARU

JUDGE