REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.167 OF 2015

CHRISPINE ODUOR OMOLLO…….....APPELLANT

VERSUS

REPUBLIC……..……RESPONDENT

(Being an appeal from the original conviction and sentence in case No.3599 of 2015 in the chief magistrate's court at Kibera delivered on 24/08/2015 by Hon. Ochoi Principle Magistrate)

JUDGMENT

The Appellant was charged with obtaining money by false pretenses contrary to section 313 of the Penal Code Cap 63 laws of Kenya. The particulars were that on diverse dates between the month of March 2014 and the month if August 2014 at Dagoretti Coner in Riruta within Nairobi County with intent to defraud obtained from Thomas Chepkwony Ksh.200,000/= by falsely pretending that he was in a position to repair his vehicle a fact he knew to be false. He was sentenced to twelve months imprisonment. In addition, he was to refund Ksh.200,000/= to the complainant failure of which he would serve a further twelve months imprisonment. Being dissatisfied with the conviction and sentence he appealed on grounds that;

1. **The plea was not properly taken or recorded.**
2. **The facts outlined by the prosecution did not disclose any intent to defraud or obtain money by false pretense.**
3. **The sentence of months of twelve months imprisonment in default of payment of compensation was unlawful.**

He was represented by Mr. Oduk who submitted that the plea was not taken in a proper manner in that after the charge was read, the Appellant stated, "it is true." There after the facts of the case were read and a plea of guilty was entered. He submitted a list of authorities to support his argument that the plea was not unequivocal. He referred the court to the case of **Adan Vs R** and also to **Section 207(1) of the criminal procedure code**. He also referred this court to the cases of **Joseph Wanyonyi Wafuko v Republic [2014] eKLR** which highlighted the elements of the offence of obtaining money by false pretenses, the case of **John Wanyoike Kimani v Republic [2004] eKLR** in which the facts were similar to those in the instant case, the case of **Juma bibali v Republic [2014] eKLR** and finally the case of **Republic v Maurice Otieno Nyamgwe[2010] eKLR** which touched on the issue of the discretion of court to interfere with sentence passed by a trial court.

Mr. Wario, who was counsel for the respondent conceded to the appeal. He submitted that it was evident that the plea was not unequivocal.

Under **Section 348 of the Criminal Procedure Code**, no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence. Therefore only grounds 1 and 3 ARE VALID for determination herein. First, I will look at the issue whether or not the plea was unequivocal and was properly taken and recorded. The relevant provision of the law in this regard is Section 207(1) and (2) of the Criminal Procedure Code which provides that;

> **"207(1) the substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.**
>
> **(2) if the accused person admits the truth of the charge his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.''

The procedure was emphasized in the case of **Adan vs Republic (1973) EA 445**. In that case, the then East African Court of Appeal laid down the steps a court should take in order to record a proper plea as follows:-

"i) The charge and all the essential ingredients of the offense should be explained to the accused in his 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 to add any relevant facts.

iv) If the accused does not agree 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 facts relevant to sentence together with the accused's reply should be recorded."

In the case of **Kariuki v Republic [1984] KLR 809** the Court of Appeal also set out the manner in which a plea of guilty is to be recorded. It was stated that;

i. **The trial magistrate or judge must read and explain to the accused the charge and all the ingredients of the offence, in the language of the accused or a language the accused understands.**
ii. **He should then record the plea in the accused person's own words and if they are an admission, a plea of "guilty" should be entered.**
iii. **The prosecution must then, immediately, state the facts and the accused should be given an opportunity to dispute, to explain or to add any relevant facts.**
iv. **If the accused does not agree to the facts or raises any question as to the facts, his answers should be recorded and a change of plea entered. If there is no change of plea, a conviction should be recorded alongside a statement of facts relevant as well as the reply of the accused.**

In the instant case, the substance of the charge and every element thereof was read to the Appellant in a

language that he understood and upon being asked whether he admitted or denied the truth of the charge replied, **"It is true**." Thereafter the facts of the charge were read to him in response to which he stated, "**The facts are true."**

The questions which this court must answer then on this issue are whether the words, "it is true" and "the facts are true" as used by the Appellant amount to a plea of guilty and if they do, whether the plea was unequivocal and properly recorded.

The term "unequivocal" under **Black's Law Dictionary Ninth Edition** is taken to mean unambiguous, clear, free from uncertainty.

Whereas it has been held in some cases that words such as "I admit", "I accept", "it is true", "I am guilty" and so on cannot be considered as unequivocal pleas (See the case of **Njuki v Republic [1990] KLR 334.),** it is an established principle that every case must be determined according to its own merits.

The Appellant referred to the case of **John Wanyoike Kimani v Republic .** In that case, the proceedings were taken as follows:

> ***"6.2.2004***
>
> ***Before G. A Ndela C.M.***
>
> ***C/P Sp Miyienda***
>
> ***c.c. Gachunji***
>
> ***Accused present***
>
> ***It is true***
>
> ***G.A NDENDA C.M."***

The facts were then read to the Appellant, and when asked if the facts were correct, he answered, ***"Facts are true."***

In mitigation the Appellant stated, ***"I have nothing to say."***

It was held that "**from the above proceedings the procedure as laid down by the law was not followed. The language in which the plea was taken was not stated. Neither was the charge read to the Appellant. It is not evident from the record if the Appellant understood the charge and made the informed decision to plead guilty to the same….it is clear that from the aforegoing that the plea taken by the Appellant was equivocal."**

The Appellant also referred to the case of **Juma Bilali v Republic** in which the case of Kato V Republic [1971] E.A542 (CAD) was cited. In Kato's case, the Court ofAappeal said, **"the procedure relating to the calling upon the accused person to plead is governed by section 203 of the criminal procedure code. In our view, if it can be clearly shown that an accused person has admitted all the ingredients which constitute the offence charged, it is then proper to enter a plea of guilty. The words "it is true" when used by an accused person may not amount to a plea of guilty, for example, in a case where there may be a defence of self-defence or provocation…"**

These two cases are distinguishable from the present case. In John Wanyoike's case, there was no record showing whether or not the charge was read to the Appellant which is not the scenario in the present case. In Juma Bilali's case when the Appellant was first arraigned court and the charge was read to him he responded, "it is not true." at a later date he asked the charge to be read to him again and he responded, "it is true". The facts were read out to the Appellant on another date to which he pleaded not guilty. This

again was not the scenario in this case.

In the case of **Hussein Hassan Ali v Republic [2009] eKLR,** the Appellant was convicted on his own plea of guilty. The Court of Appeal keeping in consideration Kato's case and Adan's case said, **"…He is recorded to have answered "*it is true*" on each of the two charges read to him… In the case subject to this appeal, the trial court record shows that after the plea of guilty was recorded, the facts of the offence were narrated to him by the prosecutor and recorded by the court to which he answered:-**

"the facts are correct."

The trial magistrate then recorded:-

"Plea of guilty was unequivocal. Accused convicted on his own plea of guilty on both counts I and II."

The Appellant was given a chance to mitigate before being sentenced as stated before. In our view, the Appellant's plea was unequivocal and the superior court properly summarily rejected his appeal."

The court in the case of **Republic V Yonasani Egalu and others, [1965] 9 EACA 65,** said that **"it is most desirable that not only every constituent of the charge be explained to the accused person, but that he should be required to admit or deny every constituent part thereof and that what he says should be recorded in a form which would satisfy an appeal court that he fully understood the charge and pleaded guilty to every element of it unequivocally."**

The above case law is in consonance with the provisions of Section 207(1) and (2) of the Criminal Procedure Code. What is clear is that a plea of guilty must be unequivocal. The charge must be read to him in such clear and an unambiguous manner that he understands the charges facing him. After the statement and particulars of the charge are read to him and he admits them, the court must enter a plea of guilty. Thereafter the fact of the case must also be clearly read to him and if he admits them as correct and true, the court proceeds and convicts him on his own a plea of guilty. There is no short to the taking of a plea of guilty. In the instant case the trial magistrate failed to enter a plea of guilty after the particulars of the charge were read to the Appellant. Without a doubt the plea of guilty was not unequivocal. It was not therefore a properly recorded plea. For this reason alone this appeal must succeed.

In view of the above observations, I need not delve much on the issue of compensation save to say that the same contravened **Section 175(4)(a) Criminal Procedure Code** which provides that no order of compensation shall issue before the expiry of the time limited for appeal against the conviction or sentence in respect of which the order was made.

In the result, I quash the conviction and set aside the sentence. The Appellant is hereby set free unless he is otherwise lawfully held.

DATED and **DELIVERED** this **3rd** day of **DECEMBER,** 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. M/s Musungu holding brief for Oduk for the Appellant

2. M/s Atina holding brief for M/s Wario for the Respondent.