REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal209 of 2007

PAUL IRUNGU MAINA……...…….……ACCUSED

VERSUS

REPUBLIC……..…..PROSECUTOR

JUDGMENT

PAUL IRUNGU MAINA (the Appellant), was upon his own plea of guilty to seven counts of breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code convicted and sentenced to 5 years imprisonment on each count. The sentences were ordered to run consecutively. He has appealed to this court against both the conviction and those sentences.

On conviction, the ground urged by Mr. Chege for the Appellant is that the record does not show the language used. Moreover he further argued, contrary to the Court of Appeal decision in the case of Mose v Republic [2002] 1 EA 163, there is nothing on the record to show that each ingredient of the offences was explained to the Appellant and no separate pleas were recorded.

On the appeal against sentence Mr. Chege submitted that the sentences of 5 years imprisonment on each count are omnibus and is therefore illegal. If they are not, he further submitted, then the order that they run consecutively makes the entire sentence manifestly excessive. He urged me to allow the appeal.

Mr. Mugambi for the state conceded the appeal mainly on the ground that the language used is not stated in the record of appeal.

I have considered these submissions. Section 77(2)(b) of the Constitution requires that:-

"Every person who is charged with a criminal offence –

(a) ……..

(b) shall be informed as soon as reasonably practicable, in a language he understands and in detail, of the nature of the offence with which he is charged;"

Section 207(1) of the Criminal Procedure Code also mandatorily requires:-

"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."

It is trite law that the record should always show the language used in the trial.

In Baya Vs Republic [1984] KLR 657, the Court of Appeal held that:-

"Compliance with the section [Section 207(1) of the Criminal Procedure Code] entails the explanation of the charge and all its ingredients to the Accused in his vernacular or in some other language he understands. The Accused's own words in reply should be correctly translated into English and then carefully recorded. If the words are an admission a plea of guilty should be recorded – see *Adan Vs Republic [1973] EA 445*."

In this case, as correctly pointed out by Mr. Chege for the Appellant, the record does not show what language was used. In the circumstances we cannot be sure that the Appellant understood the charges against him. His conviction cannot therefore be said to have been unequivocal.

Outlining the procedure to be followed when taking a plea on several counts, the Court of Appeal had this to say in Mose Vs Republic (supra):-

"The procedure for calling upon an Accused person to plead required that the Accused admit to all the ingredients constituting the offence charged before a plea of guilty could be entered against him. The words 'it is true' standing on their own did not constitute an unequivocal plea of guilty. It was desireable that every constituent of the charge be explained to the Accused and that he should be required to admit or deny every constituent *(Kato Vs Republic [1971] EA 542, Republic Vs Yonasali Egalu [1942] 9 EACA 65* and *Wanjiru Vs Republic [1975] EA 5* followed)."

In this case the record only shows the words "it is true" against each count after the charged were read to the Accused. There is nothing to show that the constituent ingredients of each count were explained to the Appellant. For these omissions the appeal against conviction must therefore also be allowed.

The record in this case shows that the sentence for 5 years imprisonment was on each count. I therefore do not agree with Mr. Chege that the sentence imposed in this case was omnibus. As was stated by the Court of Appeal in Mohammed Warsama Vs Regina (1956) EACA 576, a sentence is only omnibus when it is not clear to which count it relates. However on the severity of sentence I agree with him that the order directing the sentences to run consecutively makes the entire sentence manifestly excessive. See Ondiek Vs Republic [1981] KLR 430. In the circumstances I would have reduced the sentence if I had dismissed the appeal against conviction.

For the reasons already stated I allow this appeal, quash the conviction and set aside the sentence. The Appellant shall be set free forthwith unless otherwise lawfully held.

DATED and DELIVERED at Nakuru this 3rd October, 2008.

D. K. MARAGA

JUDGE