

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CRIMINAL APPEAL NO. E065 OF 2023

MANGALE

YAWA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDEN

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*(Being an appeal from the original conviction and sentence by Hon.
Chepchichir, PM, in Mariakani PM`s Court Criminal Case No.E140 of 2023
delivered on 26/7/2023)*

JUDGMENT

1. The appellant herein was convicted in count 1 on his own plea of guilty for the offence of intentionally endangering safety of persons travelling by railway contrary to section 233 (b) of the Penal Code. He was also convicted in count 2 on his own plea of guilty for the offence of stealing contrary to section 268 (1) as read with section 279 of the Penal Code. The particulars of the offence in count 1 were that on the 23rd May 2023 at Mnagoni village in Taru location of Kwale county he intentionally endangered the safety of persons travelling by railway by vandalizing fencing posts

valued at Ksh.30,000/= the property of Kenya Railways Corporation.

2. The particulars of the offence in count 2 were that on the same day, time and place as in count 1 he stole 4 D10 steel rods approximately 6 feet each and approximately 5 kg of metal hooks all valued at Ksh. 30,000/= the property of the above said Kenya Railways Corporation.

3. The Appellant was sentenced to serve 10 years imprisonment in respect to count 1 and 2 years imprisonment in respect to count 2. He was aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are:

- 1) That the trial magistrate erred in law and facts by convicting the appellant on unequivocal plea of guilty.
- 2) That the trial magistrate grossly erred in law and facts by convicting the appellant on a matter that had no facts.
- 3) That the trial magistrate erred in both law and facts by failing to consider and evaluate the state of mind of the appellant at the time of pleading guilty.
- 4) That the trial magistrate erred in both law and facts by failing to consider that the facts and plea pleaded guilty to was for the offence of stealing and not endangering.

4. The Appellant was convicted on his own plea of guilty. His appeal is on the ground that the plea was not unequivocal though his submissions were confined to mitigation.

Submissions

5. The appeal was canvassed by way of written submissions. The appellant submitted that the trial court did not consider his mitigation and it did not factor in that he was a first-time offender and a young man. He submitted that the trial court ignored his mitigating circumstances and imposed upon him a sentence that was harsh and excessive. He urged the court to consider his mitigating circumstances. He insisted that he was a first-time offender and as such the sentence ought to be lenient.
6. The Respondent on the other hand submitted that the appellant was convicted on his own plea and that the court before rendering the sentence noted his mitigation, particularly his age and the fact that he was a first-time offender who had a family. That the trial court balanced this as against the fact that thousands of Kenyans use the SGR and the danger posed to their lives when it is vandalized.
7. On whether the trial court erred in law and fact by convicting the appellant on an unequivocal plea of guilty, counsel relied on the case of **Alexander Lukove Malika vs Republic (2015) eKLR** where the court held as follows;

“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty.

Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged.

8. It was submitted that the manner of recording of a plea is provided for in Section 207 (1) and (2) of the Criminal Procedure Code and the same was dealt with in **Ombena vs Republic (1981) eKLR**. Counsel further submitted that the charge was read over to the appellant in a language he understood and thus pleaded guilty. That he confirmed that the facts were correct. It was submitted that the trial court complied with the provisions of Section 207 and that the proceedings do not illustrate that the appellant was of unsound mind and could not understand the proceedings.

Analysis and determination

9. This being the first appellate court in the matter, the court has a duty to analyze and evaluate the evidence which was adduced before the trial court and come up with its own independent finding and in the process of doing so bear in mind that the trial court had the advantage of seeing and

hearing the witnesses testify and give due credit for that, see **Okeno v Republic [1972] E.A. 32.**

10. I have considered the grounds of appeal, the record of the trial court and the submissions of the appellant and those of the prosecution counsel. The issues that arise for determination are whether the plea was equivocal and whether the sentence imposed on the Appellant was harsh and excessive.
11. The procedure in plea taking in the subordinate courts is laid down under **Section 207 (1), (2) and (3) of the Criminal Procedure Code.** The Section provides as follows: -

“207.

The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

If the accused person admits the truth of the charge otherwise than by a plea agreement 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.

If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.”

12. The manner of taking pleas was explained in the case of **Adan v Republic [1973] EA 445** where the **Court of Appeal** laid down the steps which should be followed in taking pleas as follows:

“The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

the accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded;

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;

if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

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.”

13. The court before entering a plea of guilty must therefore be satisfied that the accused wishes to admit the charge without any qualifications on every element of the offence charged and only when so satisfied can the court record a plea of guilty. Upon admitting the charge, the court is required to call upon the prosecutor to state the facts upon which the charge is based. The detailed facts must be given and not just the particulars outlined on the charge sheet. In case there are any exhibits which form evidence in support of the charge, they must be produced when the facts are being read out in court.
14. In this case the appellant appeared in court for plea on 25th May 2023 when the charge was read over to him wherein he made a reply that:
 - Count 1: It is not true
 - Count 11: It is not true
 - Alternative charge: It is not true
 - Count 111: It is true
15. A plea of not guilty was then entered in respect to Count 1, 11 and alternative charge to Count 11. A plea of guilty is entered in respect to count 111.
16. The record shows that on 30/6/2023 the appellant sought to change plea. On 24/7/2023, the charge was read

over to him in Kiswahili, a language he understood to which he answered;

Count 1: It is true

Count 11: It is true.

17. The prosecutor then gave the facts of the case. The facts were that a guard who was guarding the Standard Gauge Railway (SGR) at Taru reported to the police that there was a certain person who was destroying the SGR. Policemen went to the scene and found the Appellant cutting the perimeter fence of the SGR and damaging the concrete poles so as to extract the metal rods. Four D 12 steel rods and 5 kg of metal hooks were recovered.
18. The appellant admitted the facts and he was convicted on his own plea of guilty. He mitigated and he was sentenced.
19. Upon considering the manner the plea was taken by the trial court, it is my finding that the plea was taken as per the guidelines set out in the case of *Adan v Republic* (supra). The appellant understood the charges as they were read to him in a language that he understood, a fact that he has not disputed. The appellant in mitigation pleaded for mercy signifying that he understood the charges against him. He, in this appeal, did not attempt to show that the plea was equivocal as stated in his grounds of appeal. Neither did he show that he had a mental problem that made him not understand the charge. It is thus my finding that the plea

taken on the appellant was unequivocal and the conviction is thereby upheld.

20. The Appellant was sentenced to serve 10 years imprisonment in respect to count 1 which carries the maximum imprisonment for life. The offence in count 2 of Stealing contrary to Section 268 (1) as read with Section 279 of the Penal Code attracts a maximum sentence of 14 years imprisonment. The Appellant was sentenced to serve 2 years imprisonment in respect to count 2.
21. The principles upon which a first appellate court may interfere with the sentence imposed by the trial court were laid down in the case of **Wanjema v Republic [1971] EA 493**. These are that an appellate court can only so interfere if it is satisfied that in arriving at the sentence the trial court did not take into account a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate court must not lose sight of the fact that in sentencing, the trial court exercised discretion and as long as the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion.
22. The state told the trial court that the Appellant was a first offender. The Appellant in his mitigation before the trial court stated that he was at the material time aged 29 years and the eldest in the family of a sister, a brother and a

mother. That he was the breadwinner of his family. That the sister was in form 3 and the brother in form 1 but they had dropped out of school after he was arrested. That on the material day they did not have food at home and he regretted his actions. That he would sensitize others with similar intentions.

23. The trial court in sentencing the Appellant to 10 years imprisonment in respect to count 1 noted that his actions endangered thousands of people travelling by SGR.

24. It cannot be down played that there were grave consequences to the offence committed by the Appellant. A deterrent sentence was most appropriate in the circumstances of the case. However, considering that the Appellant was a first offender, the sentence of 10 years imprisonment was, in my view harsh. I consider a sentence of 5 years in respect to count 1 to be appropriate.

25. The upshot is that the conviction by the trial court is upheld but the sentence of 10 years imprisonment in count 1 is set aside and substituted with one of five (5) years imprisonment. The sentence in count 2 remains. The sentence, as ordered by the trial court, to run concurrently.

Delivered dated and signed at GARSEN this 26th day of February, 2026.

J. N. NJAGI

JUDGE

In the presence of:

Mr. Oluoch for Respondent

Appellant - present virtually at G. K. Prison Manyani

Court Assistant - Rahma

Original