REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 58 OF 2015

WILLY KIPCHIRCHIR ……..APELLANT

VERSUS

REPUBLIC ……..RESPONDENT

(An Appeal from the Judgment of the Resident Magistrate Honourable B. Kiptoo in Kapsabet Criminal Case No. 990 of 2015, dated 27th April, 2015)

JUDGMENT

1. The appellant was convicted on his own plea of guilty with the offence of grievous harm contrary to ***Section 234*** of the ***Penal Code***. He was sentenced to twenty years imprisonment.
2. The appellant was aggrieved by both his conviction and sentence. He initially filed an appeal in person on 5th May, 2015 but he subsequently engaged the legal services of *M/s Magut & Sang Associates* who filed another petition of appeal on 11th May, 2015. At the hearing of the appeal, learned counsel *Mr. Magut* withdrew the petition of appeal filed by the appellant on 5th May, 2015 and argued the appeal based on the petition of appeal dated 11th May, 2015 filed in court on even date.
3. In the petition of appeal dated 11th May, 2015, the appellant relied on twelve grounds of appeal which can be condensed into the following three grounds;

i. That the learned trial magistrate erred in law in failing to strictly adhere to the procedure set out under ***Section 207*** of the ***Criminal Procedure Code*** in recording a plea of guilty and convicted the appellant on an equivocal plea of guilty.
ii. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's plea in mitigation when passing sentence.
iii. That the learned trial magistrate erred in law by meting out a sentence that was excessive in the circumstances of the case.

4. In prosecuting the appeal, *Mr. Magut* submitted that the plea in this case was equivocal as the charge was not read to the accused in a language he understood as required by ***Art 50(2) (n)*** of the ***Constitution*** and ***Section 198*** of the ***Criminal Procedure Code***; that from the proceedings, it is not clear which language was used whether it was English or Swahili and whether the accused understood the charges he was facing. Counsel further submitted that as the appellant stated in his plea in mitigation that he was drunk when he committed the offence and that he never quarreled with his wife, the trial magistrate should have investigated further to establish that he understood the elements of the offence. It was further submitted that as the trial

magistrate did not follow the procedure of plea taking as provided by ***Section 207*** of the ***Criminal Procedure Code,*** the conviction was unsafe and ought to be quashed and a retrial be ordered if the court was not inclined to acquit the appellant.

5. On sentence, *Mr. Magut* submitted that the trial magistrate erred in not considering the appellant's plea in mitigation and that the sentence of 20 years imprisonment was harsh and excessive. He urged the court to set aside the sentence.
6. The appeal is contested by the state. Learned prosecuting counsel *Miss Karanja* in opposing the appeal submitted that the plea of guilty which resulted into the appellant's conviction was unequivocal as the record shows that the trial magistrate complied with the provisions of ***Section 207*** of the ***Criminal Procedure Code*** and followed the principles set out in ***Adan V Republic 1973 EA 445*** when recording the plea.

Counsel therefore submitted that the conviction was sound in law and ought to be upheld.

On sentence, it was the Republic's position that the trial magistrate had considered the appellant's plea in mitigation before passing sentence and that the sentence was lawful. *Miss Karanja* disputed the appellant's claim that the sentence was harsh and excessive.

7. I have considered the grounds of appeal, the rival submissions by counsel for the appellant and the Republic and the record of the lower court.

The procedure that a trial court should follow in recording a plea from an accused person is clearly set out in ***Section 207*** of the ***Criminal procedure Code*** which has found expression in various judicial pronouncements. In the celebrated case of ***Adan V Republic (1973) EA 445*** which was quoted with approval by our Court of Appeal in ***Kariuki V Republic (1984) KLR 809,*** the East Africa Court of Appeal laid down the steps a plea court should take to record an unequivocal plea as follows;

i. ***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;***
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 the facts or raises any question 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.***

The same procedure was endorsed by our Court of Appeal in ***Kariuki V Republic (Supra).***

8. From the foregoing, it cannot be gainsaid that a plea court in recording a plea of guilty must ensure that an accused person fully understands the offence with which he is charged and the manner in which it is alleged that he committed the offence. In order for the accused to fully understand the charge preferred against him, the charge must be read and explained to him in a language that he or she understands and this language must be reflected on the court record. The duty of the court goes beyond just reading the charges to the accused. As emphasized by the Court of Appeal in ***Kariuki V Republic (Supra)***

"the trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands".

9. In the instant case, the record of proceedings on the date the appellant took his plea read as follows;

24.4.14:-

Before B. Kiptoo (RM)

CP:PC Belio

CC: Tallam

Accused present

Charge read over and explained to accused in English/Kiswahili who replies;

Kweli

Court: Plea of guilty entered.."

10. I agree with *Mr. Magut* that looking at the record of proceedings in the lower court, it is not possible to tell which language between English and Kiswahili was used to read and explain the charges to the appellant. Though the record shows that the appellant responded to the charges in the Swahili language and must therefore be taken to have understood that language, there is no indication whether the charges had been read to him in the same language. There is also no indication in the court record to show that the appellant was proficient in the English language as well so that if the court had used either of the two languages, there would be a basis for a finding that the charges had been read to the appellant in a language that he understood.
11. The record shows that the facts of the case were not narrated by the prosecution on the same date the plea was taken. The facts were narrated on 27th April, 2015 three days after plea was taken on 24th April, 2014.

The error by the trial court in failing to indicate on record the language that the appellant understood and the language which was used to read the charges to him on plea day could have been cured had the learned trial magistrate indicated the language used on 27th April, 2015 when the facts were read to the appellant. This was regrettably not done.

12. In the absence of evidence that the charges were read and explained to the appellant in a language that he understood, I am unable to find that the plea of guilty entered in this case by the trial court was unequivocal as urged by the State. I agree with learned counsel *Mr. Magut* that the plea of guilty in this case was equivocal and a conviction flowing from it is needless to say, invalid.
13. It is therefore my finding that this appeal is merited. It is hereby allowed with the result that the appellant's conviction is quashed and the sentence set aside. Since this is a fairly recent case and the appellant's conviction has been vitiated only because of the manner in which the plea of guilty was recorded by the trial court, I am satisfied that the interests of justice will be better served if the case was remitted to the lower court for a retrial.

14. Consequently, the appellant shall be escorted to the Principle magistrate's court at Kapsabet on 28th December, 2015 for plea and further orders. In the meantime, he shall be held in custody at the Kapsabet police station.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 22nd day of December 2015

In the presence of:

The Appellant

Mr. Magut for the Appellant

Mr. Mulati for the State

Mr. Lobolio Court Clerk