REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 49 OF 2019

BENJAMIN MULAVA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Consolidated with criminal Appeal No 50 of 2018

JACOB MBUVI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

(Appeal from original conviction and sentence (Hon. M Kasera SPM) in criminal case No. 1190 of2019 at the Chief Magistrate's Court, Kajiado Republic v Benjamin Mulava & another, dated 27th August 2019)

JUDGMENT

1. These are consolidated appeal Nos 49 and 50 of 2019. Benjamin Mulava and Jacob Mbuvi, the 1st and 2nd appellants respectively, were charged with the offence of cutting down trees contrary to section 334 (c) of the Penal Code. Particulars were that on the 24th day of August 2019, at Masimba Location, Mashuru sub-county within Kajiado County, willfully and unlawfully cut down trees, the property of Masimba Ensukuta Community Water Project.

2. The appellants were presented before the trial court on 27th August, 2019 and when the charge was read to them, they were recorded to have pleaded guilty to the charge and a plea of guilty was entered against each of them. Thereafter, according to the record, the prosecution stated that facts were as per the charge sheet. The trial court then ordered each of the appellants to pay a fine of Kshs. 200,000/- and in default to serve 4 years imprisonment. The trial court ordered exhibits, namely; power saw, and panga forfeited to the state.

3. The appellants were aggrieved and filed separate appeals against their conviction and sentence. The 1st appellant raised the following grounds of appeal, namely:

1. That he pleaded guilty to the charge because it was his first time in court and he was scared.

2. That the trial court did not consider that he was a first offender.

3. That he was not given time to mitigate.

4. That the trial court did not consider that he was contracted to cut down only dry acacia trees and

5. That the sentences imposed was harsh and excessive.

4. The 2nd appellant filed his grounds of appeal that are similar in every aspect to those of the 1st appellant and therefore there is no need for this court to reproduce them here.

5. During the hearing of this appeal, the appellants had not filed their written submissions. They opted to rely on their grounds of appeal. On his part, Mr. Njeru, learned Assistant Deputy Prosecution Counsel, conceded the appeal. He told the court that he did not support the appellants' conviction and sentence because in his view, the appellants' plea was equivocal.

6. Mr. Njeru submitted, first, that the record did not show the language in which **the** charge was read to the appellants. Second, that; that notwithstanding, even after the appellants were recorded to have pleaded guilty, the prosecution did not state the facts to the appellants. According to Mr. Njeru, the prosecutor merely stated that facts were as per the charge sheet. The trial court then went ahead to fine the appellants. Mr. Njeru further submitted that exhibits were not produced. It was for those reasons that he did not support the conviction and sentence.

7. I have considered this appeal, the grounds thereof and submissions by Mr. Njeru in conceding the appeal. The law is well settled that concession of an appeal does not bind the court. The court must consider the appeal on merit and make its own determination on it. This position was well stated in ***Odhiambo v Republic*** [2008] KLR 565, that;

"[T]he court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on evidence."

8. That said, this being a first appeal, it is the duty of this court as the first appellate court, to reconsider the evidence reanalyse and reassess it and come to its own conclusion on that evidence giving reasons for that. In doing so, this court should however bear in mind that it did not see the witnesses and give due allowance for that.

9. In ***Okeno v Republic*** [1973] EA 32, the Court of East Africa Court of Appeal held that;

"An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"

10. In ***Kiilu& Another v Republic*** [2005]1 KLR 174, the Court of Appeal held that:

"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

11. The appellants were charged before the trial court with the offence of cutting down trees contrary to section 334 (c) of the Penal Code. They pleaded guilty to the charge and were fined Kshs.200,000/- each and in default, to serve 4 years imprisonment. They have now appealed to this court against both conviction and sentence.

12. The record of the trial court indicates as follows;

" court; substance of the charge(s) and e very element thereof has been stated by the court to the accused person in the language that he or she understands who on being asked whether he/she admits or denies the truth of the charge Replies;

Accused 1; It is true.

Accused 2; It is true.

Court; Plea of guilty entered.

Prosecutor; Facts as per charge sheet;

Court; accused to pay a fine of Kshs. 200, 000/= each in default to serve 4 years' imprisonment. Exhibits: power saw and panga forfeited to state.

Right of Appeal explained."

13. Section 348 of the Criminal Procedure Code does not allow an appeal from a conviction on one's own plea of guilty. The section provides that; ***"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."***

14. That notwithstanding, whether or not to accept an appeal challenging conviction on a plea of guilty is a matter at the discretion of the court which has to determine whether or not such a plea of guilty was unequivocal to form the basis of a conviction. The court must strive to do justice to the parties and will deal with such an appeal before allowing it or disallowing it on that ground since the issue of the nature of the plea recorded whether unequivocal or not is a matter of fact to be borne by the record and circumstances of the case.

15. First and foremost, the record of the trial court as reproduced above does not show the language in which the charge was read and explained to the appellants to enable this court to know whether or not the appellants understood the charge they faced before pleading to it. Language is an important aspect of fair trial in terms of Article 50 (2), (b) of the Constitution which confers on every accused person the right ***to be informed of the charge, with sufficient detail to answer it***; and, (m), ***to have the assistance of an interpreter without payment if he cannot understand the language used at the trial.***

16. Without indicating the language in which the charge was read to the appellants, it would be difficult for this court to assume that the appellants understood the charge they faced and unequivocally pleaded guilty to it. The appellants had a constitutional right to a fair trial, a right that is non derogable under Article 25 (c) of the Constitution. Failure by the trial court to ensure that the appellants were accorded this right, by indicating on its record the language used in explaining the charge to the appellants vitiated their right to fair trial before that court.

17. Second; the facts constituting the charge were not read to the appellants. After pleading guilty, the appellants were entitled to have the facts read to them again in a language they understood and either admit the facts as stated by the prosecution or dispute them. If they disputed the facts, the court would then have to enter a plea of not guilty and proceed to conduct a trial. The trial court could only convict the appellants on their own plea of guilty if satisfied that they understood the facts as stated by the prosecution and admitted them.

18. It is always important for the trial court to bear in mind section 207 of the Criminal Procedure Code which provides how a plea should be recorded. The section provides;

"(1)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.

(2) 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.

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

(4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.

(5) If the accused pleads—

(a) that he has been previously convicted or acquitted on the same facts of the same offence; or

(b) that he has obtained the President's pardon for his offence, the court shall first try whether the plea is true or not, and if the court holds that the evidence adduced in support of the plea does not sustain it, or if it finds that the plea is false, the accused shall be required to plead to the charge."

19. The trial court did not comply with section 207 of the Code when explaining the charge to the appellants and recording their plea to the charge.

20. Third, the exhibits the appellants were said to have been arrested with were not produced before the trial court. The record does not show that there were exhibits that were produced in court. Exhibits constitute part of the facts that the appellants were to either admit or dispute. It is possible to have exhibits that the appellants were not arrested with and that would determine whether a conviction is to be recorded or it would require that the matter goes for trial.

21. From all this I agree with Mr. Njeru that the plea of guilty was equivocal and ought not to have been recorded against the appellants and form the basis of a conviction.

22. In the circumstances and for the above reasons, this appeal is allowed, conviction quashed and the sentence set aside. The appellants are hereby set at liberty unless otherwise lawfully held. Any fines paid to be refunded.

Dated Signed and Delivered at Kajiado this 20th Day of December 2019.

E C MWITA

JUDGE