



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAHURURU
CRIMINAL APPEAL NO.87 OF 2017

BENSON SIMIYU WANAMI.....APPLICANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, Benson Simiyu Wanami was charged with the offence of stealing by servant Contrary to Section 281 of the Penal Code.

The particulars of the charge are that, on 23/1/2016 at Kasuku Village being a servant of Washington Chege Wagugi stole sheep, chicken, a mattress, rabbits, bed sheets, blankets oat seed all valued at Kshs.71,700/= . He was convicted on his own plea of guilty and sentenced to serve four (4) years imprisonment.

Being dissatisfied with the sentence meted on him, the appellant filed this appeal and listed what he termed as mitigation. He also filed submissions. He reiterated the mitigation in court and pleaded with the court to reduce his sentence.

Ms Rugut, learned counsel for the State, conceded the appeal and stated that though the charge was read to the appellant, he did not reply to the plea. She pleaded with the court to order a retrial because the mistake was made by the court.

I have perused the original record and that of the record of appeal and it is apparent that the appellant did not plead to the charge. There is no evidence that the charge was read to the appellant because he did not reply to the charge. If at all he did, the court did not record it and this court will not assume that the charge was read to the appellant.

A proper plea must be taken in terms of Section 207 Criminal Procedure Code, by the charge and all its elements being read to an accused in the language that he understands. See ***Adan v Republic (1973) EA 445*** . The East Africa Court of Appeal set out guidelines which courts must follow in taking of plea. The court said:

- (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language which 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; and

(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.

This court cannot ascertain whether or not the charge was read to the appellant. The plea was therefore equivocal and I hereby quash the conviction and set aside the sentence.

The State requests the court to order a retrial. There are a host of decided cases on when a retrial should be ordered. In ***Fetehali Manji v Republic (1966) EA 343*** the court of Appeal held:

“..... in general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interest of justice require it and should not be ordered where it is likely to cause an injustice to the accused person.”

Applying the above principles to this case, the trial in the Lower Court was defective and has been quashed.

The appellant was sentenced to serve 4 years imprisonment on 18/2/2016. So far, he has served about 2 years which is half of the sentence. If he has been of good character, he would be entitled to remission of 1/3 the sentence and may only have served about 3 years. It means the appellant would have less than a year to go.

In my view, ordering a retrial would be prejudicial to the appellant. For all the above reasons, this court will decline the invitation to order a retrial. The appellant is hereby set at liberty forthwith unless otherwise lawfully held.

Dated, Signed and Delivered at NYAHURURU this 19th day of January, 2018.

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R.P.V. Wendoh

JUDGE

Present:

Mr. Mutembei – for prosecution

N/A - for the appellant

Soi - court assistant

Present – appellant