



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO.40 OF 2017**

*(An appeal from original conviction and sentence of Ogembo SRM’s Case No. 723 of 2015 by Hon. C.R.T. ATEYA. (RM) – Resident Magistrate dated 19<sup>th</sup> May, 2015)*

**DANFORCE LEKANYI SIAKEYI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. **DANFORCE LEKANYI SIAKETI**, the appellant herein, was charged with the offence of stealing Motor Cycle contrary to **Section 278 (A) of the Penal Code**. The particulars of the offence were that on 29<sup>th</sup> April 2015 at Magena market within Kisii County, jointly with another not before he court stole a motor cycle Registration Number KMCY 864Y make TVS Maxx4 valued at Kshs. 70,000/= the property of Tom Onsare.
2. The accused faced the alternative charge of handling stolen goods contrary to section 322 (1) of the Penal Code the particulars being that on 1<sup>st</sup> May 2015 at Lolgorian market in Transmara West District within Narok County otherwise than in the course of stealing, dishonestly undertook the retention of one motor cycle Registration NO. KMCY 864Y make TVS maxx4 knowing or having reason to believe it to be stolen good.
3. The appellant pleaded guilty to the main count of stealing a motor cycle and was consequently convicted and sentenced to serve five years imprisonment thereby triggering the instant appeal in which the appellant has in his petition of appeal, mainly faulted the trial court for passing a sentence that was manifestly harsh and excessive given the circumstances of the case and the fact that he was a first offender and the sole bread winner of his family of 4 children and 2 orphans.
4. At the hearing of the appeal, the appellant chose to rely on his written submissions cum petition of appeal which I have perused.
5. Mr. Otieno, learned counsel for the state, on his part, conceded to the appeal while arguing that the appellant’s guilty plea was not unequivocal given that he qualified the said plea during mitigation when he explained the reasons and the circumstances under which he was found in possession of the alleged stolen motorcycle.
6. As the first appellate court, this court is under an obligation to re-analyze and re-evaluate the evidence tendered before the trial court afresh with a view to arriving at its own independent findings but while bearing in mind that it neither heard nor saw the witnesses testify. **(See Okeno vs Republic (1973) E.A. 353)**.
7. As I have already stated in this judgment, the appellant pleaded guilty to the main count of stealing and therefore the issue of analyzing evidence tendered before the trial court does not arise. Be that as it may, this court is still obligated to consider the manner in which the guilty plea was taken and recorded in order to satisfy itself that the conditions under **Section 207 of the Criminal Procedure Code (CPC)** were adhered to at the time the guilty plea was recorded.
8. The said **Section 207 of Criminal Procedure Code** stipulates as follows;

**“207. Accused to be called upon to plead**

**(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.”

9. The court of appeal aptly captured the procedure stipulated in Section 207 of the Criminal Procedure Code in the celebrated and oft cited case of **Adan vs Republic [1973] E.A. 446** as follows:

*“When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused’s reply must of course, be recorded.”*

Also see **Kariuki vs Republic (1984) 809**.

10. The question begs an answer in this case is whether the trial court adhered to the above procedure when recording the guilty plea.

11. Mr. Otieno, counsel for the state highlighted the fact that the appellant qualified the guilty plea during mitigation thereby retracting the same in which case, the trial court ought to have entered a guilty plea and subjected the case to a full trial.

12. I note the appellant stated in part, as follows during mitigation:

**“I was given a squad and I went with it...I got a customer to Kilgoris and another to Lolgorian. I was arrested coming back.”**

13. From the above extract of the appellant’s mitigation after conviction, it is clear that he attempted to explain, to the court, why he was in possession of the subject motor cycle.

14. Under the circumstances, it can be said that the appellant denied stealing the motor cycle as he justified why it was found in his possession. I therefore find that the guilty plea was not unequivocal and consequently, the conviction founded on the said plea was illegal.

15. I further find that the appeal is merited and I allow it with the result that the conviction is hereby quashed and the 7 years sentence imposed on the appellant is set aside.

16. Having quashed the conviction, the next issue for determination is whether the court should order for a retrial.

17. I am aware that a trial court can only order for a retrial where the following factors exist: that the prosecution will be able to trace and produce witnesses when retrial is ordered, that the order of retrial should not be used as an opportunity by the prosecution to plug the gaps in its case; that taking into consideration all the circumstances of the case, it would be just and fair for the court to order the appellant to be tried.

18. In the present case, I find that an order for a retrial would greatly be prejudicial to the appellant who has already served close to 3 years out of his 5 years sentence. I am of the humble view that the period that the appellant has served in prison is enough punishment assuming that he had committed the offence in question and therefore subjecting him to a fresh trial will be tantamount to double jeopardy.

19. The law requires that the right of the appellant to a fair process must be weighed against the victim’s rights. In this case, the alleged stolen motor cycle was recovered and handed back to the owner who has in that case not suffered any loss. Conversely, the appellant has suffered in custody for a long period and I find that the justice of this case will require that following the quashing of his conviction, he be set

at liberty forthwith unless he is otherwise lawfully held.

**Dated, signed and delivered in open court this 20<sup>th</sup> day of March, 2018**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno for the State
- Appellant in person
- Omwoyo court clerk