



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL APPEAL NO. 192 OF 2015

TIRATHY MAINA KARANI.....APPELLANT

VERSUS

REPUBLICPROSECUTOR

(Appeal from the Ruling of the Chief Magistrate’s Court at Nyahururu A. W Mukenga–Resident Magistrate delivered on the 7th August, 2015 in CMCR Case No. 1896 of 2014)

JUDGMENT

The appellant **TIRATHY MAINA KARANI** has filed this appeal against his conviction and sentence by the learned Resident Magistrate sitting at Nyahururu Law Courts. The appellant had been charged with the offence of **STEALING BY SERVANT CONTRARY TO SECTION 281 OF THE PENAL CODE**. The particulars of the charge were that

“On the 16th of July, 2015 and other different unknown dates at Kirima Village within Nyandarua County, cut down 1528 Eucalyptus trees, stole and sold them at Kshs 1,840,000 the property of Bonface Kibunja Muiru which came into his possession by virtue of his employment”.

The appellant entered a plea of ‘**Guilty**’ to the charge. On 5/8/2015 the prosecution read out the facts of the charge. The appellant maintained his plea of ‘**Guilty**’. The trial magistrate proceeded to convict the appellant on the basis of his plea of Guilty. Thereafter the appellant was allowed an opportunity to mitigate. Finally the trial court sentenced the appellant to serve five (5) years in prison without the option of a fine. Being aggrieved the appellant filed this appeal.

This court being a court of first appeal must satisfy itself that the appellant plea of Guilty was in fact unequivocal.

Section 207 of the criminal procedure code sets out the procedure to be followed by a court in recording plea. This procedure was further enunciated in the case of **ADAN Vs REPUBLIC [1973] E.A 445**, where it was held as follows

(i) “In the charge and all the essential ingredients of the offence should be explained to the accused in the language or in a language he understands

(ii) The accuseds 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 explain the facts or to add any relevant facts

(iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and the charge of plea entered

(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".

I have anxiously perused the record in this matter I am satisfied that the trial magistrate properly complied with Section 207 in recording the plea. The charge as well as on full statement of the facts were duly read out to the appellant. The appellant responded succinctly to each and pleaded **'guilty'**. The record indicates that the proceedings were being interpreted from English to Kiswahili. The fact that the appellant fully understood the language being used is buttressed by his robust participation in the proceedings of that day. I find that the appellant entered on unequivocal plea of guilty to the charge.

MR. OBUTU Advocate who look up this appeal on a **'pro bono'** basis (for which he must be commended) submitted that the court ought to have allowed a process of reconciliation or Alternative Dispute Resolution as mandated by the Constitution. It is true that on 28/7/2015 the appellant indicated to the court that the complainant was willing to have the matter discussed with a view to resolving the case amicably. The court adjourned the case to enable Alternative Dispute Resolution to be pursued. However on 5/8/2015 when the case next came up the prosecutor indicated that the complainant no longer wished to settle out of court. The court then proceeded with the case.

Whilst the courts are encouraged to promote Alternative Dispute Resolution in an effort to have matters resolved out of court, parties cannot be compelled to submit to any form of arbitration, nor can a complainant be compelled to negotiate with an accused person. The complainant in this case had indicated through the prosecution that he did not wish to resolve the case out of court. It was not necessary to hear from the complainant himself. I find that in the circumstances the learned trial magistrate was quite correct to proceed with the matter.

The appellant entered an unequivocal plea of **'guilty'** to the charge. He further confirmed this guilty plea by stating as follows in mitigation

"I cut the trees so as to recover my salary which my employee had not paid"

I find that the appellant was properly convicted and I confirm that conviction.

No past records were availed to the court, thus the appellant was taken to be a first offender. Given this fact and the fact that the appellant had pleaded guilty to the charges I feel that the trial court ought to have considered alternative sentence *e.g* probation or a fine. In no way could the appellant be deemed to be a danger to society. The trial magistrate ought to have called for a probation report before sentencing. The sentence was in the circumstances harsh and excessive. I therefore allow this appeal against sentence. I set aside the five (5) years term of imprisonment imposed upon the appellant and in its place I substitute a fine of Kshs 30,000/= in default three (3) years imprisonment. To this extent **only** this appeal succeeds.

Dated and Delivered in Nakuru this 24th Day of April 2017.

Mr Obutu for the appellant

Mr Mwtenole for DPP

Maureen A. Odero

Judge