REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 6 OF 2017

HASSAN OSMAN MOHAMMED……………...…............…………… 1ST APPELLANT

ABDIFATAR ORAT ABDISHOW……….........………………………2ND APPELLANT

VERSUS

REPUBLIC……………………………….......………………………… RESPONDENT

(From the conviction and sentence in Wajir SPM Criminal Case No. 85 of 2017

Hon. Mugendi Nyaga –RM)

JUDGMENT

1. The two appellants were charged in the Magistrate's Court at Wajir with stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were that on 15th February, 2017 at Abakakore location in Habaswein sub-county within Wajir county stole one camel valued at Kshs.70,000 the property of Orat Abdi.

2. When they appeared before the magistrate's court on 20th March, 2017they were recorded as having admitted the charge. They were thus convicted and each sentenced to serve 5 years in jail.

3. They have now come to this court on appeal through counsel, Steven Gakonyo Wanyoike who relied on an amended petition of appeal, with the following grounds:-

> **1. The Learned magistrate erred in law and in fact in entering a plea of guilty that was not un equivocally made by the accused persons.**
>
> **2. The Learned Magistrate erred in law and in fact in relying on a defective, inaccurate, and biased probation officers report.**
>
> **3. The learned trial Magistrate erred in law and in fact in arriving at his decision to sentence the appellants by considering erroneous facts.**
>
> **4. The Learned Magistrate erred in law and in fact in pronouncing a sentence that was manifestly excessive.**

4. The Learned counsel for the appellants Mr. Wanyoike also filed written submissions to the appeal. He relied on a number of court cases, and opted to adopt the written submissions during hearing of the appeal.

5. In summary counsel emphasized that the plea of guilty entered on the basis of a statement from the appellants that “it is true” was not unequivocal, as the language used in court was not recorded by the magistrate. Secondly, counsel submitted that the facts read out to the appellants were not accurate and did not disclose an offence. Thirdly, that the probation officer’s report relied upon by the trial court in sentencing was defective as it was influenced by the complainant who was the father one of the appellants. Counsel concluded by stating that the sentence was manifestly excessive and that the magistrate did not consider the mitigation of the appellants in sentencing.

6. The Principal Prosecuting Counsel Mr. Okemwa submitted that the plea was unequivocal. According to counsel, the only challenge arising in these proceedings was the fact that the trial magistrate did not indicate the language used in court. However, counsel was convinced that since there was a court clerk present by the name Amina, it meant that the proceedings were translated into Kiswahili or Kisomali. According to the Prosecuting Counsel, the fact that the appellants understood the proceedings was confirmed by the action of one of the appellants who stated in mitigation that the complainant was his father.

7. Counsel submitted that the five authorities relied upon by Mr. Wanyoike for the appellants related to the facts given by the prosecutor and not the response of the accused persons. Counsel submitted that minor human errors on the part of a magistrate which do not cause a miscarriage of justice should not vitiate a conviction.

8. Counsel concluded that as it was apparent that the complainant had recovered his camel, the court should take that fact into account in determining the appropriate sentence.

9. Mr. Wanyoike for the appellants responded to the Principal Prosecuting Counsel's submissions and stated that it was the duty of the court to ensure and record that the language used in court was understood by an accused person, which was not done in the present case. According to counsel the fact that the 2nd accused or appellant said that the camel belonged to this father was a qualified the plea which was not unequivocal. In addition, the Probation Officer's report was erroneous as it suggested that the two appellants were one and the same person. Counsel urged this court to consider that the appellants were young people, and set aside the sentence.

10. This is a first appeal, which arises from a conviction and sentence in proceedings wherein the appellants were convicted on their own plea of guilty.

11. I am thus duty bound to re-evaluate the entire record of the trial court in order to establish whether the guilty plea of the appellants was unequivocal.

12. The steps to be taken by a in recording a plea of guilty was stated clearly in the case of **Adan -Vs- Republic (1973) EA 445** which has been consistently followed by courts in this country. In that case the Court of Appeal for East Africa stated that when taking a plea in a criminal case, the accused must be informed of the detailed ingredients of the charge which constitutes the offence, in a language that he understands, the date on which the offence was committed, the approximate time when it was committed, if known, and the person or persons against whom the offence was committed.

13. The above case was cited with approval by the Court of Appeal in the case of **Mohamed Abadada -Vs- Republic – Mombasa** Criminal Appeal No. 372 of 2012, relied upon by counsel for the appellants.

14. The first issue is on language. Counsel for the appellants contends that the magistrate did not indicate the language used. Having perused the proceedings, I find that the trial court did not record the specific language used in the proceedings. The court clerks present were named as Amina and Ezekiel, and the magistrate merely stated as follows:-

> **“Charge read over and explained to the accused person in a language which he understands and when asked whether he admits or denies the charge replies:**

Accused 1: It is true.

Accused 2 : it is true"

15. A plea of guilty was then entered. Thereafter facts were summarized by the prosecutor and each of the appellants was recorded as having said that the facts were correct. They were thus convicted. In mitigation, the 1st appellant asked for leniency, while the 2nd appellant said that the complainant was his father and that he was sorry.

16. In my view, the magistrate was wrong in not specifically recording the language used in court. In ordinary circumstances courts use the English language which is not necessarily known by all accused persons. Where there is need for translation the Constitution under Article 50 (1) (m) provides a right to an accused person be provided a translator free of cost.

17. From the record of the proceedings however, in view of the responses of the appellants stating that it is true, then that the facts are correct, and also stating what they said in their mitigation, which is not denied on appeal, it is evidence that in deed the appellants understood the language used and fully participated in the proceedings. Thus though the magistrate erred in not specifically stating or recording the language used in court, I find that the appellants were not prejudiced by that mistake of the magistrate. In this I rely on the case of **George Mbugua Thiongo -Vs- Republic** (2013) eKLR wherein to the Court of Appeal at Nyeri stated that where there was no miscarriage of justice, the fact that the magistrate did not record the language used in court did not vitiate the conviction.

18. On whether the plea of the appellants was equivocal, indeed the appellants said that the charge was true. Thereafter, facts were summarized by the prosecutor and the two appellants said that the facts were correct.

19. The charge described the offence, and the facts summarized by the prosecutor supported the charge and disclosed the circumstances under which the alleged offence was committed. In my view, the fact that the appellants merely said "it is true", in answer to the charge, did not mean that their plea was equivocal. This is because the facts, which disclosed or described the same offence charged, were summarized by the prosecutor and all two appellants said that the facts were correct. As such, in my view, in the circumstances of this case the plea of the appellants was unequivocal and the conviction was thus proper.

20. On sentencing, the magistrate called for a Probation Officer's report and relied on the same in sentencing the appellants. The probation report states that the appellants regretted the offence and asked for leniency and forgiveness. The same report also says that they were members of the same family and that on several occasions the two had reported missing livestock while in fact they sold the livestock. According to Probation Officer that habit had become the trend.

21. I appreciate that sentencing is an exercise of discretionary power by a trial court. I appreciate that this is a serious offence with a maximum sentence of 14 years imprisonment. However, in my view, since the camel was recovered and the appellants appeared to be relatives of the complainant and were remorseful, and a lesser sentence would suffice. Though I do not find a non-custodial sentence appropriate in this case, in my view imprisonment for a term of 5 years for first offenders in the circumstances of this case was too harsh and excessive. I will thus interfere with the sentence and order that instead each of the appellants serves 1 year imprisonment from the date on which he was sentenced.

22. I thus dismiss the appeal against conviction. I uphold the conviction of the trial court. With regard to sentence, I set aside the sentence of 5 years imprisonment against each of the appellants and order that instead each of the appellants will serve 1 year imprisonment from the date on which he was sentenced by the trial court.

Dated and delivered at Garissa this 23rd November, 2017.

George Dulu

JUDGE