REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 27 OF 2014

(From original conviction and sentence in Criminal Case No. 1876 of 2013 of the Principal Magistrate's Court at Narok, T. A. Sitati - SRM)

FRANCIS NARANKAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant herein, Francis Narankai was on the 30th December, 2013 convicted and sentenced to serve 7 years in jail for the offence of stock theft contrary to Section 278 of the Penal Code, by the Narok Principal Magistrate, T. A. Sitati in Narok Principal Magistrate Court Criminal Case No. 1876 of 2013.

He has appealed to this court against both the conviction and sentence, and has put forth the following grounds:

1. *THAT the Learned Magistrate erred in Law in convicting the Appellant on a plea of guilt that was equivocal and/or not properly taken.*

2. *THAT the Learned trial Magistrate erred in Law in failing to take such precaution and administer such warning so as to ensure that the Appellant understood the nature and the consequences of the charge he was pleading guilty to before he entered a plea of guilty and thereon sentenced the Appellant.*

3. *THAT the Learned Magistrate erred in Law and fact in failing to appreciate that the Appellant who is a Maasai may not have properly understood the language used by court (sic) English/Kiswahili and further on the basis that the Appellant was unrepresented before court.*

4. *THAT the Learned Magistrate erred in law in meting out a sentence that was manifestedly harsh and excessive in the circumstances of the case.*

He urged this court to set aside the conviction and sentence and acquit him.

2. Brief facts of the case are that on the 30th December 2013 the Appellant together with another, were arraigned before the Principal Magistrate's Court at Narok and charged with the offence of stealing stock contrary to Section 278 of the Penal Code. When the substance of the charge and every element thereof were read to the two accused in English/Kiswahili, the 1st Accused *(now the Appellant)* replied that *"It is true but the value of the animal is less."*

The trial magistrate then entered a plea of guilty. The facts of the offence were then read to the accused to which he replied, *"facts true"*. The court convicted the accused on his own plea of guilt and upon considering the accuseds mitigation, sentenced him to the minimum sentence of 7 years imprisonment.

3. The Appellant in his first ground of appeal states that he was convicted on a plea of guilt that was equivocal and or not properly taken. The second ground of appeal is that the trial magistrate failed to take precaution and administer warning to ensure that the appellant understood the nature and consequences of the charge he had pleaded to and the sentence.

I shall deal with these two grounds together as they are related.

4. I have carefully looked at the proceedings before the trial court on the 30th December, 2013. It is not indicated that the language the court used in the plea taking exercise was the language that the accused understood. It simply shows that the substance of the charge and every element thereof has been read to the accused in English/Kiswahili. In his appeal, it is stated that the Appellant is a Masai, and that he did not understand the language of the court, English/Kiswahili. Counsel for the Appellant submitted that the said plea was not taken properly and was equivocal, that the Appellant did not understand what he pleaded guilty to, nor did he understand the nature and consequences of such plea as no precaution and warning were administered to him.

The proceedings before the trial court do not indicate if such warning or precaution were administered to the Appellant by the court.

5. This court has also noted that in his response to the facts read to him after pleading guilty to the offence, the Appellant replied that the facts were true but added a rider, that the value of the animal is less. The court without considering the purport and import of the rider entered a plea of guilt, convicted him and thereafter sentenced the Appellant. It is urged by Counsel for the Appellant that the rider makes the plea equivocal, and therefore it ought to be set aside.

6. I have considered the celebrated case of **Adan -vs- Republic (1973) E.A. 445 – 447** where the Court of Appeal stated the manner of recording and steps to be taken when an accused person pleads guilty to an offence, and I fully concur with the said procedure and practice, thus -

I. *the charge and all essential ingredients of the offence should be explained to the accused in his language or in a language 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,*

V. *if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.*

7. In the present case, it is not indicated whether or not the accused *(Appellant)* understood

English/Kiswahili. The Appellant did not agree with the facts as read out to him, which fact the trial court recorded. It is not clear nor is it shown whether or not the trial court gave the Appellant an opportunity to change his plea of guilt as should have been the case.

In my view, this was a complete failure of justice to the Appellant and more so that he was unrepresented.

As stated in the **Adan case** *(supra)*, the trial court ought to have enquired from the Appellant whether he wished to change his plea in view of the additional facts before he proceeded to convict him. The record is silent on this.

8. The prosecution on the other hand has urged this court to disallow the appeal and put forth the following arguments, that, the Appellant understood the language of the court – English/Kiswahili, as he answered when requested to respond. Learned State Counsel Mr. Maroro contended that the additional facts or rider by the Appellant was not a major component in a criminal charge, and would not have prejudiced the accused at all, and urged the court to ignore this ground of appeal as non consequential, so is the allegation that the appellant did not understand the language of the court as not all Maasai people do not understand English or Swahili. On the issue of warning by the court, it is the states statement and argument that the offence of stock theft, not being a capital offence, the warning and precaution was not necessary.

9. In the **Adan case *(supra),*** the Appellant therein was charged with a similar offence of stock theft contrary to Section 278 of the Penal Code. The Learned Judges of Appeal held as earlier stated, thus, whether a felony or not, capital offence or not, the rules of practice and procedure ought to apply to all, as Justice is not selective but all inclusive, both to minor and capital offenders.

I fully subscribe to the courts holding in the case of **Paul Mutungu -vs-Republic (2006) KLR, 446** that the court should be concerned that an accused person should not be convicted on his own plea of guilt unless it is certain that he really understood the charge and had no defence. The danger of a conviction on an equivocal plea is obviously greatest where the accused is unrepresented, is of limited education and does not speak the language of the court.

10. Consequently and having carefully considered all arguments collectively, I am satisfied that plea taking was not satisfactorily taken and I proceed to quash and set aside the conviction and sentence imposed by the trial court upon the Appellant. It is noted that the Appellant has been in jail for slightly over one year now. It is further noted that the 2nd accused's case with whom the Appellant was jointly charged was withdrawn by the Complainant.

I therefore make the following orders:

1. ***That the conviction and sentence by the trial court is hereby quashed and set aside.***

2. ***That the Appellant be retried de novo on the same offence, stealing stock contrary to Section 278 of the Penal Code.***

3. ***That the re-trial be conducted before the Principal Magistrate's Court at Narok by a different magistrate.***

Dated, signed and delivered at Nakuru this 23rd day of January, 2015

JANET MULWA

JUDGE

Judgment read in open court in the presence of:

Kibirio holding brief for Kanui for the Appellant

Ngovi for the State

Court clerk: David