



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 1 OF 2015

(From original conviction and sentence in Criminal Case No. 12 of 2015 of the Chief Magistrate's Court at Garissa B. J. Ndeda - SPM).

BILLOW ABDI ALI APPELLANT

V E R S U S

REPUBLIC RESPONDENT

JUDGMENT

The appellant was charged in the Subordinate Court with three counts. Count 1 was for stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were that on diverse dates between 17th and 20th December 2014 at Fafi Hujin village in Fafi District within Garissa County in the Republic of Kenya with others not before court stole 2 camels and 50 goats all valued at Kshs 360,000/= the property of Abdi Ali Mohamed. Count 2 on the other hand was threatening to kill contrary to Section 223 (1) of the Penal Code. The particulars of the offence were that on 17th December 2014 at Fafi Nujin in Fafi District within Garissa County in the Republic of Kenya without lawful excuse, uttered threatening words to kill Abdi Ali Mohamed. Count 3 was also for threatening to kill contrary to Section 223 (1) of the Penal Code. The particulars of the offence were that on the same day and place described in count two without lawful excuse, uttered threatening words to kill Aden Abdi Ali.

He was recorded as having pleaded guilty to count 1 and not guilty to count 2 and 3. After the facts were summarized by the prosecutor regarding count 1, he stated that the facts were correct. He was sentenced to serve 4 years custodial sentence.

Aggrieved by the decision of the trial court the appellant has come to this court on appeal through counsel C.P. Onono and Company, on the following grounds.

1. Due to inept, incompetent, unclear and or inadequate interpretation by the court clerk, the appellant did not understand count one of the charge facing him and the particulars.
2. The conviction was based on a charge and particulars not correctly and accurately interpreted and explained to the appellant.
3. The appellant never intended to and could not plead guilty to stealing stock which was his property.
4. The trial court ought to have considered, but failed to address its mind to, the opportunities and policy directions provided under Article 159(2)(c) of the Constitution of Kenya 2010.

I wish to put it on record here that before the appeal of the appellant was heard, this court considered an application for bail pending appeal and granted the appellant bail pending appeal.

During the hearing of the appeal, learned counsel for the appellant Mr. Onono submitted that though the appellant had faced three counts, count 2 and 3 were withdrawn by the complainants. Counsel submitted that this court should peruse the affidavit in the application for bail pending appeal filed on 5th February 2015 which gave the detailed background information directly relevant to the appeal. Counsel emphasized that the appellant was a son of the complainant and that the livestock in question actually belonged to the appellant. According to counsel, the appellant could not plead guilty to stealing his own property.

Counsel highlighted ground 1 and 2 of appeal and stated that the appellant did not hear the language of the court and that the court clerk did not accurately and correctly explain the charge and particulars for the appellant to understand the same. According to counsel, if the charge and particulars thereof were explained clearly, the appellant could never have pleaded guilty. Counsel also submitted that the two affidavits in the application for bail pending appeal demonstrated disagreements between the complainant and the appellant as they were part of the same family.

Counsel also relied on the Provisions of Article 159(2) of the Constitution and said that this matter should have been resolved between father and son through reconciliation, mediation or negotiation in order to promote peace. Counsel stated that had the trial court known this fact, it would have acted in favour of reconciliation between the father and son. Counsel submitted lastly that since this court was aware of these facts, the appeal should be allowed and a retrial ordered.

Learned Prosecuting Counsel Mr. Orwa opposed the appeal and relied on the lower court records. Counsel stated that there was no parallel court records and that there was adequate translation of the charge and particulars into Kisomali language which the appellant understood. Counsel emphasized that the clerk attending the magistrate's court was the same clerk interpreting the proceedings on appeal. Therefore he could not be said to have been an incompetent clerk.

Counsel relied on Section 348 of the Criminal Procedure Code (cap.75) and stated that the appellant had pleaded guilty to the charge. He could thus only appeal against sentence. Counsel submitted that the evidence on record, and from the summary of facts, was that the appellant stole livestock which did not belong to him. He admitted the offence. He could not thus come to this court and say that he did not understand that he stole. Counsel also emphasized that the livestock was not recovered and stated that Article 159 (2)(c) of the Constitution was not applicable in this matter, as the Director of Public Prosecution had powers to prosecute the case under Article 157 (6) of the same Constitution.

Counsel submitted further that the appellant was wrong in relying on an affidavit supporting a Notice of Motion dated 5th February 2015 for bail pending appeal. Counsel felt that such an affidavit should not form the record as it would contravene the provisions of Section 350(2) of the Criminal Procedure Code (cap.75) as the Notice of Motion was not part of the lower court records. Counsel emphasized that the charge sheet was in conformity with the provision of 137 of the Criminal Procedure Code and that the facts was in tandem with the charge.

Counsel submitted lastly, that the appellant was sentenced to serve 4 years imprisonment while the maximum sentence for the offence was 14 years imprisonment. According to counsel, the sentence was neither harsh nor excessive.

In response to the Prosecuting Counsel's submission, Mr. Onono submitted that courts did not operate in a vacuum and that was the reason why the appellant's side took the bother to provide background information in the affidavit in support of the application for bail pending appeal. Counsel emphasized that nobody had denied that the appellant was a son of the complainant. He also stated that nobody had denied that livestock was a personal property of the appellant.

With regard to the competence of the clerk, counsel submitted that the issue was how he translated in the trial court. According to him, the appellant did not hear the clerk say that he had stolen. Counsel submitted that in the Somali Community the father of the appellant had authority over everybody in that family and he had explained on oath what had happened. He urged the court to exercise its discretion in

the matter.

This is an appeal from the conviction of the trial court on a plea of guilty. Counsel for the appellant has raised a number of grounds on appeal. He has underscored ground 1 and 2 of appeal, that the court clerk did not competently or clearly or adequately interpret the charge and particulars facing appellant. I have perused the record. Counsel has not given any example of what was meant to be interpreted by the clerk and which was interpreted wrongly or incorrectly. In my view the allegations by counsel for the appellant about the way the clerk interpreted the proceedings in the trial court, have no basis. I dismiss those complains.

There is no ground of appeal on what was stated or what was to be stated in an affidavit in the application for bail pending appeal. What is in that application therefore cannot be revisited in the appeal. Since it was not part the lower court record, it can only arise on appeal as additional evidence through the set down law and procedure. No application or request has been made for tendering further evidence on appeal. I therefore will ignore the contents of the two affidavits filed in the application for bail pending appeal, in as far as this appeal is concerned.

The counsel for the appellant has, in submissions, asked for a retrial. There is no ground of appeal requesting for a retrial. Besides, the considerations to be taken by a court in determining whether a retrial should be ordered are quite clear. They have been considered in several case authorities. See the case of Muiruri –vs- Republic 2003 KLR 552 and Elirema –vs- Republic (2003) KLR 351. The main reason for a retrial is to do justice considering the interests of the appellant, the prosecution, as well as the victim. I find no basis for the request for a retrial I dismiss the request.

Coming to this appeal, in my view the main issue which was not canvassed by the appellant's counsel and the prosecuting counsel, was whether from the record the plea of the appellant was unambiguous.

In my view the translation or explanation of the charges and particulars in Kisomali language to the appellant cannot be faulted. In my view the charge and particulars thereof were explained to the appellant in clear Somali language which he understood.

When the charge was read and explained to him, the appellant stated that it was true. The court recorded guilty plea. The facts were then explained or summarized by the prosecution and in my view they were explained or translated to the appellant in Kisomali language which he understood. He stated that the facts were correct. The learned magistrate did not record a conviction, but went on to say that the appellant was a first offender. The appellant then in mitigation stated that he wanted to reconcile with his father and that he was planning a wedding and so needed the money. The appellant was then sentenced to serve 4 years custodial sentence.

Though after the facts were summarized by the prosecutor, the court did not specifically record that it had convicted the appellant, in my view that was a mistake of form and not substance. The appellant must have understood that he was convicted when he was sentenced. I see no miscarriage of justice occasioned by the failure of the learned magistrate to state specifically that he had convicted the appellant.

The law requires that the facts given by the prosecution in a plea of guilty establish all the elements or ingredients of the charge. The charge against the appellant was for stealing stock which was the property of Abdi Ali Mohammed.

In the facts given in court by the prosecutor there is no mention of the owner of the livestock. There is also no mention or an allegation that the appellant was not the owner or did not have any claim of right to the livestock. All that the facts stated was that the appellant on 17th December 2014 went to his father's home and stole one camel valued at Kshs 80,000/= while armed with a Somali sword and threatened his father. It was also stated that on 22nd December 2014 he went again to his father's manyatta in a motor vehicle and stole 50 goats and put them in the vehicle. Again, it is stated that on unknown dates he went to the same manyatta and stole one camel valued at Kshs 80,000/= while armed with a Somali sword. It was stated that the father reported the matter to the area chief, and when the appellant was found in

Halgadera Refugee Camp he admitted that he had stolen two camels and 50 goats valued at Kshs 360,000/=.

The above facts were admitted by the appellant to be correct. In my view the facts as given by the prosecutor did not establish the elements of the offence of theft of livestock. They did not disclose that the livestock belonged to the complainant. The facts also did not disclose that the appellant had no interest or right in that livestock. The facts however clearly stated that the appellant was very eager to take away the livestock and, on two occasions, was armed with a somali dagger in order to prevent any intervention from his intended taking away of the livestock, but he did not injure anybody or damage any property. That eagerness alone did not establish that the livestock belonged to somebody else or that the appellant did not have an interest in the same.

In my view since the facts did not prove or establish all the elements or ingredients of the offence of theft of livestock, the conviction of the appellant was a mistake. The plea of guilty of the appellant was not unambiguous. The conviction cannot thus stand. The sentence has to be set aside.

Consequently I find merits in the appeal, I allow the appeal quash the conviction and set aside the sentence imposed. I am aware that the appellant was granted bail pending appeal. However in case he is still in prison, I order that he be released forthwith unless otherwise lawfully held.

Dated and delivered this 17th November 2015

GEORGE DULU

JUDGE