



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HCRA NO 120 OF 2012

Originally Chief Magistrate's Criminal Case 1964 of 2011

JULIUS K. MOSBEIAPPLICAN

VS

REPUBLICRESPONDENT

(Being an appeal against the decision of Honorable D.K. Kemei, Principal Magistrate, Eldoret Chief Magistrate's Court, delivered on 6 June 2011 in Eldoret CM's Criminal Case No. 1964 of 2011)

JUDGMENT ON APPEAL

The appellant was charged with the offence of Stealing Stock, contrary to Section 278 of the Penal Code. In brief, the particulars of the offence were that on the night of 29-30 May, 2011, he stole one sheep valued at Kshs. 3,500/=. There was also an alternative count of Handling Stolen Goods contrary to Section 322 (1) and (2) of the Penal Code. The plea was taken on 3 June 2011, and the appellant pleaded guilty. The prosecutor then asked for a new date to read the facts. The matter was adjourned to 6 June 2011, for reading of facts. On that day, again the appellant was asked to plead, and he pleaded guilty. The facts were then read. The facts as read, were that the sheep of the complainant went missing and he received a tip-off that the sheep had been spotted in the possession of the appellant. A search was done, and it was found that the sheep had already been slaughtered. What remained were the head and skin which were positively identified by the owner. The appellant was then arrested and charged. The appellant affirmed that the facts were correct and he was then convicted of the main charge, and after mitigation, sentenced to 7 years imprisonment.

He has now appealed against the conviction and sentence. In his petition of appeal, the appellant has averred that he pleaded guilty due to a lack of understanding, as the plea was read in a language that he was not familiar with. He has also averred that he was confused, as it was his first time to stand in court, and out of fear, he pleaded guilty. He has also averred that no exhibit was brought before court at the time of plea and no photograph was ever taken. He therefore has asked that the case be retried.

At the hearing of the appeal, the appellant, who was unrepresented, argued that when he first appeared in court, he had been beaten by the complainant and that the police advised him to plead guilty. He averred that the complainant is his brother and he insisted that he was innocent.

Mr. Munene for the State, opposed the appeal. He averred that the appellant was convicted of his own plea and that the proceedings were in Kiswahili language which the appellant understood. Mr. Munene also pointed out that the allegations that he was coerced to plead guilty were never raised during the proceedings. As to sentence, Mr. Munene stated that the maximum sentence is 14 years and that there was nothing wrong with the sentence of 7 years.

I have considered the rival arguments and the record before me. The record shows that the appellant stated that he understands Kiswahili language and the proceedings were conducted in Kiswahili. The appellant's ground that the proceedings were conducted in a language that he did not understand therefore holds no water. There is also nothing in the proceedings that shows that the appellant had been beaten or had been coerced to plead guilty. His argument that he was confused and that he pleaded guilty out of fear are unsupported by the record. I am indeed skeptical as to whether one can found an appeal on the ground that he pleaded guilty out of fear or confusion, unless sufficient material is presented, which will go to show that the accused was not himself during the trial. There is none in this case. It will indeed be noted that there was a break of three days between the time the appellant was first arraigned in court and the time that the facts were read. The argument that no exhibit was brought is to me, in the circumstances not plausible. The sheep stolen had already been killed and it could not have been brought before court. Carcass by its nature rots. The appellant in any event did not contest the facts. I see nothing wrong that the trial magistrate did in taking down the plea of guilty. The appellant was therefore properly convicted on his own plea of guilty.

The petition as worded appears to be an appeal against both conviction and sentence. I however do not have before me any grounds attacking the sentence. Section 350 of the Criminal Procedure Code bars the appellant from relying on a ground of appeal other than those set out in the petition of appeal. The appellant was unrepresented, and it is probable, that he is not well versed with procedure. I will therefore consider the appellant's plea on sentence in the interests of justice. I take solace in the provisions of Article 159 (2) (d) of the Constitution which obligates the court to do justice without undue regard to technical procedures. In any event Mr. Munene for the State made submissions in relation to the sentence and I do not think that any prejudice will be caused to the State.

The record shows that the appellant is a first offender. He stole a sheep valued at Kshs. 3,500/=. Stealing of any kind ought not to be condoned, but I think, considering that the appellant was a first offender, and that he pleaded guilty, the court ought to have considered whether the appellant could benefit from a non-custodial sentence. I think it would have been prudent for the trial court to ask for a probation report so as to consider whether the appellant was fit for a non-custodial sentence. The appellant pleaded guilty and I think the court ought to have been a bit lenient on sentence, otherwise, there would be no incentive for anyone to plead guilty.

The appellant has now spent more than two years in jail. I think he has learnt the lesson that crime does not pay. I sincerely hope that he is going to reform. In my discretion, I alter the sentence to coincide to the time that has been served by the appellant. Thus, although I uphold the conviction, I order the appellant to be released unless otherwise lawfully held as he has now served his sentence.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 30TH DAY JANUARY OF 2014

JUSTICE MUNYAO SILA

DUTY JUDGE

HIGH COURT AT ELDORET

Delivered in the presence of:

Appellant – present

Mr. Munene for the state