



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NOS. 154 AND 156 OF 2012

(CONSOLIDATED)

BETWEEN

HARON OGARI ONDIEKI 1ST APPELLANT

JEREMIAH ONYAMBU SAMBURA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from original conviction and sentence of the SPM's court at Ogembo in criminal

case Nos.981, 982 and 983 of 2012 – by Hon. D. Ogola (SPM) dated 26th June 2012)

JUDGMENT

1. The two appellants, Jeremiah Onyambu Sambura and Haron Ogari Ondieki were the first and second accused persons when they were arraigned before the Principal Magistrate's Court at Ogembo on one count of Stealing farm produce contrary to **section 8 (1)** of the **Stock and Produce Act Cap 355** of the **Laws of Kenya**. It was alleged that on the 23rd day of June 2012 at Ritumbe sub location in Nyamache District within Kisii County, they jointly stole three bunches of bananas valued at Kshs.900/= the property of Josephine Monyangi.
2. When the two appellants appeared for plea on 25th June 2012 before the Senior Principal Magistrate, Mr. D.O. Ogola, they pleaded guilty to the charge were convicted and sentenced to serve 2 years imprisonment.
3. The facts of the case as given on 26th June 2012 were that on the 23rd June 2012 at Ritumbe village, the complainant in the case was informed that the accused persons were seen cutting his 2 bunches of bananas from his farm. He went to the farm and confirmed that indeed the 2 bunches of banana had been cut. Later, he was informed that the two appellants had been arrested with the bunches of banana. He went and identified the bananas which were valued at Kshs.600/=. Both accused were subsequently arrested and charged with the offences. The 2 bunches of banana were produced in court as **P. Exhibit 1**.
4. Upon conviction and sentence, the two appellants were dissatisfied with both conviction and sentence and have appealed to this court.
5. In his petition of appeal filed in court on 6th July 2012, Haron Ogari Ondieki (now 1st appellant) complains that:-
 - *the learned trial magistrate erred in law and facts by not thoroughly considering that the*

- appellant had entered a plea of not guilty;*
- *the learned trial magistrate erred in both law and fact by failing to consider that the exhibits were not availed in court;*
 - *the learned trial magistrate erred in law and fact by not considering the contradictory evidence adduced by the prosecution;*
 - *the sentence of 6 years imprisonment is overly excessive and illegal.*
6. Jeremiah Onyambu Sambura raised similar grounds of appeal save that under ground number 4 he complained that the sentence of 9 years imprisonment is overly harsh, excessive and illegal in the circumstances. Both appellants asked this court to allow the appeal, quash the conviction and set aside the sentences and set them free.
 7. When the appeal came up for hearing, the 1st appellant, Haron Ogari Ondieki submitted that the whole reason why he pleaded guilty during the trial is because he had been severely assaulted.
 8. The second appellant Jeremiah Onyambu Sambura submitted that after he was arrested he was severely beaten and promised to be released if he pleaded guilty. He asked this court to remit the case to the lower court for a fresh trial. This appellant was also convicted on the offence of escape from lawful custody and sentenced to 3 years imprisonment.
 9. The State opposed both appeals, on the ground that the appellants were convicted and sentenced on their own plea of guilty, and that pursuant to **section 348** of the **Criminal Procedure Code**, the appellants can only appeal against the extent and/or legality of the sentence. **Section 348** provides as follows:-

“348. No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence.”

10. Counsel submitted that neither appellant told the court that the appeal was against the extent or legality of the sentence and that in the circumstances, this appeal has no merit and should be dismissed.
11. This is a first appeal, and because the conviction herein was based on a plea of guilty, this court's duty is to ensure that the plea was unequivocal and taken in accordance with the steps set out in the case of **Adan –vs- Republic [1973] EA 445**.
12. I have carefully considered the record of the lower court and note two issues: one is whether the answer **“it is true”** by each appellant in response to the charge was sufficient for the plea of guilty entered before the facts were given and two, whether the fact that the facts disclosed theft of 2 bunches as opposed to 3 bunches set out in the charge sheet was fatal to the prosecution's case.
13. Regarding the first issue, I make a finding that the words **“it is true”** are not the best way of answering to the charge, and should be discouraged. However, the circumstances of this case show that no prejudice was caused to the appellants. The record shows that after the facts were given, each appellant confirmed that the facts as given were true. This means that each appellant understood the charge facing them and were prepared to plead guilty to the same.
14. On the second issue, the charge sheet specified that what was stolen was 3 bunches worth Kshs.900/= but the facts given showed that the appellants stole 2 bunches valued at Kshs.600/=. Again in my view, I am persuaded that the discrepancy did not occasion any prejudice to the appellants at the time of pleading guilty to the offence of stealing of farm produce. The ideal situation would have been for the trial court to require an amendment of the charge sheet and to take a fresh plea before the facts were given afresh. However, taking the overall picture into account, this court is of the view that no prejudice was caused to the appellants.
15. Further, in the instant case, no attempt was made by the appellants to prove to the trial court that they had lawfully come into possession of the 2 bunches of bananas which they were seen cutting from the complainant's farm.
16. As to sentence, the appellants have raised concerns on sentences that were not passed by the trial court. The sentence imposed by the trial court was 2 years imprisonment and not 6 or 9 years. The question of the sentence being overly harsh or excessive in the circumstances of this case does not arise. The court is of the view that whoever drafted the petition of appeal for the appellants did so when he had before his eyes a petition of appeal relating to a case which had gone through a

- whole trial and where the sentences imposed were 6 and 9 years respectively.
- 17.The section under which the appellants were charged provides that where a person is convicted of the offence under **section 8 (1)**, such a person is liable on conviction to the penalties prescribed for theft under **section 275** of the **Penal Code**. The penalty for theft under **section 275** of the **Penal Code** is three years.
- 18.In the instant case, the trial court was informed by the prosecution after convicting the appellants on their own plea of guilty that each appellant had been convicted of a similar offence in Criminal Case No.983 of 2012. It was on the basis of that previous record that the trial court before sentencing the appellants to 2 years' imprisonment said the following:-

“I have considered the mitigation of both accused. The 2 are clearly habitual thieves who deserve custodial sentence. I sentence both accused 1 and 2 to serve 2 years imprisonment.”

- 19.It is therefore clear to me that there is no reason whatsoever for this court to interfere with the sentence meted out to the appellants by the trial court as the same was neither harsh nor overly excessive.
- 20.For the reasons above stated, I find no merit in the consolidated appeals. The appeals are accordingly dismissed on both conviction and sentence. R/A explained.
- 21.It is so ordered.

Dated and delivered at Kisii this 16th day of January, 2014

R. N. SITATI

JUDGE.

In the presence of:

Present in person for 1st Appellant

Present in person for 2nd Appellant

Mr. Wainaina for State/Respondent

Mr. Bibu - Court Clerk