



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. E014 OF 2021

(CORAM: F.M. GIKONYO J.)

(From the sentence of Hon. G.N. Wakahiu (C.M) in Narok

CMCR No. E 720 of 2021 on 7th July 2021)

NCHOLE OLE OLODI KIMAMANTI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

[1]. The appellant was charged with Stealing contrary to Section 275 of Penal Code. It is alleged that on 6th July, 2021 at around 0320hrs at Ololulua village in Narok East Sub County within Narok County, the appellant stole 30 meters of chain link valued at Kshs. 9,000/= the property of one SIMON SENCHO.

[2]. In the alternative charge, the appellant was charged with handling stole property contrary to Section 322(2) of the Penal Code. It is alleged that on 6th July, 2021 at around 0320hrs at Ololulua village in Narok East Sub County within Narok County, otherwise than in the course of stealing dishonestly retained 30 meters of chain link valued at Kshs. 9,000/= the property of one SIMON SENCHO knowing or having reason to believe it to be stolen property.

[3]. The appellant was convicted on his own plea of guilt, and sentenced to serve 5 years' imprisonment.

[4]. Of the nine (9) grounds of appeal set out in the petition of appeal, are substantially arguments in support of the appeal. Except, arising therefrom are two issues:

i) **Whether the plea was unequivocal; and**

ii) **Whether the sentence was harsh and excessive.**

[5]. It appears from the grounds of appeal and submissions in court, that, the appellant is arguing:

i. **THAT Article 50(2) (p) and (q), 27 (1) of the Kenyan Constitution of Kenya, 2010 were not followed.**

ii. **THAT his case is fit for a re-trial for, he was confused following assault by the arresting officers and he was not informed of the rights of an arrested person under articles 50 of the constitution.**

iii. **His mitigation, to wit; he is a first offender, a young person and the sole bread winner to his immediate family and poor parents, a parent with children who are school going, and one who is sickly and takes and helps to school, be considered in sentencing.**

iv. **THAT the sentence imposed should be reviewed for being highly excessive and punitive, and he be committed to non-custodial sentence.**

[6]. Ultimately, he prayed that this appeal be allowed; conviction and sentence be set aside and quashed, and the matter be forwarded to the chief magistrate court for fresh re-trial.

[7]. Despite those arguments, on 7/12/2021 the Appellant orally submitted to this court that he had received the record of appeal and he agrees with conviction. He now only seeks for non- custodial sentence on the basis of the mitigation stated above.

[8]. Mr. Karanja, the prosecution counsel, submitted for the state that, the appellant was given an opportunity to mitigate and trial court considered his mitigation. No ultra vires matter was considered. Therefore, no reason for interfering with discretion of the trial court.

ANALYSIS AND DETERMINATION.

[9]. Where a plea is unequivocal, no appeal shall be allowed on conviction from own plea of guilt, except on the extent or legality of sentence. (See section 348 of the Criminal Procedure Code and **Olel v Republic [1989] KLR 444**)

[10]. Although in his oral submissions in court, the appellant stated the he has no quarrel with the conviction except he prayed for a non-custodial sentence, some of the grounds of appeal challenge the plea as not being unequivocal. In such case, the court must be satisfied that the plea was unequivocal as a matter of right to fair trial.

[11]. For a plea to be unequivocal, it must be free from any coercion, threat, promise or inducement, and be informed decision of the accused. Hence, the requirements of the law in section 207 of CPC, and that plea must be taken in the manner set out in **Adan vs. Republic (1973) EA 445** that: -

i. The charge and all the 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 with 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.

[12]. The requirements in section 207 of the CPC, and the steps for taking plea set out in **Adan vs. Republic**, are real safeguards of fair trial for an accused who pleads guilty to a charge.

[13]. Applying the test, the appellant was arraigned before the chief Magistrate's Court at Narok on 7th July 2021 to answer charges of stealing contrary to section 175 of the Penal Code. The record shows that the substance of the charge(s) and every element thereof was stated by the court to the appellant in the language that she understood. On being asked whether she admits or denies the truth of the charge(s) she replied in Kiswahili '**Ni Kweli**' for count I.

[14]. Subsequently, the prosecutor then stated the facts thus:

"On 6/7/2021 the complainant Solomon Nakale a night watchman at a site at Olulua village spotted a man carrying a roll of black chain link at 1.00 a.m. he stopped the man. The man was unable to explain. The watchman then lit a torch and saw the accused who was personally known to him.

The accused was unable to explain where he brought/ got the chain link from. The watchman challenged him. He tried to escape. The watchman raised alarm. Members of the public came. They arrested the accused and took him to Suswa police station. The complainant later went and identified the chain link as his. The police investigated. The accused was charged. The chain link which was recovered is here- P Exh 1."

[15]. The appellant is then recorded as having stated "**facts are true**" after which the court convicted him on his own plea of guilty.

[16]. The appellant merely claimed without any proof that he was confused following assault by the arresting officers and he was not informed of the rights of an arrested person under articles 50 of the constitution. There is no basis whatsoever for ordering a re-trial.

[17]. Having examined the record of proceedings before the trial court and guided by the legal principles on how a plea of guilty and conviction of an accused person should be recorded by the trial court, I am satisfied that the plea was taken and recorded in accordance with the law.

[18]. I find no merit in the complaint that the plea was equivocal. I also find that the appellant was properly convicted. His appeal on conviction, therefore, fails.

Sentence

[19]. Is 5 years' imprisonment imposed for the offence of stealing harsh or illegal in the circumstances of this case?

[20]. Section 275 of the Penal Code sets out the penalty for stealing as follows:

Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

[21]. In light of the law, the sentence imposed herein was excessive. Accordingly, there is lawful reason to interfere with the exercise of discretion by the trial court. Whereas, the appellant was a first offender, the trial court noted that the offence is rampant in the area, hence, the need for deterrent punishment.

Conclusion and orders.

[22]. In the upshot: -

i) **I find no merit in the appeal on conviction. Accordingly, appeal on conviction is dismissed.**

ii) **However, I find merit on the appeal on sentence. Consequently, I set aside the 5 years' imprisonment imposed by the trial court, and sentence the appellant to 3 years' imprisonment. The sentence to run from the date of conviction; 7/7/2021.**

iii) **It is so ordered**

Dated, Signed and Delivered at Narok Through Microsoft Teams Online Application this 26th Day of April, 2022.

F.M. GIKONYO

JUDGE

In the presence of:

1. Mr. Karanja for DPP

2. The appellant

3. Mr. Kasaso -Court Assistant