



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Criminal Appeal 7, 8 & 9 of 2012**

**DAUGLAS MULUSA ..... 1<sup>ST</sup> APPELLANT**

**HILGAD KISAVUKI ..... 2<sup>ND</sup> APPELLANT**

**BENSON SAINA ..... 3<sup>RD</sup> APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

***(Appeal arising from the Judgment of [L. ONYINA, SRM) in Vihiga Senior Resident Magistrate Court in Criminal Case No. 11 of 2012)***

**J U D G M E N T**

The appellants were charged with the offence of burglary contrary to section 304(2) and stealing contrary to **Section 279(b)** of the **Penal Code**. The 1<sup>st</sup> appellant **DOUGLAS MULUSHIA** was also charged with a count of handling suspected stolen goods contrary to **section 322(2)** of the Penal Code. The appellants preferred this appeal. The grounds of appeal are similar and are that:

1. The trial magistrate erred in law and fact by failing to warn the appellants on the consequences of pleading guilty.
2. The trial court convicted the appellants without establishing which language each of the appellants understood.
3. The charge sheet was defective as it did not indicate who the actual owner of the purported stolen properties and the values thereof.
4. The alternative charge did not indicate which property was stolen.

Mr. Lugadiru, counsel for the appellants submitted that the record of the trial court is not clear. The appellants do not understand English or Kiswahili and the language of the court is not clear. Counsel relied on two authorities of **ELIJAH AWAY ZEDEKIAH VS REPUBLIC – Nairobi Criminal Appeal No. 87 of 200 C.A** and that of **ZAPHANIA OKWOYO GESURE VS REPUBLIC – Kisumu Criminal Appeal No. 274 of 2008 C.A**. Counsel further submitted that the charge sheet did not indicate the value and the owner of the stolen items and therefore it was defective. Mr. Orinda, state counsel, opposed the appeals and submitted that the charge was read over to the appellants and explained to them. The appellants understood the language which was Kiswahili and they pleaded guilty. The conviction was therefore proper.

The record of the trial court show that the appellants were arraigned before the court on 4<sup>th</sup> of January 2012. According to the record the substance of the charge and every element was explained to the appellants in Kiswahili language which they understood and all the appellants pleaded guilty. The facts were then explained to the appellants and they also pleaded guilty to the facts. They were allowed to mitigate and the 1<sup>st</sup> appellant stated that he was found with the maize while the other two stated that they had nothing in mitigation. The appellants were sentenced to serve 3 ½ years' imprisonment on the first limb of burglary and one year imprisonment on the second limb of stealing. The court did not pass sentence on the second charge for the 1<sup>st</sup> appellant relating to being in possession of suspected stolen property.

The particulars of the offence as per the charge sheet are as follows:-

*The appellants on the 15<sup>th</sup> day of December 2011 at SIMBOYI village, Kigama sub-location in North Maragoli location within Vihiga County jointly with others at large broke in and entered the dwelling houses of MR. ALBERT KISII and JAVAN MUGILWA with intent to steal from therein and did steal two beds, two water drums, ten bags of maize all valued at KShs.45,000/= the property of the said KISII ALBERT and JAVAN MUGILWA.*

*The particulars of the second count was that Daglous Mulusha, on the 2<sup>nd</sup> day of January 2012 at Simboyi village, Kigama sub-location in Vihiga County in Western Province otherwise than in the cause of stealing dishonestly retained or received one sack of maize cobs knowingly or having reason to believe them to be stolen or unlawfully obtained.*

From the record of the trial court it is established that the second count was not read over to the 1<sup>st</sup> appellant.

From the above particulars it is clear that the owners of the stolen items were mentioned in the charge sheet. The value of the stolen items was given as KShs.45,000/=. There was no need to mention the value of the properties in the second count of handling suspected stolen property. The contention by the appellants that the charge sheet was defective is unfounded and therefore fails.

The next issue is whether the plea was properly taken. Although the record of the trial court does not indicate that the appellants were asked whether they understood Kiswahili, the charges were read in Kiswahili language and the court record states as follows:-

**“The substance of the charge read over and every element explained to the accused persons in Kiswahili language they each understand and each of the three accused persons asked whether he admits or denies the charge”**

Counsel for the appellants contends that the appellants do not understand English or Kiswahili. During the hearing of this appeal counsel did not seek an interpreter for the language the appellants understand. Counsel submitted in English and the appellants appeared to understand what counsel was submitting. Further when the appellants were asked to mitigate the 1<sup>st</sup> appellant informed the court that he was found with the maize while the two other appellants had nothing in mitigation. It is clear that the appellants were following the court proceedings and also knew the consequences of pleading guilty. According to the authority of **ZAPHANIA OKWOYO GESURE** the Court of Appeal laid emphasis on a situation where the accused is charged with an offence punishable by death. The appellants herein pleaded guilty and did understand the nature of the offence. It is not mandatory that the trial court had to explain the consequences of pleading guilty. Article 49 of the Constitution states as follows-

(g) At the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released.

Under Article 50(b) an accused person has the right to be informed of the charge with sufficient detail to answer it.

From the above provisions there is no constitutional requirement that an accused person must be informed the consequences of pleading guilty. It is desirable that trial courts should explain to the accused persons the consequences of pleading guilty even if the charge facing the accused is not that of murder. By the time the trial court passes sentence it should be satisfied that the accused willingly and knowingly pleaded guilty to the offence. In the current case I am satisfied that the appellants willingly and knowingly pleaded guilty to the charge.

In the end I do find that the appeal lacks merit and the same is disallowed. Taking into account the circumstances of the case I will vary the sentence for both limbs of the first count to 1 ½ years' imprisonment. The appellants shall serve 1 ½ years' imprisonment otherwise the appeal is disallowed.

*Delivered, dated and signed at Kakamega this 7<sup>th</sup> day of February 2013*

**SAID J. CHITEMBWE**  
**J U D G E**