



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CRIMINAL APPEAL NO.151 OF 2012**

**BETWEEN**

**JOSEPH PERIDE .....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from original conviction and sentence of the SPM's Court at Kilgoris in Criminal*

*Case No.481 of 2012 delivered on 28<sup>th</sup> June, 2012 by Hon. A.K. Mkoross (RM))*

**JUDGMENT**

1. The appellant herein Joseph Peride was charged in count I with Stealing stock contrary to **Section 278** of the **Penal Code**. The particulars of the charge were that on the 11<sup>th</sup> day of June 2012 at about 10 a.m. at Osinoni sub location in Transmara West District within Narok County, he stole one sheep valued at Kshs.1,700/= the property of Richard Morombi Koteene.
2. In Count II he was charged with escape from lawful custody contrary to **section 123** as read with **section 36** of the **Penal Code**. The particulars of the charge were that on the 27<sup>th</sup> day of June 2012 at about 7.00 a.m. at Kilgoris police station in Transmara West District within the Narok County being in lawful custody of No.81528 PC Elvis Keeta escaped from the said custody.
3. The appellant pleaded guilty to both counts and was sentenced to 7 years imprisonment on Count I and 1 year's imprisonment on Count II, Both sentences were to run concurrently.
4. From the record, the facts of the case are that: On the 1<sup>4th</sup> June 2012 at Osinoni sub location in Transmara West of Narok County, the complainant decided to check his cattle boma and count his sheep and on counting them he noticed one sheep was missing. He proceeded to go around the neighbourhood looking for the sheep but he did not find it. He then decided to go to Nyangusu market and on reaching Shankoe Empasi junction; he came across one Ole Gongo who was driving some sheep towards Nyangusu market. On stopping Ole Gongo he inquired from him where he got the particular sheep from and he responded that he had been given the same by one Jackson Ole Muiya.
5. The complainant called Ole Muiya. They all converged at Nyangusu market and Ole Muiya told the complainant that he had bought the sheep from the appellant at Kshs.1,300/= and had paid a deposit of Kshs.1000/=. The complainant in turn called the chief, and the accused who was a pupil at Osinoni Primary School was sought for and taken to Kilgoris police station where he was charged.
6. However on 27<sup>th</sup> June 2012 while accused was being detained by PC Leeta outside the OCPD's

office the accused tried to hide in the flowers at the police compound, managed to get out through the compound back door and escaped towards DEB Primary School. The police officers gave chase and managed to arrest him at Narumo area which was some 3 Km away from police station. This led to appellant being charged with the 2<sup>nd</sup> count. The said sheep was then produced as an exhibit.

7. When asked to confirm or deny the facts as given by the prosecution, the appellant stated that all the facts were true. A plea of guilty was then entered by the court and the appellant was convicted on his own plea of guilty. Before sentencing an age assessment was done on the appellant, the appellant was found to be 19 years old.
8. The learned trial magistrate while sentencing the appellant noted that the rise of livestock theft had plagued the society within his jurisdiction and that the vice had to be stopped. He therefore sentenced the appellant to 7 years for the offence of theft and 1 year for the offence of escape from lawful custody. Both sentences were however to run concurrently.
9. Being aggrieved by both conviction and sentence, the appellant appealed to this court. In his homemade petition of appeal filed in court on 4<sup>th</sup> July 2012 the appellant appealed on grounds, inter alia, that:-

1. *That my lords, I was sentenced to 7 years after my own plea of guilty for the offence of stealing stock and Escape from lawful custody contrary to section 278 and 123 of Penal Code.*
2. *That my lords I pleaded guilty amidst frustration and physical torture by the police who went further to misinform me by persuading me to plead guilty so that I could be set at liberty.*
3. *That my lords the nature and consequences of the alleged offence was not explained to me properly by the trial court.*
4. *That the trial court ought to have given me at least some days to recover from the stress of unexpected arrest and come back to my normal senses instead of rushing with the conviction.*
5. *That my lords the trial magistrate erred in law and fact by failing to evaluate that I am a minor with only 16 years of age and in class eight.*
6. *That my lords I now request to be furnished with a true certified copy of court proceedings to enable me highlight my grounds of appeal and also request that my appeal be heard in my presence.*

10. When the matter came up before me on 7<sup>th</sup> November 2013, the appellant submitted in Kiswahili and stated that he wanted a retrial because at the time of his arrest, he was beaten and forced to plead guilty as he had been threatened with death.
11. Secondly, he submitted that the person who allegedly found him with the sheep did not adduce any evidence to support his allegation and on Count II he submitted that he was defending himself thus he never ran away.
12. The appeal was opposed. Miss Cheruiyot Prosecution counsel submitted that since the appellant pleaded guilty, his appeal should only address the extent/legality of sentence as the record did not show that the appellant was coerced into admitting the charges facing him.
13. Secondly, she submitted that on count 1 the appellant was sentenced to 7 years imprisonment, which according to her was fair compared to a maximum of 14 years and that on count II the sentence of 1 year was fair considering the maximum which was 2 years. In conclusion she prayed that the appeal be dismissed.
14. The appellant in reply to the Respondent's submission acknowledged the fact that in as much as the record did not show that he was assaulted, he did not inform the lower court of that because he was ignorant of the rights of an accused person, and that since he was now aware of his rights, he has the duty of informing the court about all his rights in case they had been violated.
15. This being a first appeal, the duty of this court as a first appellate court has been cut out by the Court of Appeal in such cases as **Pandya –vs- R [1957] EA 336** and **Okeno –vs- Republic [1972] EA 32**. This court is under a duty to reconsider and evaluate the evidence afresh with the view of reaching its own conclusions in the matter. In the instant case in which the appellant was convicted on his own plea of guilty, this court is under a duty to ascertain whether the steps required to be taken by the trial court in entering a plea of guilty were all taken. In the case of **Aden –vs- Republic [1973] EA 445** the Court of Appeal set out the following steps for purposes of confirming that a plea of guilty is unequivocal:-

1. *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;*
  2. *the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;*
  3. *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;*
  4. *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;*
  5. *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.*
16. After carefully analyzing the record of the lower court, the issue that arises for determination is whether the steps as authored above were complied with. From the record of the lower court, the charges and particulars were all explained to the appellant in Kiswahili, the language he understood. When the matter came on appeal before me, the same appellant used the Kiswahili language to explain to this court, the reasons why he was appealing against the lower court conviction and sentence. When the appellant was asked to reply to the charges, he stated: **“it is true”** to each of the 2 counts. I however note that the trial court did not enter a plea of guilty before the facts were given by the prosecutor.
17. In the case of **Boit –vs- Republic [2002] 1 KLR, 815**, the appellant therein pleaded guilty to a charge of robbery with violence and was sentenced to death. His appeal to the High Court was dismissed. On appeal to the Court of Appeal, the court held, *inter alia*, that though there was no statutory provisions invalidating a plea even in cases where upon conviction, an accused would suffer death, it was important for the trial court to ensure that an accused person fully understands the offence with which he is charged. To be able to have that understanding, the Court of Appeal said that the accused person must be informed of the charge in a language familiar to him and the ingredients of such a charge; only when the accused has clearly understood the nature of the offence against him and answered to the same clearly can a plea of guilty be entered.
18. In **Kisivi –vs- Republic [1991] KLR 125**, the appellant was charged and convicted of stealing stock and sentenced to four years imprisonment with corporal punishment. In answer to the facts, the appellant is recorded as having said; **“yes it is true.”** On scrutiny of the lower court record, the Court of Appeal found that there was no connection between the appellant and the movement of the allegedly stolen animals found in another person's compound. On the basis of the above, the court held, *inter alia*, and quite persuasively so in my view that:-

**“1) Some offences are quite technical and a layman may for instance**

**never know the legal distinction between being in innocent**

**possession of stolen property and the kind of possession**

**contemplated by section 4 of the Penal Code.**

**2) Unless therefore the magistrate elicits and gets enough detail of**

**what happened and how the accused before him was connected**

**with the offence charged, it is likely that the plea will not be**

**unequivocal.”**

19. In the instant case, the chain linking the appellant to the stolen sheep is clear and consistent. The

facts show that the appellant, who was in possession of the sheep in the first instance sold the sheep to one Jackson Ole Muiya who then gave the sheep to Ole Gongo to drive it to Nyangusu market for sale. The appellant sold the sheep for Kshs.1300/= out of which he had been paid Kshs.1000/=. In my considered view therefore, is that when the appellant eventually told the court **“All the facts are true”**, he fully understood what it was he was pleading to. He was admitting that he had stolen the complainant’s sheep and sold the same to Jackson Ole Muiya for Kshs.1000/=.

20.Regarding the appellant’s plea for a retrial, the principles that should guide the court in deciding whether or not to order a retrial in a criminal appeal were summarized in the case of **Koome –vs- Republic [2005] 1 KLR 575** as follows:-

1. *In general a retrial will be ordered when the original trial was illegal or defective;*
2. *A retrial will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial;*
3. *Even where a conviction is initiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;*
4. *Each case must depend on its particular facts and circumstances;*
5. *An order for retrial should not be ordered where it is likely to cause an injustice to the accused person.*

21.Furthermore, in **Sinaraha & Another –vs- Republic [2004] 2 KLR 328** the High Court added the further and equally important factor that a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. In **Otieno & Another –vs- Republic [1991] e KLR – Criminal Appeal No.55 of 1989** it was held that: **“In terms of propriety and attitude, the proper order to make before directing a retrial is not to quash but set aside the conviction since the merits of the conviction have not been gone into.”**

22.After considering the submission by the appellant on why this court should allow a retrial, I am not convinced that his reasons hold any water. As stated above, he pleaded guilty to the two counts in the charge sheet, his plea was unequivocal and his case has not met any of the factors to be taken into account by a court when considering whether or not to order a retrial.

23.On the issue of sentence meted out against the appellant, the appellant argues in his petition that he was a minor and therefore the sentence meted against him was harsh and excessive. On scrutiny of the record of proceeding in the lower court, there is evidence that the appellant was taken for an age assessment examination where he was assessed to be 19 years old. A persona aged 19 years old is an adult according to the Children’s Act.

24.However it has been constantly stated that sentencing is a matter for the discretion of the sentencing court. That discretion must nonetheless be exercised judicially and not capriciously. The sentencing court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. It has also been held that an appellate court can only interfere with the sentence imposed by a subordinate court if it is shown to be unlawful and illegal or if is manifestly harsh and excessive as to amount to a miscarriage of justice. See generally **Ogola & Owuora –vs- Republic [1954] 19 EACA 270; James –vs- Republic [1950] 10 EACA 147, Nilsson –vs- Republic [1970] EA 599 and Wanjema –vs- Republic [1971] EA 493.**

25.The offences for which the appellant was convicted carries a maximum sentence of 14 and 2 years imprisonment respectively. The appellant was sentenced to 7 and 1 year imprisonment respectively. Before sentencing the appellant, the trial court noted that the crime of stock theft was prevalent within the trial court’s particular area of jurisdiction. Having read through the entire record, and considering the fact that the appellant pleaded guilty, and further considering the appellant’s age, I am inclined to interfere with the sentence of the lower court by setting aside the 7 and 1 year imprisonment terms and substituting thereof prison terms of 4 years and 6 months respectively on counts 1 and 2. The sentences shall run concurrently from 28<sup>th</sup> June 2012.

**Dated, signed and delivered at Kisii this 17<sup>th</sup> day of December 2013**

**RUTH NEKOYE SITATI**

**JUDGE.**

**In the presence of:**

**Present in person for Appellant**

**Mr. Imbali for Respondent**

**Mr. Bibu - Court Clerk**