

REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

Criminal Appeal 4 of 2011

MOHAMED BADI BIN ALI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant herein was arraigned with another before the District Magistrate's court at Mpeketoni, on 26th November 2010. From the record of proceedings, both the main charge and the alternative were read to the accused who pleaded guilty to both. The main charge was stock theft contrary to section 278 of the Penal Code while the alternative charge was Handling Stolen Property contrary to section 322(2) of the Penal Code. The subject of the charges was a donkey valued at Kshs. 20,000/- the property of one Jafar Haji Hamisi. The accused were sentenced to five (5) years imprisonment. The appellant herein was the first accused in the lower court. He has now appealed to this court against both conviction and sentence on grounds, inter-alia that the lower court did not give him an option of a fine and that he is a young man with heavy family responsibilities (grounds 1, 2, 3, 6, 7)

The remainder of the grounds introduce what can only be termed as a denial of the offences. Through Mr. Kemo the State has opposed the appeal and emphasized the fact that the appellant pleaded guilty to the charges hence can only challenge the legality or severity of the sentence under section 348 of the Criminal Procedure Code. The State submitted that the sentence was not harsh given the appellant's antecedents as recorded in the probation officer's report produced in the lower court.

This appeal raises two main issues, firstly, whether the plea recorded in the lower court was unequivocal and whether the sentence meted out was manifestly excessive.

The correct manner of taking a plea was clearly set out in the celebrated case of **ADAN VS REPUBLIC [1973] E.A. 445**. Section 207(2) of the Criminal Procedure Code provides that where the accused pleads guilty, the court shall convict and sentence him. In the present case both the main and alternative counts were read to the appellant who replied "*It is true.*" When the facts were given by the prosecution, the appellant responded that the "*facts are true*", whereupon the court entered a conviction. Although the two counts were charged in alternative, the record does not show the particular count for which a conviction was entered and whether the appellant understood it. There was ambiguity and the plea cannot be considered as unequivocal or safe.

Section 348 of the Criminal Procedure Code provides that no appeal shall be allowed in the case of an accused person who has pleaded guilty and been convicted of that plea by a subordinate court except as to the extent of legality of the sentence. The plea must however be unequivocal and if not, the conviction is liable to be quashed.

On the principles settled in **Adan Vs Republic [1973] E.A. 445**, the conviction in the subordinate court is

hereby quashed, and the sentence which on the face of it, appears rather severe, it is set aside.

The appellant has been in prison since November 2010 and has therefore served a year of the sentence imposed. I have agonized whether to order a retrial in this case, particularly in light of the antecedents of the appellants as recorded in the probation officer's report. Unfortunately whatever prior convictions the appellant may have had were not tendered before the court by the prosecution for him to admit or deny. In light of this and the nature of the offence, I think that ordering a retrial in this case may result in further prejudice against the appellant. In the circumstances, I do order that the appellant be set at liberty unless otherwise lawfully held.

Delivered and signed this 7th day of **February 2012** at Malindi.

C. W. Meoli
JUDGE

In the presence of: