REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 266 OF 2009

*(From Original Conviction and Sentence in Criminal Case No. 543 of 2009 of the Senior Resident Magistrate's Court at Taveta: **C.N. Ndegwa – S.R.M.)***

BARAKA PETRO ………………………….…………………… APPELLANT
-VERSUS-
REPUBLIC …………………………….………………….. RESPONDENT

JUDGEMENT

The Appellant **BARAKA PETRO** has appealed against his conviction and sentence by the learned Senior Resident Magistrate on two counts of **STEALING IN A DWELLING HOUSE CONTRARY TO SECTION 279(b) PENAL CODE**. The Appellant was arraigned before the trial court on 9th November 2009 and the charges were read out to him. He entered a plea of ***'guilty'*** to both counts. The learned trial magistrate then proceeded to convict the Appellant and after listening to his mitigation sentenced him to serve four (4) years imprisonment on each count. It is against this conviction and sentence that the Appellant now appeals.

I have perused the submissions filed by the Appellant and I note that one of his grounds of appeal is the allegation that he did not understand the proceedings in the lower court due to language barrier. I have looked at the record which does not bear out this allegation. It is clear from the record that on the date when the Appellant's plea was taken and recorded there was a court clerk named ***'MIRIAM'*** present. It has been held by no less than the Court of Appeal that the presence of a court clerk in court is sufficient indication that proceedings were being translated from English to Swahili or vice versa. [see **STANLEY KARIMI KAGO and ANOTHER –VS- REPUBLIC Crim. App. 228 and 234 of 2006**]. In addition I note that the learned trial magistrate took care to indicate that the proceedings were in actual fact translated into Kiswahili for the benefit of the Appellant. At page 1 it is indicated:

"Court: Charge read over and every element thereof explained to the accused in Kiswahili which he understands and replies in Kiswahili"

It is clear that all the elements of the charge were read out and explained to the Appellant in Kiswahili and the Appellant also responded to the charges in Kiswahili. If the Appellant did not understand the two languages of the court being English and Kiswahili he was at liberty to ask for translation into his mother-tongue. There is no indication that the Appellant made any such request. The Appellant when called upon to mitigate did make a statement saying –

"I pray for forgiveness"

The fact that the Appellant made a statement in mitigation persuades me that he did actually follow the proceedings very well.

Upon the charge being read out the Appellant responded to both Count No. 1 and 2 thus –

“It is true”

So saying he entered a plea of guilty to both counts. Thereafter the court prosecutor did read out the facts of the charge to the Appellant as required by law. To these facts the Appellant responded:

“The facts are correct”

thereby pleading guilty to these facts. Nothing could be clearer than this. The Appellant pleaded guilty and maintained his guilty plea even after the facts were read out to him. His plea was clear and unequivocal. In line with S. 207(2) of the Criminal Procedure Code the learned trial magistrate, thereafter proceeded to convict the Appellant on both of Count Nos. 1 and 2 of the charge. I find that the plea of the Appellant was properly and procedurally recorded. The Appellant clearly understood and participated in the proceedings. I find that his plea was unequivocal and I do uphold the conviction on both Count Nos. 1 and 2.

Following his conviction and following the request by the prosecutor to have the Appellant treated as a first offender the trial court did call upon the Appellant to make his statement in mitigation. The Appellant complied and said:

“I pray for forgiveness”

The trial magistrate did give due consideration to this mitigation and sentenced the Appellant to serve 4 years imprisonment on each count. Though the sentences were lawful they were in my view excessive given the circumstances. The value of the items said to be stolen were minimal Kshs.1,000/- on Count No. 1 and Kshs.1,800/- on Count No. 2. The facts indicate that the stolen items were recovered and returned to their owners so no permanent loss occurred. The trial court ought to have considered the fact that by pleading guilty the Appellant saved the court from an unnecessary trial. All these factors combined ought to have caused the trial magistrate to impose a more lenient sentence like a fine. The Appellant was sentenced in November 2009. He has served about 1½ years in prison. In my view this is sufficient punishment and I have no doubt that he has seen the error of his way. I therefore set aside the 8 year prison term and substitute it with time already served. The appeal against sentence therefore succeeds. Appellant to be released forthwith unless otherwise lawfully held.

Dated and Delivered at Mombasa this 8th day of March 2011.

M. ODERO
JUDGE

In the presence of:
Mr. Onserio for State
Appellant in person