REUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL APPEAL NO. 20 OF 2011
LESIIT, J.

NANCY MUTHONI……………….…………………………………..APPELLANT

VERSUS

REPUBLIC…...…………………………………………………….RESPONDENT

(From Original SPM's Criminal Case No.388 of 2011 at Maua; J. G. Kingori – SPM)

JUDGEMENT

The appellant **NANCY MUTHONI** was convicted on her own plea of guilty to one count of stealing contrary to section 275 of the Penal Code. She was sentenced to 18 months imprisonment.

The appellant was aggrieved by the conviction and the sentence and therefore filed this appeal.

There are five grounds of appeal in the amended petition dated 21st March 2011. Mr. B.G. Kariuki argued the appeal on behalf of the appellant. The appeal was opposed. The state was represented by Mr. Kimathi, the learned state counsel.

The appellant was arraigned before the SPM's court with stealing 10 plants of beans, 5 cobs of maize and a bundle of miraa all worth 1,500/- which she had plucked from her father's land.

Mr. Kariuki's first ground was that the language used in the plea taking was not disclosed because the language of the court was indicated as "English/Swahili/Kimeru".

Mr. Kimathi submitted that the language used was clearly indicated in the proceedings.

Mr. Kariuki urged another point that the charge was not proved because among others the appellant had a claim of right being a child of the owner. Mr. Kariuki submitted that the food was being cooked for the appellant and her father and therefore the appellant had a claim of right. Counsel relied on the case of **Adan v Republic [1973] EA 443; KORIR V Republic [2006] 1 KLR 51.**

Mr. Kariuki argued a legal point that the learned trial magistrate should have changed the plea of guilty to that of not guilty the moment the appellant claimed a right over the things alleged to have been stolen. For that preposition counsel relied on a Seychelles case of **Rep-vs-Bistoquiet [2010] SCSC 79**.

Mr. Kimathi urged the court to find that the appellant understood the charge and also admitted the charge both after the facts were read and in her mitigation.

I have considered this appeal guided by the Court of Appeal case of **OKENO-VS-REPUBLIC 1972 EA 32** where the court defined the duty of a first appellate court in the following terms:

““**An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [**Pandya vs. Republic (1957) EA 336] **and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusion** (Shantilal M. Ruwala v. Republic [1957] EA 570.) **It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See** Peters v. Sunday Post, [1958] EA 424.)"

The issue is whether during the plea taking the learned trial magistrate followed the procedure set out in the case of **Adan v Republic, Supra**. The record shows that after the charge was read to the appellant she replied **"it is true".**

The prosecution then led the following facts:

"**The facts are that on 30.1.2011 at about 1.00 p.m. the complainant's watchman one Jacob Kariuki was guarding the miraa of the complainant Johana Kaberia, he saw the accused enter the farm and uproot 10 bean plants, pluck 5 maize cobs and also plucked a bundle of miraa all valued at Kshs.1,500. He informed the complainant who is the accused's father. The father reported the matter to the O.C.S Laare and accused was arrested the same day, taken to Laare Police Station and charged. After investigations. No recovery was made**

I do not think that the facts of the case disclosed the offence charged. Mr. Kariuki was right that the facts should have established the ingredients of the offence of theft. The learned trial magistrate should have satisfied himself that the facts as led by the prosecution disclosed the charge facing the appellant before calling upon the appellant to plead to those facts.

The ingredients for a charge of theft were not considered by the learned trial magistrate. S 268 of the Penal Code defines stealing as follows:

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

(2) A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say –

(*a*) an intent permanently to deprive the general or special owner of the thing of it;

(*b*) an intent to use the thing as a pledge or security;

(*c*) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;

(*d*) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;

(*e*) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

(3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered. Definition of stealing. 54 of 1960, s. 30. CAP. 63 *Penal Code* 9 2 [Rev. 2009

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move."

The facts before court were that the appellant entered her father's shamba and took 10 cobs of maize and uprooted 10 bean plants. Surely the learned trial magistrate should have required the prosecution to show how the appellant, a young girl of 19 years could have been regarded as a thief for taking such few items from her father 's shamba. Given her age, unless the facts demonstrated it, the appellant was still a young person most likely under her father's care. The facts as led by the prosecution did not show that the appellant **"stole"** as contemplated under the Penal Code.

I agree with the learned counsel for the appellant that the defence of claim of right was available to the appellant. Unless evidence was adduced to negate the claim, the learned trial magistrate ought not to have convicted the appellant on the basis of those facts.

I find that the plea of guilty entered in this case was equivocal as the facts led by the prosecution did not disclose the offence charged.

Issue is whether I should order a retrial. On the issue of retrial the Court of Appeal made an observation in the case of **Jackson Leskei v Republic, Criminal Appeal No.313 of 2005** thus:

"……………By entrenching in the constitution the right of interpretation in a criminal trial the framers of the constitution appreciated that it is fundamental for an accused to fully appreciate not only the charge against him but the evidence in support thereof. It is then that it can be justifiably said that an accused person has been accorded a fair hearing by an independent and impartial court. It is the court's duty to ensure that the accused's right to interpretation is safeguarded and to demonstratively show its protection……………..

The failure of the lower court as stated before to indicate the language leads me to find that the trial was a nullity. For that reason, the conviction of that court will be quashed and the sentence of that court will also be set aside. The learned state counsel requested that the court would order the appellant to be retried

A retrial will normally be ordered as has been decided in previous cases in the following circumstances:-

(i) If original trial was illegal or defective.

(ii) If it is in the interest of justice.

(iii) If it will not occasion injustice or prejudice to the appellant.

(iv) If it will not accord the prosecution opportunity to fill up gaps in its evidence at the first trial.

(v) If upon consideration of the admissible or potentially admissible evidence a conviction may result and finally;

(vi) Each case must depend on its particular facts and circumstances."

The appellant is 19 years old. She has been in custody serving sentence since 8th February 2011. The Probation Report was negative to her. I must comment on it. The report is questionable as the identity of persons interviewed and associated with the adverse report against the appellant are not disclosed. It was not a satisfactory report. The allegations of theft should have been disregarded as that was not a recognisable record of previous convictions. They were merely allegations and who knows they could have been the result of suspicion. What I think is that the appellant's father influenced the report. He appears to be tired of his own daughter. What the appellant needed is counsel and rehabilitation not rejection and imprisonment. She was a first offender. Clearly the Probation Officer's report was biased and prejudicial. The officer did not keep an open mind.

The learned trial magistrate should have remembered CSO and probation sentences are not the only non-custodial sentences available. For instance S.35 of the Penal Code provides custodial or unconditional discharges as options, all of which the court should have considered. There are many other alternatives like suspended sentences and the like.

The learned trial magistrate was unduly influenced by the Probation Officers' Report. The court should remember always that that the issues of sentence are a matter for the discretion of the court. It cannot be exercised with undue influence from any quarters even Probation. The judicial officer must consider carefully why he should order a certain sentence in respect of a specific person. That exercise of discretion is a cardinal role of the court, which even on appeal is seldom interfered with unless it is very necessary for good reasons to be recorded. It is therefore an exercise that should be exercised judicially and guarded jealously.

The learned trial magistrate did not indicate the language used to explained the charge to the applicant. To show on the record that English/Swahili/Kimeru is not sufficient as there is no way the court explained to the appellant in all three languages. The record as reflected did not satisfy the requirement of S 198 (1) of the CPC.

I think that the appellant has suffered enough so far. If a retrial is ordered, it will give the prosecutions time to rectify its case and fill gaps in its case. That will be prejudicial to the appellant and will not serve the interest of justice.

Having come to this conclusion, I decline to order a retrial. The appellant should be set at liberty unless she is otherwise lawfully held.
Those are my orders.

Dated, Signed and delivered at Meru this 13th day of April 2011.

LESIIT, J.
JUDGE