



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 161 OF 2009

(From Original Conviction and Sentence in Criminal Case No. 481 of 2008 of the Resident Magistrate's Court at Wundanyi: F. Munyi – R.M.)

DANSON MWAGONDA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant **DANSON MWAGONDA**, has filed this appeal challenging his conviction and sentence by the learned Resident Magistrate sitting at Wundanyi Law Courts. The Appellant and his co-accused **LUKAS KYALO** were arraigned before the trial court on 29th December 2008 on a charge of **STEALING FROM THE PERSON CONTRARY TO SECTION 279 (a) of the PENAL CODE**. The particulars of the charge were that:

“On the 23rd day of December 2008 at Mwashuma Trading Centre Maktau Location in Taita-Taveta District within Coast Province, jointly stole cash Kshs.700/- one mobile phone make Nokia 3310 and 2 ATM cards of Co-operative and Equity Bank all valued at Kshs.5,000/- the property of JACKSON NGILA MAWEU from the person of the said JACKSON NGILA MAWEU”

The Appellant in addition faced an alternative charge of **HANDLING SUSPECTED STOLEN PROPERTY CONTRARY TO SECTION 322 (2) of the PENAL CODE**. At this first appearance the Appellant entered a plea of guilty to the charge by stating in Kiswahili:

“Ni kweli”

Meaning **‘it is true’**. The facts were then read out by the court prosecutor **INSPECTOR OMBOGO**. The Appellant maintained his plea of guilty stating:

“Ni kweli”

meaning **‘the facts are correct’**. The learned trial magistrate then proceeded to convict the Appellant on his own plea of guilty in line with S. 207(2) of the Criminal Procedure Code. The Appellant has now appealed against this conviction on the basis that he did not understand the proceedings and that he was misled by fellow prisoners to plead guilty. The appeal was opposed.

Regarding the latter claim, no evidence exists to show that the Appellant was misled by any third

party to enter a plea of guilty. In any event the Appellant appeared in court alone and was under no such influence when he entered his plea of guilty. The fact that the Appellant fully comprehended the proceedings is shown by the fact that he made his answers to both the charge and the facts in Kiswahili. This coupled with the fact that on the material date it is indicated that there was a court clerk present in court convinces me that interpretation was going on thus there cannot be any issue of a language barrier.

The Appellant argues that he was not represented by counsel and thus was at a disadvantage in court. Firstly the decision of whether or not to engage legal counsel rests entirely with the suspect. The fact that the Appellant was not represented by a lawyer at the time he took plea was a choice made by the Appellant himself. Secondly the offence of stealing does not fall under the category where legal representation is provided at the cost of the State.

I am satisfied that Appellant made a conscious decision to plead guilty to the charge. He fully understood the proceedings and his plea was unequivocal. I find no reason to fault his conviction and I hereby confirm the same.

After being convicted the prosecutor requested that the Appellant be treated as a first offender. The Appellant was accorded an opportunity to mitigate. He did make a statement in mitigation. The learned trial magistrate did consider this mitigation and said pg. 2:

“I have considered the mitigation of the offenders and the fact that they are first offenders. However, the offence is serious and a deterrent sentence is necessary”

The trial magistrate proceeded to impose on the Appellant of seven (7) years imprisonment. The sentence imposed was lawful and it fell way below the maxim sentence of 14 years. However in the circumstances this sentence was in my view harsh and excessive. The Appellant was a first offender. He had pleaded guilty thus saving the court from an unnecessary trial. The court ought in the circumstances have considered an alternative sentence e.g. fine or probation. The value of the stolen goods was minimal Kshs.5,000/- and the stolen items were recovered and returned to the complainant and Appellant has spent 2 years in prison which I feel is sufficient punishment. I do set aside the 7 year term of imprisonment imposed by the trial court and I substitute it with time already served. The appeal against sentence succeeds. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

Dated and Delivered in Mombasa this 13th day of June 2011.

**M. ODERO
JUDGE**

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