



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL NO.124 OF 2010

(Appeal arising from original WBY CR. NO.1540 of 2010)

STOIC JUMA WAFULA.....APPELLANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Stoic Juma Wafula was convicted of being in possession of public stores contrary to section 324 (2) of the Penal Code. He was sentenced to two years imprisonment. The appeal is against both conviction and sentence.

The grounds of appeal raise the following issues:

- a) ***That the plea was not equivocal;***
- b) ***The exhibits were not produced in court;***
- c) ***The court ignored the mitigation of the accused.***

Mr. Situma for the Appellant argued that the charge and all its elements were not interpreted to the Appellant in the language he understands. It is not clear which language was used during the plea. It was wrong for the prosecution not to produce the exhibits in court and that the sentence was excessive.

The appeal was opposed by Mr. Okeyo who argued that the proceedings of the court during plea were properly conducted and that the plea was equivocal. Interpretation was in Kiswahili language and there was an interpreter present in court. It was not fatal not to produce the exhibits in court.

The trial court record on the 9/12/2010 the date of plea read as follows:

***“The substance of the charge and every element thereof has been stated to the accused person in Kiswahili language who being asked whether he admits or denies the truth of the charge replies:
Accused: True”***

In the coram of the court, it shows that the presiding magistrate was Mr. Kyambia, the prosecutor IP Kipsang and the court clerk, Moses/Diana. It is indicated at the end of the column that : ***“Interpretation is in Kiswahili.”*** The only inference that can be drawn from the record of the court is that the plea was read and explained to the accused in Kiswahili. There was interpretation from English to Kiswahili. Both of these are languages of the magistrates’ courts. The Appellant replied to the charge that it was true. This means that the Appellant understood Kiswahili language. It follows that he understood the proceedings of the court.

The facts of the case were read out to the Appellant in the same language. The Appellant replied that; **“the facts are correct.”** The accused was then convicted of the offence.

The defence raised the issue that there were two clerks in court and it is not known which of the two interpreted the charge to the Appellant. The record shows on part of the clerk or clerks present as **“Moses/Diana”**. This may be taken to mean that it was either Moses or Diana who were in court doing interpretation. It may also mean that both clerks were present in court and that one of them did the interpretation. The two clerks are qualified clerical officers and court interpreters. It does not matter which of the two interpreted the charge to the Appellant. The plea was in my considered opinion unequivocal.

I have looked at the facts of the case and they disclose an offence under section 324 (2) of the Penal Code. The prosecutor said that police recovered several items of prison uniform referred to in the charge as government stores. There is no indication in the court record that the said items were produced in court as exhibits. It is necessary that any exhibits recovered by police be produced in court. The purpose of production is to strengthen the evidence of the prosecution as regards proof. In the case before me, the Appellant pleaded guilty to the charge at plea stage. The prosecution did not produce the exhibits in court. After the facts were read to the Appellant explaining how the recovery was done in his own house, the Appellant said the facts were correct. In a case of plea of guilty, the admission of facts means that the accused admits the evidence of recovery. The Appellant had an opportunity to dispute recovery of the exhibits during plea. The fact that he did not rebut that evidence is evident of admission.

The issue which arises is whether any prejudice was caused to the Appellant by failure to produce the exhibits. The Appellant did not show or claim any prejudice on his part. I find that no prejudice was caused to the Appellant by the failure to produce the exhibits. In the circumstances, the omission is not fatal to the prosecution’s case.

In his mitigation, the Appellant told the court that he was sickly and had a family who depended on him. He was a first offender. The maximum sentence under section 324 (2) of the Penal Code is three (3) years. The magistrate imposed a sentence of two (2) years imprisonment which is within the law. However, considering the Appellant’s mitigation and the fact that he was a first offender, the sentence of two years imprisonment was a bit excessive. A non-custodial sentence ought to have been considered.

The appeal against conviction is hereby dismissed and the conviction upheld. As for sentence, the Appellant has already served seven (7) months imprisonment. I will substitute the imprisonment sentence with a non-custodial sentence subject to suitability. The Appellant is hereby referred for a probation inquiry. Mention on 21/9/2011.

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F. N. MUCHEMI
JUDGE

Judgment dated and delivered this 27th day of July, 2011 in the presence of the Appellant and Mr. Ogoti state counsel.

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F. N. MUCHEMI
JUDGE