



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL 13 OF 2009

CHIKOSA MWERO YAWA..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The Appellant **CHIKOSA MWERO YAWA** has filed this appeal against his conviction and sentence before the lower court. On 8/1/2009 the Appellant was arraigned before the Senior Resident Magistrate Kwale Law courts and charged with the offence of **STEALING STOCK CONTRARY TO SECTION 278 OF THE PENAL CODE**. He pleaded guilty to the charge. The facts of the charge sheet were read out to the Appellant and he retained his plea of guilty. He was then convicted. After listening to his mitigation, the learned trial magistrate sentenced the Appellant to a term of six (6) years imprisonment. The Appellant now appeal against both conviction and sentence.

I have perused the written submissions filed by the Appellant. I note that his main ground of Appeal is what he alleges was a breach of his constitutional rights under section 72 (3) of the Constitution of Kenya. The record indicates that the Appellant was arrested on 5/1/2009 and was arraigned in court on 8/1/2009. The constitution of Kenya specifically section 72(3) provides that a suspect arrested on suspicion of having committed a non-capital offence shall be taken before a court not later than 24 hours after such arrest. In this case the Appellant remained in police custody for three (3) days. This clearly goes against the provisions of section 72(3). The question is whether such delay entitles the Appellant to an automatic acquittal. I think not. In my view a 3 day sojourn in police custody cannot be said to be so inordinate as to amount to a breach of the Appellants fundamental trial rights. The Appellant I note did not raise this issue before the lower court but has

only now raised it upon appeal. In the case of **ELIUD NJERU NYAGA VS.REPUBLIC.CRIMINAL APPEAL. 182/2006** the court of appeal held

“while we would reiterate the position that under the fair-trial provisions of the constitution,an accused person must be brought to court within twenty-four hours for non-capital offences and within fourteen days for capital offences yet it would be unreasonable to hold that any delay must amount to a constitutional breach and must result in an automatic acquittal”

This ground of the Appeal therefore has no merit and I do dismiss the same.

The accused pleaded guilty to the charge. The language of the court was Kiswahili which the Appellant well understood. When the facts were read out to him the Appellant responded

“ The facts are correct”

This is a clear indication that he understood both the charge and the facts. His plea was both clear and unequivocal. When asked to give mitigation, the appellant said

“I leave it to court”

a further indication that he was following the proceedings. I am satisfied that the plea was properly taken and the Appellant clearly pleaded guilty to the same. His conviction was sound and I do hereby uphold the same.

Regarding the sentence I do not agree with the learned state counsel that the six (6) year sentence imposed by the trial magistrate was unlawful. Section 278A of the Penal Code clearly provides.

“if the thing stolen is any of the following that this is to says, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox , [my emphasis] ram, ewe, weter, goat or pig or the young thereof, the offender is liable to imprisonment for a period not exceeding fourteen years”

Thus this section provides for only a maximum sentence. No provision is made for a minimum sentence at all. As such the six (6) year sentence imposed by the trial court was lawful. I have no indication to interfere with the same and I do uphold that sentence. This appeal therefore fails in its entirety. The conviction and sentence of the lower court are confirmed.

Dated and Delivered in Mombasa this 2nd day of July 2010.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Onserio for State

Appellant in person

M. ODERO

JUDGE

2ND JULY 2010