



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO. 45 & 46 OF 2009

(From original conviction and sentence in Criminal Case No. 281 of 2009 of the Chief Magistrate's Court at Naivasha (N. Njuki) dated 4th February, 2009)

JAMES AMUNGA OUMA.....1ST APPELLANT
HERMAN MOSSE JORAM.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellants were charged jointly of the offence of stealing contrary to the provisions of Section 275 of the Penal Code, (*Cap. 63, Laws of Kenya*). They each pleaded guilty, and a plea of guilty was entered. At the conclusion of the reading of facts to them, each of the appellants confirmed that the facts were true, and their respective pleas of guilty were confirmed. The prosecution complied with the rules laid down in the case of **ADAN vs. REPUBLIC [1973] E.A. 445** on the procedure where an accused pleads guilty to a charge.

The Appellants were convicted on their respective pleas of guilty and each sentenced to 5 years imprisonment. They each filed appeals against both their conviction, and sentence. The grounds were identical and are -

- (1) *The Learned Trial Magistrate erred both in law and in fact by taking a plea which was not unequivocal.***
- (2) *The Learned Trial Magistrate erred both in law and in fact by failing to state the language of the court.***
- (3) *The Learned Trial Magistrate erred both in law and in fact by disregarding the facts of the offence and convicting the Appellant on the basis of extraneous matters.***
- (4) *The Learned Trial Magistrate erred both in law and in fact by handing in an illegal sentence against the Appellant.***

(5) The Learned Trial Magistrate erred both in law and in fact by failing to consider the sentence vis a vis the gravity of the offence allegedly committed by the Appellant.

And for those reasons, each of the Appellants prayed -

- (a) This Appeal be allowed.**
- (b) The conviction and sentence be reversed and the Appellant be acquitted forthwith.**
- (c) In the alternative the sentence be reduced.**
- (d) Any other order that this Honourable Court may deem fit to grant.**

The two appeals were by order of court consolidated and heard together on 15th July 2010. The appeal was argued by Mr. Wamaasa for the Appellants while Miss Nyagol, State Counsel urged against the appeals on behalf of the Republic.

The Appellant's case was two-fold. **Firstly**, that the plea was unequivocal, and **secondly**, the sentence was illegal.

In law, a plea which is ambiguous is said to be equivocal or not clear. For example - "*Guilty but I was not sure that the goods did not belong to me or were not mine.*" In the case of **ADAN vs. REPUBLIC** (*supra*) if a plea remains ambiguous, a plea of not guilty will be entered on behalf of the accused.

In this case, the Appellants pleaded guilty to stealing contrary to Section 275 of the Penal Code. They each confirmed his plea of guilty when the facts were read to them and the court confirmed the pleas of guilty.

Mr. Wamaasa learned counsel for the Appellants contended that the pleas were not unequivocal, and secondly that the facts were at variance with the particulars of the charge.

I have examined both the particulars and the facts as narrated by the prosecution. The particulars were that the Appellants on 2nd February 2009 at about 10.00 p.m. at Gilgil Oil Plant in Naivasha District, within Rift Valley Province, stole one steel iron bar, four bolts and nuts all valued at Kshs 3,000/= (*three thousand Kenya Shillings*), the property of Kenya Railway Corporation.

The facts were that on 2nd October 2009, at 10.00 p.m. security guards on duty at Kenya Railways spotted two men carrying things from the yard. The two men refused to stop when challenged. They were pursued and arrested. One steel iron bar was recovered from the 1st Appellant and four bolts were recovered from the 2nd Appellant. A spanner and a pipe wrench, tools used to unbolt the nuts were also recovered. Further investigations also revealed that the steel bar had been removed from the main Kenya-Uganda Railway line. The Appellants were consequently charged.

When asked by the court if the facts as narrated by the prosecution were correct, both Appellants pleaded in the Kiswahili language - "*The facts are true*". That plea was clear unequivocal and cannot be said to have been equivocal.

I am unable to discern any discrepancy between the particulars in the charge sheet and the facts read out by the prosecution. The particulars of the charge are by their nature and procedure, required to be concise, and therefore short. The facts will be a little longer because they are explanatory. The discrepancy in the date of 2nd February 2009 (*in the charge*) and 2nd October, 2009 (*in the particulars*) is merely an error which did not prejudice the Appellants in any way, in terms of Section 382 of the Criminal Procedure Code. If the timing was material, the Appellants would have objected to it

immediately when the facts were read to them. I agree with the submission by Miss Nyagol for the Republic that the Appellants were not prejudiced in any way by the discrepancy in the dates. I reject the contention to the contrary by Mr. Wamaasa.

Miss Nyagol conceded to Mr. Wamaasa's last contention that the sentence was illegal. The punishment for stealing under Section 275 of the Penal Code is imprisonment for three years. The Appellants were sentenced each to imprisonment for five years. That sentence was illegal as being contrary to statute.

The Appellants were sentenced on 4th February 2009 and have therefore been in prison for the last one year and seven months. Both pleaded for leniency, the first appellant has a family whilst the second appellant is jobless.

Their appeals have no merit at all except on the question of sentence. They have served just over 1^{1/2} years imprisonment out of a maximum of 3 years. I think taking into account the nature of the offence, the Appellants have suffered enough punishment. I would confirm their conviction but substitute their sentence from the illegal five years to 18 months. Since the Appellants have served this term I would direct that they be released forthwith unless otherwise held for lawful cause.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 5th day of November 2010

M. J. ANYARA EMUKULE
JUDGE