



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 126 of 2007

CHARLES NDEGWA WARUTERE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the conviction and sentence of

B.M. Kimemia Resident Magistrate in Senior Resident Magistrate's

Criminal Case No. 1174 of 2006 at KARATINA)

JUDGMENT

CHARLES NDEGWA WARUTERE, hereinafter referred to as the appellant was charged with the offence of stealing stock contrary to section 278 of the Penal. He pleaded guilty to the charge and was convicted on his own plea of guilty. He also accepted unequivocally the facts as put forward by the prosecution which were brief. Upon conviction, the appellant was sentenced to serve seven years imprisonment. The appellant was aggrieved by the conviction and sentence hence, he lodged the instant appeal.

In his home drawn petition of appeal, the appellant complained that,

- “1. That I pleaded guilty to the charge.
2. That I pleaded guilty that (sic) the charges because I was worried to stand before the thronged court as it was first time to face the magistrate.
3. That I was deceived by the arresting officer that if I admitted the offence I committed I would be acquitted by the court.
4. That I am a young boy who sat for O' Level examination and ready to proceed with further education.
5. That my condition behind the bars will be a pathetic (sic) nature in regard that I committed the offence in search of money so that I may join a certain course.
6. That I pray for the success of this application and be present during the hearing date.”

When the appeal came up for hearing **Mr. Orinda**, learned Senior Principal State Counsel conceded to

the same on the grounds that the facts did not connect the appellant with offence. He opined therefore that the case was a mistrial. That the facts were not clear as to whether the appellant stole the heifer or whether he is the one who sold it to one **Mr. David**. Because of what counsel perceived as a mistrial, he sought for an order for retrial.

Miss Mwai, learned counsel who had been retained by the appellant to argue the appeal on his behalf agreed in principle with the submission of the learned state counsel but parted company with the state counsel on the question of retrial. Counsel submitted that the appellant had served almost two years of the prison term imposed. A retrial would thus be prejudicial. That the heifer was recovered and thus no substantial loss was occasioned to the complainant.

Having carefully perused and considered the proceedings of the trial court, I am inclined to agree with the position taken by both counsel in this appeal. The particulars of the charge facing the appellant were that on the night of 8th and 9th December 2006 at Kiriko village in Nyeri District within central province, the appellant stole milking cow (heifer) valued at Kshs.5000/-, the property of John Munene Gichuki. To this charge the appellant pleaded guilty. What are the facts? From the record they were:-

“On 8/12/06 at around 6.00p.m. the complainant securely tied his heifer in his boma and later left to do other matters and in the morning of 9/12/06 at 6.30a.m. he woke up and found his cow missing and mounted a search with his family and did not get the same. He reported the matter at Kiamariga and as the search continued, one David had bought the same and later learnt that it was stolen and reported the same to the police with the chief, he knew the accused and searched for accused. Later the police were tipped of the whereabouts of accused and was later traced at Kiamariga and arrested and the recovered heifer returned to the owner. The accused was charged and arraigned before this court.”

From these facts it is quite clear that they do not point to the appellant as having stolen the heifer. In other words there is no nexus between the stolen heifer and the appellant. The heifer was in the possession of one, David who claimed to have bought it. However the facts do not show that he bought the same from the appellant. Accordingly and as correctly submitted by the learned Senior Principal State Counsel, the facts as outlined by the prosecutor do not connect the appellant with the offence. For that reason, this appeal ought to and is hereby allowed, conviction quashed and sentence imposed set aside.

Should an order for a retrial be made as urged by **Mr. Orinda**? Ordinarily an order for retrial will be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors for consideration include illegalities or defects in the original trial, the length of time having elapsed since the arrest and arraignment of the appellant in court, and whether the mistakes leading to the quashing of the conviction were entirely the prosecution's making or not. *See Muiruri v Republic [2003] KLR 552*. It is also necessary to consider whether a retrial will afford the prosecution a chance to fill in gaps in their case. Alternatively, as in this case whether a retrial will afford the prosecution opportunity to correct their mistakes. Further before making an order for retrial, the appellate court should be satisfied that on proper consideration of the admissible, or potentially admissible evidence, a conviction might result from the retrial. *See Mwangi v Republic [1983] KLR 522*.

I have taken all these principles into account and I am satisfied that an order for retrial in this case will not be proper at all. I am convinced that if I was to make such an order, I would indirectly have handed the prosecution a life line to correct the mistakes it committed when it gave the facts of the case. This will obviously occasion in justice and prejudice to the appellant.

In the result, I allow the appeal, quash the conviction of the appellant and set aside the sentence of seven years imprisonment imposed on him. The appellant shall be set at liberty unless he is otherwise lawfully held.

Dated and delivered at Nyeri this 29th day of January 2009.

M.S.A. MAKHANDIA

JUDGE