



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Criminal Appeal 120 of 2005

GODFREY URANDU ZACHARIAH ::::::::::::::: APPELLANT

V E R S U S

REPUBLIC ::::::::::::::: RESPONDENT

J U D G E M E N T

The appellant was convicted for the offence of stock theft contrary to **section 278** of the Penal Code. He was thereafter sentenced to imprisonment for 5 years.

In his grounds of appeal, the appellant decried the excessive sentence which the learned trial court had handed down to him. He pointed out that he was a first offender, and that he had pleaded guilty to the offence, as a result of plea bargaining. Therefore, in his considered view, the trial court ought to have been lenient when sentencing him.

Furthermore, he complained that the trial court had failed to take into account his mitigation. Therefore, the appellant asked this court to review the sentence, by reducing it, so as to reflect a sentence that was more appropriate in the circumstances of the case.

Although those were the issues which the appellant had set out in his grounds of appeal, he did raise a new issue when his appeal came up for hearing. The said issue was based on the provisions of **section 72 (3) (b)** of the Constitution.

It was the contention of the appellant that his constitutional rights had been violated, by being taken to court 5 days after his arrest. In the light of that alleged constitutional violation, the appellant submitted that his conviction ought to be quashed, and the sentence set aside.

Because the appellant raised that issue on the morning when the appeal had come up for hearing, the learned senior state counsel, Mr. Daniel Karuri, objected to the appellant being allowed to rely on it. His reason for the said objection was that by raising the issue on the very day when hearing, and without prior notice, the appellant was depriving the state of an opportunity to put forward its explanation for the delay in taking the appellant to court.

When the appellant opposed the state's application for an adjournment, the court put the appellant to an election. He was told to choose between limiting himself to the grounds of appeal specified in his memorandum of appeal, or alternatively, to consent to an adjournment. My reason for putting him to an election is that it would be wrong to allow the appellant to introduce a new ground of appeal at the very last minute, as that would then deprive the respondent of an opportunity to adequately prepare a response thereto.

Having been put to an election, the appellant then agreed to an adjournment, so that the respondent could have an opportunity to tender its explanation for the delay in taking the appellant to court.

The appeal was then adjourned for about 3 months.

When the appeal next came up for hearing, the respondent informed the court that the police had not been able to make available any explanation for taking the appellant to court after 5 days, instead of within 24 hours.

In the absence of any explanation from the police, for the delay in taking the appellant to court, I find and hold that the constitutional rights of the appellant had been infringed.

Secondly, as the learned state counsel noted, the trial court did not indicate the language used when the plea was taken. Therefore, this court is unable to ascertain whether or not the appellant did understand the language used in the trial court.

Accordingly, I find that the plea was not unequivocal.

In the result, it would be unsafe to sustain the conviction founded upon the said plea. The conviction is therefore quashed and the sentence is set aside.

It is ordered that the appellant be set at liberty forthwith unless he is otherwise lawfully held.

Dated, Signed and Delivered at Kakamega, this 29th day of January 2009

FRED A. OCHIENG

J U D G E