



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

**AT MOMBASA**

**Criminal Appeal 80 of 2008**

**SALIM HARE ..... APPELLANT**

**- Versus -**

**REPUBLIC ..... RESPONDENT**

**J U D G M E N T**

The Appellant, Salim Hare, was charged in the Senior Resident Magistrate’s court, Kwale, with stealing contrary to section 275 of the Penal Code. He was convicted on his own plea of guilty and sentenced to serve 2<sup>1</sup>/<sub>2</sub> years imprisonment. He appealed to this court against conviction and sentence.

His grounds of appeal as set out in the amended memorandum of appeal were as follows-

1. *That the plea of guilty was not unequivocal.*
2. *That the sentence of two and a half years imprisonment was excessive considering all the circumstances of the case.*
3. *That the learned magistrate took into consideration extraneous matters in sentencing the appellant.*
4. *That the facts as narrated by the prosecutor*  
*did not disclose the criminal acts committed by the appellant.*

At the hearing of the appeal, the appellant appeared in person while the Assistant Director of Public Prosecutions, Mr. Ondari appeared for the Republic. Mr. Ondari conceded the appeal on the grounds that the plea was not unequivocal; that the facts narrated by the prosecutor did not disclose the criminal acts committed by the appellants; and that the sentence was excessive.

A scrutiny of the proceedings before the trial court shows that when the charge was read and explained to the appellant, he replied “*Ni kweli*” which is Kiswahili for “*It is true.*” In the case of WANJIRU v. REPUBLIC [1975] EA 5, it was held that the words “*it is true*” may not amount to a plea of guilty, with the court saying at page 6-

“... *We are of the view that the words ‘It is true’ are a poor foundation for a conviction and they ought to*

*be explored in all save the simplest of charges. And where they are relied upon, a court should readily permit a change of plea where the facts are challenged or there is a possibility of a misunderstanding. ... It is surely better for a trial to be held than for there to be the possibility of injustice. Of course, each case must depend on its own facts."*

And in EDWARD KAZUNGU MAGEGO v. REPUBLIC Mombasa Cr. App. No. 316 of 1992, Omolo J., as he then was, observed that though the plea is recorded as "*It is true*", and the magistrate then proceeds to receive the facts in support of the charge, and if those facts disclose the offence charged, and are unequivocally admitted by the appellant, that would cure the inadequate plea of "*It is true*."

In the instant case, after the facts were read out, the appellant's response was-

*"The facts are true. I was with others."*

A closer look at the facts, however, discloses that they are at variance with the charge. Firstly, whereas the charge sheet alleges that the stolen water pipes measured 70 metres in length, the Prosecutor said in his statement of facts that the damaged section was 7.5 metres. Secondly, the prosecutor further said that the appellant was in the company of some other persons, and that four suspects including the appellant were arrested, and this fact was accepted by the appellant as can be seen from his acknowledgement of the facts. Yet, the appellant was charged alone. What happened to the other three suspects?

Another aspect of the matter was that the learned trial magistrate imposed a sentence of 2<sup>1</sup>/<sub>2</sub> years imprisonment out of a maximum sentence of three years. Since the appellant was a first offender, and had offered a plea of guilty, this sentence, bordering on the maximum, was manifestly excessive. Lastly, in sentencing the appellant, the trial magistrate also remarked that many Kenyans are suffering and lack the basic commodity of water because of the accused persons actions. That was a mater extraneous to what was before the court, and was not supported by any evidence.

Against that background, I find that the appeal must succeed, and that Mr. Ondari properly conceded the appeal. The appeal is therefore allowed, the conviction for stealing quashed and the sentence set aside. The appellant is set free forthwith unless otherwise lawfully held.

Dated and delivered at Mombasa this 26<sup>th</sup> day of March, 2009.

**L. NJAGI**

**JUDGE**