



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL 115 OF 2008

(From the Original conviction by the SRM Mrs. Alice Mong'are in Criminal Case No. 6348 of 2008 of Chief Magistrate's Court at Eldoret)

ALEX KASIANGANI:.....APPELLANT

VERSUS

REPUBLIC:.....RESPONDENT

JUDGEMENT

ALEX KISIANGANI the appellant herein was convicted of stealing contrary to section 278A of the Penal Code and Sentenced to serve two years imprisonment. Not being satisfied he has brought this appeal. The grounds of appeal are that the plea was not unequivocal and that being semi-illiterate the appellant was not conversant with Kiswahili and English and that the language used by the Appellant in responding to the charge and the exact words uttered are not specified. Other grounds of appeal are that the appellant's constitutional rights were violated by being held in police cells beyond the period allowed by law and the facts of the charge were at variance with the charge the Appellant was facing in the lower court and the same could not be used in support of the conviction and finally that the conviction was unsafe and the sentence is too harsh. He prays that conviction and sentence be set aside.

It was argued for the Appellant that the plea was equivocal as the language used was Kiswahili and the proceedings were in English only and the exact words of the Appellant in response to the charge were not recorded by the court. Learned counsel for the Appellant submitted that while it was true that the Appellant was given the motor cycle it was not clear when the same was to be returned and in those circumstances the offence of theft is not disclosed. He submitted that the Appellant had taken the motor cycle to generate some income as he had some financial problems and in any event he did not sell the motor vehicle. He submitted that the Appellant was found in possession of the motor cycle and since he had the same with the consent of the complainant which consent had not been withdrawn then the offence of theft was not proved. The fact that the Appellant had not sold the motor cycle despite his financial problems goes to show that he had not stolen it, counsel added. It was further submitted that the Appellant's constitutional rights were violated and that the Appellant should be retried by a different magistrate.

Learned counsel for the state opposed the appeal as lacking in merit. He submitted that plea was properly taken and the issue of language used was never raised and that the Appellant went further and admitted the facts and indeed went further to explain why he had committed the offence saying he had

financial problems. The appellant disappeared with the motor cycle and a search was mounted and the same was recovered in the house of a third party. It was further argued that there was no breach of constitutional rights as the Appellant was arrested on Friday evening and as the courts do not sit over Saturdays and Sundays the Appellant was brought to court on Monday. Counsel finally submitted that there is no basis for a retrial.

I have considered this appeal and taken into account what both counsel have had to say in support of their respective positions. The proceedings are quite clear as to the taking of plea and the explanation of the ingredients of the offence and the facts as explained were admitted by the Appellant who had pleaded guilty to the offence of theft. In my considered view there cannot be any basis in raising the question of the language used. The court file and proceedings are explicit on that. If the Appellant did not understand Kiswahili the language used in court on the material day how then did he communicate his mitigation that he had financial problems and that he was sole bread winner considering that there is no evidence of an interpreter having been used? When counsel submits that the Appellant took the motor cycle to generate an income, with respect he converts himself into a witness too late in the case as no such evidence came out during the proceedings. And it is not true as submitted that the Appellant was found in possession of the Motor cycle or that he had given it to a third party for safe keeping. This latter proposition did not come out either in the facts as read out to the accused or in his mitigation. On the contrary the Appellant himself stated that he had financial problems to explain why he did what he did is an admission of the commission of the offence he was charged with. The inference to be drawn from that statement and the fact that the Appellant did not return the motor cycle by the evening of the material day prompting the complainant to report the disappearance of the Appellant and the motor cycle and the fact of the motor cycle having been found with a third party, can only be that the offence of theft was committed by the Appellant and he was concealing it.

The trial magistrate cannot be faulted. I have not found evidence of violation of the Appellant's Constitutional Rights. The proceedings are crystal clear that the Appellant was arrested in the evening of Friday and the court takes Judicial Notice of the fact that courts do not transact business on Saturdays and Sundays and as it is not denied that the Appellant was promptly taken to court on the Monday following the Friday of his arrest, then the issue of having been held beyond time and hence a violation of his Constitutional Rights must fall by the wayside.

The totality of the above consideration is that this appeal must fail and the same is accordingly dismissed.

Those are the orders of the court.

DATED AND DELIERED AT ELDORET THIS 15TH DAY OF OCTOBER, 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

Mr. Miyianda H/B for Mr. Momanyi

Mr. Omutelema H/B for Mr. Chirchir for Appellant – Absent

C/C - Paul.