



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

Criminal Appeal 244 & 245 of 2008

(From original conviction and sentence in the Resident Magistrate's Court Kehancha , Criminal Case No 1155 of 2008 by J.R.NDURURI (RM))

JOHN WEREMA BOKE1ST APPELLANT

JOSEPH MARWA WEREMA.....2ND APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

The appellants were jointly convicted on own plea of guilty by the Resident Magistrate's Court , Kehancha, of theft contrary to *section 278 of the Penal Code*, and each sentenced to serve 5 years in jail. The particulars of the charge were that on 16/12/2006 at Kobinto village in Kuria District within Nyanza Province they stole one cow valued at Kshs. 19,000/= the property of Joshua Chacha Magige. They faced the alternative charge of handling stolen property contrary to *section 322(2) of the Penal Code*, that on 15/11/2008 at Nuabikongori sub location in Kuria District within Nyanza province otherwise than in the course of stealing dishonestly retained one cow worth Ksh. 19,000/= belonging to Joshua Chacha Magige knowing or having reasons to believe it to be stolen property.

The record shows that the “charge” was read over and explained to the appellants in Kiswahili and each replied:

“It is true.”

The prosecutor read the following facts. On 16/12/2006 at Kobinto village in Kuria District the complainant locked up his cows in a boma and went to sleep. At about 2 a.m he woke up to find two cows missing He raised an alarm and members of public responded. They followed the tracks without success. Matter was reported to Kehancha police station and investigations begun. On 15/11/2008 at about 9 a.m the complainant was walking around Nyabikongori when he saw one of his stolen cows grazing in a herd. He reported to the area chief who summoned “sungusungu” who arrested the two appellants who owned the flock. They recovered the cow and subsequently the appellants were charged. The other cow was not recovered. To the facts, each appellant replied:

“ Facts are true ”

The court proceeded to convict the appellants on own plea. The prosecution asked each to be treated as a first offender. The court asked the appellants to mitigate. 1 st appellant stated:

“I have never stolen. I bought the animal.”

The 2nd appellant stated:

“I am cattle trader”.

The court observed the following, before sentencing:

“Accused persons have admitted to stealing the two heads of cattle. This offence is very prevalent in Kuria and often results in interclan animosity and unnecessary loss of life. A deterrent sentence is called for.”

The complaint by Mr. Kweya for the appellants was that the plea was not unequivocal; that it was not clear to which charge, the main one or the alternative, the appellants had pleaded to. Counsel went on that the mitigation of 1st appellant clearly showed he was denying the charge. Regarding sentence, counsel pointed out that the trial court was punishing the appellants for the theft of two cows when the charges indicated only one cow was in question. To that extent, he submitted, the sentence was illegal.

Mr. Mutai for the state opposed the appeal in its entirety, and maintained the plea was unequivocal and the sentence legal.

I agree with Mr. Kweya that it was not clear from the proceedings to which charge the appellants were being asked to plead. The charge sheet had a main charge and an alternative charge. If the appellants were pleading guilty to the main charge, the record should have indicated so. (See *Ombena .V.Republic [1981]KLR 450*). The court should also have indicated the charge in respect of which conviction was being entered. During sentencing, the appellants were being dealt with for stealing two heads of cattle. That statement was being made late in the day. In any case, the charge sheet blamed the appellants for the theft of one cow, and not two. The decision in *Nyaru.V.Republic,HC Criminal Appeal no.19 of 2005 at Machakos* is useful.

When the appellants indicated the facts as correct, they were agreeing to the cow having been found in their herd. They were admitting to possession of the cow. In view of the charges, the court ought to have asked each appellant whether such possession meant he had stolen it, or that he had the cow knowing it to be stolen or unlawfully obtained. In other words the narrated facts did not point to theft or handling stolen property. It follows that the plea was equivocal, and conviction ought not to have been entered. (See *A dan .V.Republic [1973] E.A.445*).

If there were doubts about the mind of the appellants at the time, this became clear when the 1st appellant mitigated. He stated that he had bought the animal. He was saying he was in innocent possession of the cow. Since the animal was found in one herd belonging to both appellants, what the appellant was saying affected both. An accused person can change his plea at any time before sentencing. (See *Kioko .V.Republic [1983] KLR 289*).

Something about the sentence. It has already been indicated the appellants were being punished for the theft of two cows when they had been convicted for the theft of only one. But the magistrate went further than that. He made statements that indicated he was being influenced not only by the gravity and circumstances of the case but also by other matters in respect of which there was no evidence. It is good practice that an accused should be sentenced only for the offence with which he is charged, and that the facts to be considered in sentencing should be the ones relating to that charge. (See *Gibson Kimani .V. Republic [1989] KLR 293*).

The result is that the appeal against conviction and sentence is allowed. The conviction is quashed and the sentence set aside. The appellants shall be set at liberty forthwith unless they are otherwise being legally held.

Dated, signed and delivered at Kisii this 13th Day of November, 2009

A.O.MUCHELULE

JUDGE

13/11/2009

13/11/2009

Before A.O.Muchelule-J

Mongare court clerk (Kiswahili)

Mr. Kemo for state

Appellants-present

COURT: Judgment in open court.

A.O.MUCHELULE

JUDGE

13/11/2009