



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI Criminal Appeal 143 of 2008

STEPHEN OMINA JUMA.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

JUDGEMENT

Stephen Omina Juma (the appellant) was convicted on a charge of stealing by servant contrary to section 281 of the Penal Code and sentenced to 4 (four) years imprisonment.

He had pleaded guilty to the charge whose particulars were that on diverse dates (he and Abdulhaq Omar Salim (who was the 2nd accused) between 30th October 2008 and 3rd November 2008, at Bomani village in Kilifi District within Coast Province, jointly, being a servant to Salim Haji Mansor, stole from the said Salim Haji Mansor, twelve (12) sacks of Broilers Starter and Finisher Crams all valued at Ksh. 28015/-

The charge was read over to the appellant in Kiswahili – he replied as follows

“it is true.”

The facts were then narrated as follows;

“On 30-10-07, the complainant who is a businessman in Mombasa was the place of work. He received report from workers in a farm within Kijipwa that the two accused were seen with 12 sacks of broilers and when complainant asked, they refused. On 3-12-08, he got report that there was theft of some farm items. He approached both accused who denied. The complainant reported at Kijipwa Police. The police visited scene and found 12 sacks of starter and finishers crams were stolen valued at Kshs. 28015/-. The accused persons arrested and taken to Kijipwa. They were charged”

Appellant’s response to these facts was:

“facts are correct”

His mitigation was that he had a wife and two children and he was the breadwinner. So the appellant was convicted on his own plea and sentenced.

He appeals against both conviction and sentence, saying that:

1. The trial magistrate ought to have warned him of the repercussions of pleading to such a charge
2. The learned trial magistrate erred when he failed to establish the reason why appellant was pleading guilty to the charge
3. The sentence posed was harsh and excessive.
4. The sentence was not compatible with the circumstances of the case.
5. The trial magistrate ought to have considered his plea in mitigation.

Appellant then filed written submission in which he introduced new issues about the charge sheet being defective and offending section 37(1) Criminal Procedure Code – I think the provisions on the Criminal Procedure Code are very clear, an appellant can only argue issues raised in the petition of appeal and not spinning surprises by introducing new matters in submissions.

Then he also submits that the charge was based on open conspiracy, malice and spite, due to the reference of diverse dates and that the dates referred to in the chamber summons were not contained in the facts. He argues that he was convicted on imaginary dates and wonders why the offences which took place in the span of one year were not reported to the police.

Further that there were contradictions in the charge sheet as compared to the facts citing the case of **Agustino Njoroge Ritho v R Cr. App. No. 99 of 1986 (Nrb)**, to buttress his argument that contradictory evidence is unreliable. Also the case of **Alisend Nyachiro Marure v R Cr. App. 1596 of 1984**, which held that *“There should be no material discrepancies between the evidence given to the police and evidence given to court.”*

Some of the issues appellant addresses in court are so disconnected and unrelated to grounds of appeal and amorphous it is difficult to decipher his meaning. He claims to have been coerced by the arresting officer to plead guilty to the charge.

The appeal is opposed and Mr. Ogoti (Counsel for the State) submits that appellant has argued the appeal as though the matter went on full trial, yet he had admitted the charge and was convicted on his own plea. Further that plea was properly taken and sentence was within the law. It is his contention that appellant has not placed anything before the court to warrant interfering with conviction and sentence.

It is certainly not the trial magistrate's duty to advise an accused person on what considerations to make before entering plea – I think that only applies where one is facing a capital offence. It was certainly not the trial magistrate's duty to find out why the appellant had elected to plead guilty. If he was coerced to plead guilty and did not disclose that to the trial magistrate, then surely there is no way that the same can no be used to fault the trial magistrate.

All the issues about dates in the charge sheet not agreeing with what is contained in the facts is

a) Incorrect and therefore misplaced.

b) Was never raised as a ground of appeal.

I have read through the proceedings and concur with the learned Assistant Deputy Public Prosecutor that plea was properly taken, facts were narrated and confirmed by the appellant. Taking into consideration the nature of the offence, my finding is that the sentence was proper and within the law. There is no reason whatsoever to warrant interfering with the findings of the lower court and the appeal is dismissed. The conviction is upheld and sentence duly confirmed.

Delivered and dated this 10th day of **December 2009** at Malindi.

H. A. Omondi

JUDGE