REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 182 OF 2006 & 186 OF 2006

JOHN MWANGI NYAGA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Karatina in Criminal Case No. 119 of 2005 dated 15th August 2006 by P. C. Tororey – SRM)

CONSOLIDATED WITH

HIGH COURT CRIMINAL APPEAL NO. 186 OF 2006

PETER KARUMBA KIIRITU ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Resident Magistrate's Court at Karatina in Criminal Case No. 119 of 2005 dated 15th August 2006 by P. C. Tororey – SRM)

J U D G M E N T

The two appellants herein whose appeals I have consolidated were charged with the offence of stealing stock contrary to section 278 of the Penal Code. They pleaded not guilty to the charge and were tried and convicted. Upon conviction, they were each sentenced to four years imprisonment. They were aggrieved by the conviction and sentence. Hence they preferred separate appeals which as I have already stated have been consolidated.

At the hearing of the appeal both appellants elected to abandon the appeal on conviction but pursue the appeal on sentence. Since **Mr. Orinda**, learned counsel did not object to the position taken by the appellants regarding their appeals, I granted their wish. The appeals thereafter proceeded on sentence only.

In support of the appeal on sentence, the appellants submitted that the sentence imposed of four years was excessive and that they had been sufficiently punished for the time they have so far served on the sentence imposed.

In response, **Mr. Orinda** opted to leave the matter to court.

It is trite law that sentencing is a matter for the discretion of the sentencing court. As such an appellate court will rarely interfere with such exercise of discretion unless it is demonstrated that the sentencing court exercised the discretion capriciously and not judicially, that the sentence imposed was manifestly harsh and excessive or that the sentence imposed was illegal or in reaching the sentence, the sentencing court took into account irrelevant considerations and failed to take into account relevant considerations. See **Ogola s/o Owuora (1954) 21 EACA 270, Wanjema v/s Republic (1971) E.A. 493** e.t.c.

In this case, the appellants faced a charge of stealing stock contrary to section 278 of the Penal code. The maximum sentence permissible is fourteen years imprisonment. However the appellants herein were sentenced to four years imprisonment. That sentence cannot be said to be illegal or manifestly harsh and excessive. It was certainly legal and if anything, lenient. I would therefore not have been minded to interfere with the same.

However it does appear to me that the proceedings before the learned magistrate were nullity. Much as the appellants abandoned their appeals on conviction, nonetheless it is my duty as a first appellate court to satisfy myself as to whether the proceedings leading to the conviction of the appellants were proper and regular. I am therefore not bound by the positions taken by the appellants with regard to their respective appeals.

The first irregularity is with regard to section 200 of the Criminal Procedure Code. The appellants' case was first presided over by **Mrs. R. Oyaro Mecha – R.M**. She heard the two prosecution witnesses (PW1 & PW2). That was on 23rd June 2005. Thereafter the matter was adjourned severally until 22nd December 2005 when it was taken over by **P.C. Tororey – SRM** in an unclear circumstances. The record is not clear as to whether **Mrs. Oyaro Mecha** had ceased to have jurisdiction on the matter or had left the station or even judicial service.

On taking over the matter, **P.C. Tororey** did not comply with the strict and mandatory requirements of section 200 of the criminal procedure code. She did not explain the options available to the appellants pursuant to that section. The need to make that explanation and to invite the appellant to opt for any of the options available to them is mandatory. It is not sufficient to merely indicate in the record that "**complied with section 200 of the CPC ....**" The learned magistrate has to do a little more. That was not the case here. I cannot therefore rule out completely the possibility that the appellants were not prejudiced by the failure by the learned magistrate to alert them of their rights under section 200 of the Criminal Procedure Code.

The other irregularity I have noted in the proceedings is that some witnesses it would appear testified without being sworn. For instance when PW1 & PW2 testified, the record of the learned magistrate is reflected merely as follows:-

PW1 Michael Muriuki Mithamo:

I am a farmer. On 25/1/05 I recall I went and locked up my three cows....."

PW2 Geoffrey Mithamo:

I split timber. On 21.1.05 I recall I was at my house when I heard noises from cattle boma ....."

From the foregoing, it is difficult to tell whether the witnesses were sworn before they commenced their testimony. It is possible they were sworn but the learned magistrate inadvertently failed to indicate so. It is equally possible that the witnesses my actually not have been sworn. We are a court of record

and we can only go by what is onrecord. As in any criminal proceedings any doubt which arises must be resolved in favour of the appellants.

Again from the aforesaid extract, it is not possible to tell the language of the court and in which the witnesses and the appellants opted to address the court. This was a fatal omission rendering the proceedings a nullity. See **Simbauni Simiyu & others v/s Republic.**

Due to this gross or inadvertent errors on the part of the learned magistrate, the proceedings were a nullity and I so hold. The consequence of my so holding is that the appeal is allowed, conviction quashed and the sentence imposed set aside. The appellants and each one of them should be set at liberty unless otherwise lawfully held. This is not a case where a retrial will be an option as the appellants have already served a substantial portion of the sentence.

Dated and delivered at Nyeri this 30th day of June 2008

M. S. A. MAKHANDIA

JUDGE

Delivered by Hon. Lady Justice Kasango this 30th day of June 2008

MARY KASANGO

JUDGE