REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
Criminal Appeal 44 of 2007

(An appeal against both conviction and Sentence of the Resident

Magistrate's Court at Brutal in Criminal Case

No. 283 of 2007 (C. N. NDEGWA, RM)

JOSEPH MARTIN ……..…… APPELLANT

V E R S U S

REPUBLIC ……..…..…… RESPONDENT

JUDGEMENT

JOSEPH MARTIN was convicted for the offence of stock theft contrary to section 278 of the Penal Code. He was thereafter sentenced to 4 years imprisonment.

In his appeal to the High Court, the said Joseph Martin, who shall hereinafter be cited as "the Appellant" cited 5 grounds of appeal, as follows:-

"***1. THAT the learned trial magistrate erred in law and in fact in convicting the appellant on a plea that was not unequivocal.***

2. THAT the learned trial magistrate erred in law and in fact in convicting the appellant on a charge that was not read and explained to him in a language that he understood.

3. THAT the learned trial magistrate erred in law and in fact in convicting the appellant on facts that did not disclose the offence of theft.

4. THAT the learned trial magistrate erred in law and in fact in failing to record the language in which the proceedings were taken.

5. THAT the learned trial magistrate erred in law and in fact in meting out to the appellant a sentence that was excessive in the circumstances of the case."

When canvassing the appeal, Mr. Anziya, learned advocate for the appellant, submitted that the charge and the particulars thereof were not read in a language understood by the appellant.

The advocate contended that the language in which the proceedings were taken was not indicated on record.

In his opinion, there had been an attempt, after the proceedings were typed, to insert by hand, that the appellant had replied in Kiswahili.

However, even if the appellant had given his answer in Kiswahili, the appellant insists that it was still not clear in what language the charge was read.

When the court inquired from Mr. Anziya what language was used at the trial, he said that he had been instructed by the appellant, that the language of the trial court was English.

The appellant also submitted that had he given his answer in Kiswahili, his exact words ought to have been recorded.

The next issue raised by the appellant was to the effect that the particulars of the charge do not support the offence of stock theft, as the particulars were in relation to the refund of money.

Thirdly, the appellant submitted that whereas the charge indicated that he had committed the offence together with other people, the particulars provided by the prosecutor indicated that the appellant had acted alone.

For those reasons, the appellant asked this court to allow the appeal.

However, the learned Senior State Counsel, Mr. Daniel Karuri expressed the view that the conviction of the appellant was safe. He therefore submitted that the appeal ought to be dismissed.

It was the State's contention that the language of the court was Kiswahili.

It was also the submission of the state that if the appellant had not understood the language in which the charge and the particulars had been read out, he could not have responded thereto, by saying;

"***It is true.***"

Therefore, the state is of the considered view that the plea of the appellant was unequivocal, as he had admitted the facts.

Furthermore, it was submitted that the facts spelt out by the prosecutor, did disclose the offence with which the appellant had been charged.

For those reasons, the state urged me to dismiss the appeal.

A perusal of the original record of the proceedings before the trial court reveals that there is what appears to be a pre-typed script, in the following word;

"***The substance of the charge(s) and every element thereof has been stated by the court to the accused person, in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies:***"

Immediately after the typed part of the record, it was inserted by hand;

"***in Kiswahili,***

It is true."

Whereas, the pre-typing of the words above-cited may be intended to facilitate the pace at which pleas are taken, I find that it fails to indicate the language of the court or the language in which the charge and the particulars were read out to the accused person.

Provision was only made for the language in which the accused replied to the charge.

In my considered view, the fact that the accused is shown to have replied in Kiswahili, does not by itself automatically mean that the charge was read out to him in Kiswahili.

The learned trial magistrate ought to have specified the language in which the charge was read out. By so doing, there would be no room for arguments, as were made in this appeal, wherein the appellant asserted that the proceedings were conducted in English, whilst the state asserted that the charges were read out in Kiswahili.

In the case of ***KARIUKI v. REPUBLIC [1984] KLR 809***, the Court of Appeal restated the steps which had been laid down by the former East African Court of Appeal, in ***ADAN v. REPUBLIC [1973] E.A. 445***, as to the manner in which a plea of "**Guilty**" should be recorded. They stated as follows, at page 813;

"***The trial magistrate or judge should read and explain to the accused the charge and all the ingredients in the accused's language or in a language he understands, he should then record the accused's own words and if they are an admission, a plea of guilty should be recorded; the prosecution may then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts; if the accused does not agree to the facts or raises any question of his guilt his reply must be recorded and change of plea entered, but if there is no change of plea, a conviction should be recorded and a statement of the facts relevant to the sentence together with the accused's reply should be recorded."***

Applying that authority to the appeal before me I find that the learned trial magistrate erred by not indicating the language in which the charge and all the ingredients thereof were read to the appellant.

Secondly, I find that if the appellant answered in Kiswahili, as is indicated on the record, the learned trial magistrate erred in law, by failing to record the exact words uttered by the appellant.

The words "It is true", are not in Kiswahili. And it matters not that the said words were an accurate translation of the answer given by the accused person. The requirement is that the court should record the exact words uttered by the accused personally or through an interpreter, if the language used by the accused is neither English nor Kiswahili.

In the case of ***KARIUKI vs. REPUBLIC*** (above-cited) the Court of Appeal held that the failure to follow the correct procedure for recording a plea resulted in the appellant not having a satisfactory trial.

I also find that whereas the charge sheet indicated that the appellant had committed the offence "***jointly with others not before the court",*** when the prosecutor set out the facts of the case, he said that the appellant had acted alone. To that extent, the facts did not support the charge as set out in the charge sheet.

The facts given by the prosecutor also indicate that the appellant had been arrested and charged only after he had failed to honour his promise, to refund to the complainant, the money which he had made from selling the complainant's 2 cows.

As far as the appellant was concerned, those facts did not support the charge of stock theft.

However, I find myself completely unable to share that view, with the appellant.

It is my considered view that by the time the appellant was making an offer to pay to the complainant, the money which the appellant had made from selling-off the complainant's 2 cows, the offence had already been committed.

The appellant had taken the cows and sold them, but without the knowledge of the complainant. The sale of the animals was done at Matete market.

Obviously, as the complainant did not know about the said sale, he could not have authorized it. Secondly, as the cows were sold at the market, the appellant must have intended to sell them to anybody, who had sufficient funds, regardless of wherefrom the person hailed.

As it transpired, the animals were never recovered. In effect, the complainant was permanently deprived of his two cows.

The offence of theft had been committed, regardless of the intention, thereafter, by the appellant to pay to the complainant the money raised from the sale of the 2 cows.

In my considered opinion had not the learned trial magistrate erred in the manner in which the plea was taken, the conviction would have been safe. As the failure to follow the correct procedure for recording the plea resulted in the appellant having an unsatisfactory trial, the conviction cannot be sustained. It is therefore quashed, and the sentence is set aside.

In the case of ***KARIUKI v. REPUBLIC*** (above-cited), the Court of Appeal said;

"***From what we have said above it is apparent that the magistrate did not follow the correct procedure for recording a plea of guilty, ……..and the irregularities and omissions committed by the subordinate court resulted in the appellant not having a satisfactory trial. We agree with the pronouncement in REP VS. VASHANJEE LILANDAR DOSSANI [1946] 13 EACA 150 that the fairest and proper order to make where the accused person has not had a satisfactory trial is an order for a retrial."***

In line with that authority, and pursuant to the powers vested on the High Court by section 354 of the Criminal Procedure Code, I order that the appellant shall be charged afresh, with the offence as set out in the charge sheet in Butali Criminal Case No. 283/2007. It is further ordered that the trial shall be accorded priority by the magistrate's court.

Dated, Signed and Delivered at Kakamega, this 23rd day of September, 2008.

FRED A. OCHIENG

J U D G E