REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Criminal Appeal 1 of 2007

(Arising from KML SRM CR. NO. 900 of 2006)

MICHAEL KASEMBELI……...……APPELLANT

VS

REPUBLIC…….……STATE

(Arising from KML SRM CR. NO. 900 of 2006)

JUDGMENT

Michael Kasembeli hereinafter referred to as the appellant was arraigned before the Kimilili Resident Magistrate's Court on 28.12.2006 where he was charged with the offence of stealing by agent contrary to section 283 of the Penal code. The particulars of the charge were that:

"*On the 10th day of October, 2006 at Kimilili Town in Bungoma District within the Western Province, stole an ox valued at Ksh.8,500/= which had been entrusted to him by CARO WAFULA to sell and remit cash to her."*

He admitted the charge and a plea of guilty was entered when the charge was read over to him in Kiswahili language which he is said to have understood, he replied; *"It is true"*.

The facts were read over to him and upon being asked whether they were correct, he replied "*The facts are correct."* The learned trial magistrate thus went ahead and convicted him as the law requires. He appears to have mitigated by saying that he was "*sickly"*. There is no evidence on record however that he produced any medical evidence to show that he was sick and what he ailed from.

He was sentenced to 3 years imprisonment. Being dissatisfied with the said conviction and sentence he filed this appeal urging the court to quash the conviction and set aside the sentence. The appeal is premised on the following grounds:

1. That the learned trial magistrate erred in law and infact, in arriving at a judgment and passing a sentence, without satisfying himself fully that the appellant understood into details the charge and the facts thereof in the language the accused understood, and into details and that 'Bukusu' language.

2. That the learned trial magistrate erred in law and infact in arriving at a judgment and sentence which was very harsh and excessive in the circumstances of the case.

3. That the learned trial magistrate erred in law and infact in arriving at a decision without giving the appellant an opportunity of defence and mitigation thereby denying him rules of natural justice.

4. That the learned trial magistrate erred in law and infact in passing a judgment of 3 years imprisonment without any due consideration of an option or alternative sentence of fine or pardon or at all in favour of the appellant.

Counsel argued grounds 1 and 3 together and grounds 2 and 4 together. It will however be noted that in his submission in court, he did not say anything about the language issue. There was no submission to the effect that the appellant did not understand Kiswahili language which was the language used in court on that date. I would nonetheless point out that according to the record the appellant did understand the language used. If he did not, he would definitely have complained that he did not understand it. It is also noted that he even admitted the facts and mitigated. My finding on this issue therefore is that he understood very well the charge read out to him and the facts before he was convicted. Ground one is therefore not sustainable. I have considered the rest of the grounds along with the submissions by both learned counsel herein. Contrary to learned counsel for the appellant's submission in court, my finding is actually that the fact as read tallied or were in tandem with the particulars of the charge. The particulars of charge clearly state that the appellant was given an ox to go and sell for 8,500/=. The particulars disclosed that the appellant did actually sell the ox but failed to remit the money.

He thus took away the complainant's ox with his permission but he had a clear intention of depriving the complainant of the same permanently. He neither returned the ox nor the proceeds of its sale. This amounted to stealing the said ox. The situation falls squarely under section 283 (b) of the Penal Code. The charge was not therefore defective and the facts and the particulars did disclose the charge of stealing by agent. This was in my considered view a clear case of theft by agent. There was an overt fraudulent intent and this places the matter squarely in the realm of criminal culpability. This was not a civil claim disguised as a criminal case. The charge was properly before the court of criminal jurisdiction. The fact that the complainant had recourse to a civil remedy could only have been a mitigating factor which was nonetheless not raised by the appellant when he mitigated before the trial court.

Having considered the proceedings before the trial court along with the grounds of appeal raised and the submissions in court by both learned counsel, my finding is that the plea herein was properly taken. The same was unequivocal and I have no reason whatsoever to interfere with the conviction that followed.

On the issue of the sentence, I have considered the fact that the learned state counsel does not oppose the same. The sentence of 3 years imprisonment viewed *vis-a-vis* the value of the subject matter and the availability of a civil remedy is in my considered view a bit on the high side. I will therefore allow the appeal on sentence and reduce the same from 3 years imprisonment to 18 months imprisonment. The appeal against conviction is hereby dismissed. Appellant to serve 18 months from the date of the sentence.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 19th day of June, 2007 in the presence of:- Mr. Ndege for the State.