



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Criminal Appeal 88 of 2006

WYCLIFF ADIKA VINZI APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

The Appellant, Wycliff Adika Vinzi was charged on 19th March, 2004 before the Chief Magistrate's Court Eldoret with the offence of Kitchen Breaking and committing a felony contrary to Section 306 (a) of the Penal Code. There was a second Count of handling stone property contrary to Section 322 (1) of the Penal Code. This was in Eldoret CM.Cr.C No. 2070 of 2004.

After hearing the case, the Senior Resident Magistrate Mrs. M. K. N. Nyakundi on 26.07.05 convicted him of the offence and sentenced him to seven (7) years imprisonment. The Accused then filed this Appeal on 3rd November, 2006 but it was filed out of the prescribed period. Upon his application this Court allowed the Appeal to be filed out of time.

In the Petition of Appeal the Appellant pleaded that:-

1. That he pleaded not guilty at the trial.
2. That the Learned Magistrate erred in law by convicting him without considering that the prosecution failed to prove the ownership of the bicycle pump which the complainant had claimed to be his, whereas the bicycle pump was his (appellant's) and for which he "adduced" the purchase receipt before the Court. (sic)
3. That the Learned Magistrate erred in law and fact by rejecting his defence without advancing cogent reasons in rejecting the same. (sic)
4. That the trial court should have taken the evidence of the complainant as that of mistaken identity as the said items were his. (sic)

At the hearing of the Appeal, the Respondent, the Republic through the Principal State Counsel Mr. Omutelema, conceded to the Appeal in respect of both the conviction and sentence.

I have considered the Appeal, the proceedings, Judgement and the submissions by both the Appellant and the Respondent's Counsel.

The Learned trial Magistrate acquitted the Appellant in respect of the first Count. In the Second Count of handling stolen property the Learned Magistrate found that the Accused was found in possession of a bicycle pump and a headlight which had been stolen. She said that there was sufficient evidence to prove this and the evidence was corroborated by the prosecution witnesses. She added that the Accused had failed to persuade the Court that he is the owner of the pump. The Learned Magistrate rejected the receipt produced by the Accused to prove that he had purchased it. She said that he should have called the maker of the receipt to testify and having failed to do so, the pump does not belong to him. She also found that while the Accused had told the Court that the bicycle with which he was found belonged to his brother Elisha, he did not produce any evidence to show the same.

From a careful reading of the proceedings and Judgement and taking into account the concessions by the Respondent, it is clear that the Learned Magistrate shifted the burden of proof to the Accused contrary to the law. In this case of handling, all the Appellant was obliged to do was give a reasonable explanation as to the circumstances in which he had possession.

The Complainant, PW 1 gave inconsistent evidence regarding the ownership of the bicycle. At the first instance, he said that the bicycle was his but shortly thereafter, he said that the bicycle was not his but the accessories were his. The Trial Magistrate should have taken into account this glaring contradiction and questioned the credibility of the complainant upon whose statement the Accused had been charged with the first count of kitchen breaking and committing a felony.

The Complainant said that he did not have a receipt for the bicycle pump but he could identify it since it had welding marks and a rubber band on it. It should be noted that it was the Complainant's duty through the prosecution to adduce evidence to prove ownership of the bicycle pump. The Accused on the other hand produced a receipt for the purchase of the bicycle pump but the same was rejected. This was a misdirection on the part of the Learned Magistrate.

I do hereby find that the conviction of the Appellant was based on insufficient evidence and a misdirection on the burden of proof. While I am not obliged to go into the question of the sentence, it is the duty of this Court to make its observations in respect thereof.

Assuming that the conviction was sound in law, a sentence of seven (7) years considering all the facts and circumstances was excessive, harsh and totally unreasonable. The trial Court ought to have considered the nature of the bicycle pump which was only one of the items whose value was given to be Shs. 4,500/=. These were one Raja bicycle, 40 Kgs of maize, one cock and a bicycle pump! The value of the bicycle pump could not have exceeded 10% of the value of the total i.e. Shs. 450/=. The pump had been recovered.

I think that this was an appropriate case for a non-custodial sentence. Quite correctly, the Learned Magistrate called for Probation Officer's Report, to consider the propriety of a non-custodial sentence. However, at the sentencing the Magistrate said that she had perused the Report and went ahead to give the seven (7) year custodial sentence. No reasons were given for the rejection of a custodial sentence. It is my view that the sentence ought not have exceeded a period of one year.

In view of the foregoing, I do hereby allow the appeal, quash the conviction and set-aside the sentence of seven (7) years imprisonment. As a result, the Appellant shall forthwith be released from prison unless otherwise lawfully held.

The Accused has had to stay in prison for the last 2 years serving the sentence. This Court has now found that the conviction was improper and invalid. What this Court is concerned with most is the sentence which was meted out in this case. It was manifestly excessive and oppressive to say the least. I think the trial Courts ought to consider the sentencing aspect very carefully, and judiciously. We are talking of an individual's liberty when convicting and sentencing which are both important judicial processes. Once there is conviction, the trial Courts must still act objectively and fairly protecting the rights of not only the Society, Complainant and the State but also the rights of the convict. Conviction justifies and permits the lawful taking away of the individual's liberty through sentencing. However, if

the sentence is not commensurate with the offence and the circumstances then it can amount to an illegal sentence if it is so excessive and disproportionate that it violated the rights of the convict to his liberty vis-à-vis in Section 72 of the Constitution. Any excessive sentence can amount to an unconstitutional sentence if the degree is so outrightly harsh, long and disproportionate that it negates all sense of fairness and justice. I think the sentence herein was such a sentence.

DATED AND DELIVERED AT ELDORET ON THIS 13TH DAY OF JUNE, 2007.

M. K. IBRAHIM

JUDGE