REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 20 of 2007

(From original conviction and sentence of the Principal Magistrate's Court at Nyahururu in Criminal Case No. 1021of 2006– H. M. Nyaberi [R.M.])

ROBERT KIPKOECH NGENO……………….……...APPELLANT

VERSUS

REPUBLIC………………………………………….RESPONDENT

JUDGMENT

The appellant, Robert Kipkoech Ngeno was charged with the offence of Stealing stock contrary to section 278 of the Penal Code. The particulars of the offence were that on the nights of the 18th & 19th February 2006 at Lebalos village, Mochongoi Division of Baringo District, the appellant jointly with others stole four herds of cattle valued at Ksh.60,000/=, the property of Susan Kobiro. The appellant was alternatively charged with **Handling stolen goods contrary to Section 322(1) of the Penal Code.** The particulars of the offence were that on the 20th February 2006 at Mogotio slaughter house in Mogotio, Koibatek District, the appellant jointly with others, otherwise than in the course of stealing handled four herds of cattle knowing or having reason to believe the same to be stolen. The appellant pleaded not guilty to the charge and after a full trial, was convicted as charged on the main count and was sentenced to serve four years imprisonment. The appellant was aggrieved by his conviction and sentences and has appealed to this court.

At the hearing of the appeal, Mr. Mugambi for the State conceded to the appeal on the ground that the language in which the trial court took the proceedings did not appear on record. He submitted that the failure by the trial magistrate to indicate the language of the court meant that the conviction of the appellant was vitiated. He therefore submitted that the appellant's conviction should be set aside. He however pleaded with the court to order a retrial in view of the overwhelming evidence that was adduced against the appellant. The appellant on his part was not opposed to being retried. He however submitted that he had been in remand custody and in prison for a total period of twenty one (21) months.

I have considered the submission made by Mr. Mugambi on behalf of the State and that made by the appellant. I have also scrutinized the record of the trial magistrate. It is evident as stated by Mr. Mugambi that the trial court did not state the language in which the witnesses testified before court. In a recent Court of Appeal decision of **Antony Njeru Kathiari & Anor. vs Republic [2007] eKLR** it was held that the failure by a trial court to indicate the language that the proceedings were taken, in certain circumstances, made the proceedings thereto to be vitiated. In the present appeal, although the appellant did not complain that he did not follow the proceedings due to the fact that the language of the court was

not indicated, the State having conceded to the appeal, this court will allow the appeal and set aside the conviction and sentence of the appellant.

Mr. Mugambi submitted that the appellant should be retried in view of the overwhelming evidence adduced by the prosecution witnesses in the vitiated trial. The appellant on his part is not opposed to being retried. He however submitted that he has been in lawful custody for twenty one (21) months. The principles to be considered by this court in deciding whether or not to order a retrial are well settled. The Court of Appeal held in the case of **Ekimat –vs- Republic C.A. Criminal Appeal No. 151 of 2004** (Eldoret) (*unreported)* that:

"***In the case of*** *Ahmed Sumar v Republic [1964] EA 481**, at page 483, the predecessor to this court stated as follows:***

'***It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered***".

The court continued at the same page paragraph H and stated:

"***We are also referred to the judgment in*** *Pascal Clement Braganza v. R [1957] EA 152**. In this judgment the Court accepted the principle that a retrial should not be ordered unless court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person".***

There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to court is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

In the present appeal, the appellant has been in lawful custody for twenty one (21) months. He had been sentenced to serve four years imprisonment in the vitiated trial. In effect, the appellant has already served half of the sentence imposed by the trial magistrate in the vitiated trial. Would it serve the ends of justice if the appellant is ordered retried after being in custody for a period of twenty one (21) months? This court does not think so. Even though Mr. Mugambi submitted that there is overwhelming evidence which can result in the appellant being convicted in the retried case, the appellant would be prejudiced because there would be a likelihood that he would spend more time in remand custody while awaiting his case to be tried. The magistrate, who would hear his case on retrial, may or may not consider the period that the appellant spent in lawful custody in the vitiated trial. I think the appellant has repaid his debt to the society in the period that he has been in lawful custody.

The upshot of the above reasons is that this court is of the considered view that this is not one of the cases appropriate for a retrial. The appellant is discharged. He is ordered released from prison and set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 16th day of November 2007

L. KIMARU

JUDGE