



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**Criminal Appeal 2 of 2006**

**DAVI MULULU ALINAULA:.....APPLICANT**

**VERSUS**

**REPUBLIC:.....RESPONDENT**

**JUDGEMENT**

The Appellant was convicted on his own plea of guilty on 13<sup>th</sup> December, 2005 before the Chief Magistrate Mrs. F.N. Muchemi of the charge of stealing stock contrary to section 278 of the Penal Code. He was sentenced to serve three (3) years imprisonment.

The Appellant has appealed against both conviction and sentence. In his petition of Appeal, the Appellant raises four grounds of appeal, as follows:-

- a) The plea taken herein was equivocal.
- b) The plea was taken and facts read in the language the appellant did not understand.
- c) The facts read to the appellant were at variance with the particulars of charge sheet.
- d) The facts read to the appellant were in total contradiction with the particulars of the charge sheet.

In his submissions, counsel for the Appellant, Mr. Kahi stated that a casual look at the record indicates that the language in which the charges were read was not clear. He contended that the record does not say in what language the charges were read and whether the Appellant understood them or not.

It was also argued on the Appellant's behalf that the facts that were read to the Appellant, were at variance with the charges contained in the charge sheet. The reason given for this was that section 278 of the Penal Code provides as follows:-

“ 278. If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mute camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”

In the charge sheet, it was stated inter alia, that the Appellant jointly with others not before the court stole 3 bulls valued at Kshs.80,000. In the statement of facts on record it is stated that:-

“...At Namakara market the accused was arrested together with others escorting the cows towards Chemuche area. The accused was arrested by members of public while others escaped, the cows were taken to Kabras police station together with the accused. Complainant identified the cows as his cows (six) are held at the police station.”

It is for the said inconsistencies and/or discrepancies that the Appellant says that the conviction was not proper.

In reply, Mr. Omutelema for the state submitted that:-

- The plea was properly taken.
- The record clearly indicated that the charge was read to the Appellant in English and Kiswahili which he understood and to which he pleaded guilty.
- That variance in the charge sheet and the statement of facts was not in substance. The offence was that of stealing stock and he was found in possession of “livestock”.
- The use of the word “cow” instead of “bull” is curable under the provision of S.382 of the Criminal Procedure code.

I have considered the Appeal herein and submissions by counsel. The record, inter, alia, reads as follows:-

“ C.R.O & E to the accused person in English/Kiswahili which he/she understands and replies.....”

From the foregoing, it is clear that the charges were read to the accused in both English and Kiswahili. This is indicative that translation was necessary from English to Kiswahili. The language he understood from the record must be Kiswahili. The facts were read to him in the same languages and without any hesitation he pleaded guilty to the charge before the court. He pleaded for leniency in his mitigation. I do hereby hold that the plea was unequivocal as it was taken and the facts read in a language that the appellant understood.

With regard to the second substantive ground of appeal as contained in the petition of Appeal (c and d), it is clear that the facts read to the Appellant were at variance with the particulars of the charge sheet. The charge sheet refers to 3 bulls having been stolen while the facts read to him stated that the Appellant was arrested together with others escorting the cows while one lame cow had been found in the neighbourhood. Is this fatal to the Appellant's conviction?

The Respondent has invoked the provisions of section 382 of the Criminal Procedure code arguing that the aforesaid was an error which had not occasioned a failure of justice. The said section provides as follows:-

“ 382. Subject to the provisions herein  
before contained, no finding, sentence  
or order passed by a court of competent

jurisdiction shall be reversed or altered on appeal or revision on account of an error/omission or irregularity in the complaint, summons, warrant, charge, proclamations order, judgement or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission, or irregularity has occasioned a failure of justice:-

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings”

I have considered the foregoing provisions. I do accept that the reference to “cows” in the facts instead of “bulls” was an error or at the very least an irregularity. The two are not the same. However, both are “stock” and the sentence provided upon conviction is the same. The Appellant was found escorting the

said livestock and he pleaded guilty to the charges after the facts were read to him. I do hold that the said error/or irregularity has not occasioned any failure of justice. It is noted that this point was taken up for the first time at the appeal stage. This shall not be taken against the Appellant as he was unrepresented before the trial court.

In the result, I do uphold the conviction and sentence. The Appeal is hereby dismissed.

DELIVERED AND DATED THIS 6<sup>TH</sup> DAY OF APRIL,2006.

MOHAMMED IBRAHIM

JUDGE

ORDER: Right of Appeal to the court of Appeal is explained to the Appellant. Has a right of Appeal within the next 28 days.

MOHAMMED IBRAHIM

JUDGE.