



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NYERI

Criminal Appeal 134 of 2005

(From original conviction (s) and Sentence(s) in Criminal Case No. 1265 of 2004 of the Senior Principal Magistrate's Court at Githungui (L.K. Muhiu - SRM)

PETER OLANGO ONGAYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

PETER OLANGO pleaded guilty to stealing stock contrary to **Section 278** of the **Penal Code** and was convicted and sentenced to 7 years imprisonment. He has lodged his appeal challenging both the conviction and sentence.

The appeal is opposed.

The Appellant has five grounds of appeal in his filed petition and the written submissions which he put in, in support of this appeal. These grounds are mostly mitigation factors which he urges this court to consider in regard to the sentence. The Appellant submitted that he was injured in a mob justice attack at the time of his arrest and that as a result of the said injuries he pleaded guilty to the charge. The Appellant drew the court's attention to a swelling on his head which he said was where he suffered the greatest injury. The Appellant said he was in no position to know what was going on in court during the plea and that since then his plea to be taken for medical attention has not been granted. Appellant also said he was 52 years old, had suffered enough from the incarceration and sought court's mercy and discretion to set him free.

Miss Koruche learned counsel for the state opposed the appeal against sentence only. Counsel submitted that the sentence of 7 years imprisonment was quite fair. Initially counsel had submitted that it was the minimum sentence for the offence until the court pointed out to counsel the penalty provision under that section.

The Appellant pleaded guilty to the charge on 24th August 2004. From the record of the proceedings the Appellant complained of pain in the head, the hand and the back due to mob justice. The plea was taken six days after the arrest and alleged mob justice. The court did not take notice of the Appellant's mitigation and therefore failed to consider a critical issue whether the Appellant was in good mental state to plead to the charge. The injury on the head shown to this court is quite a serious one with the head still swollen 2 years later, it is likely that the Appellant was not in a state of mind to follow the proceedings as he now alleges in his appeal. The learned trial magistrate fell into error by ignoring the Appellant's

physical state and the clear large injury on his head and therefore proceeded wrongly. The proper thing to have done was to have the Appellant examined by a doctor as to his fitness to plead before taking the plea. I find the conviction entered herein was unsafe in the circumstances and therefore quash it and set aside the sentence.

The Appellant has served almost 2 years in jail which would translate to a 3 years imprisonment sentence if the $\frac{1}{3}$ remission were taken into account. It would prejudice the Appellant if an order for retrial were made in this case in the circumstances. I decline to order one and direct instead that the Appellant be set free unless he is otherwise lawfully held.

Dated at Nairobi this 19th day of July 2006.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

Appellant - absent

Miss Koruche for the State

Tabitha: CC

LESIIT, J.

JUDGE