

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

APPELLATE SIDE

CRIMINAL APPEAL NO. 206 OF 2003

(From Original Conviction and Sentence in Criminal Case No. 1420 of 2003
of the Chief Magistrate's Court at Mombasa H.M. Okwengu CM)

JOHN WAFULA TINGU APPELLANT

Versus

REPUBLIC RESPONDENT

J U D G M E N T

The Appellant was charged in count one with the offence of stealing from a locked motor vehicle contrary to section 279(g) of the Penal Code and in count two with the offence of malicious damage to property contrary to section 339(1) of the Penal Code. There was also an alternative charge of handling stolen property contrary to section 322(2) of the penal Code. He pleaded guilty to the two counts and was sentenced to serve three years imprisonment on count one and one year's imprisonment on count two. The sentences were ordered to run concurrently and no finding was made on the alternative charge of handling. He has appealed against both conviction and sentence.

The ground relating to conviction is ground 4 in which the appellant states that he is seventeen years old and could not understand what could happen to him later. The other grounds relate to sentence and they are in effect that the sentence was harsh.

At the hearing of the appeal the Appellant tendered written submissions in which he mainly raised mitigating factors. He states that he is an orphan left with a younger brother and that he dropped out of school due to school fees. By introducing free primary education it is as though the Narc Government had him specifically in mind as he wishes to complete his education. He has earnestly pleaded that he be released so that he can take advantage of the free primary school programme and to continue with his education. Mr. Monda, learned State Counsel, submitted that the charge and the facts were read over to the appellant in Kiswahili language which he understood. He cannot therefore be heard to say that he did not understand the charge. The plea, he said, was unequivocal and the appeal against conviction should be dismissed.

On sentence Mr. Monda submitted that the offence of stealing from a locked motor vehicle carries a sentence of up to 14 years imprisonment. The trial magistrate was very lenient when she imposed a custodial sentence of only five years. The same is true with count two. The offence carries a sentence of five years and the Appellant escaped with only one year's imprisonment. The sentences are not harsh and the appeal, he concluded, should be dismissed in its entirety.

Before I made up my mind on how to decide this appeal, I thought of ordering that the Appellant's age be assessed as he alleges that he is 17 years old. However after studying the record more closely and for what I am about to say that is now not necessary. It is not clear from the record in what language the charge was read over and explained to the appellant. It is shown that interpretation was English/Kiswahili. The record then states:

“Court

The substance of the charge and every element thereof has been stated by the court to the accused person, in the language he understands, who being asked whether he admits or denies the truth of the charge replies:

Accused Count 1 - it is true

Count 2 - it is true.

Court

Plea of guilty entered on both counts”.

It is therefore not clear from the record in what language the charge and particulars thereof were read to the Appellant. It cannot therefore be said with certainty that the Appellant understood the charges and therefore unequivocally pleaded guilty.

For this reason I allow this appeal quash the conviction and set aside the sentence. The Appellant is to be set free forthwith unless otherwise lawfully held.

DATED this 31st day of March 2004.

D.K. Maraga

Ag. JUDGE