



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 190 OF 2003

MWANZIA KITELA SILAAPPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

CONSOLIDATED WITH HCCRA NO. 189 OF 2003

KELI NZIUKO SILA.....APPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

J U D G E M E N T

On 25.6.2003 both appellants appeared before district Magistrate's court Kilungu charged with offence of stealing stock contrary to section 278 of the penal code. The allegations being that the two had jointly stolen a cow and bull worth 16,000/= on 24.6.2003 at Kikumbo village in Machakos district.

They faced a second count of handling stolen goods c/section 322 (2) of the penal code the particulars being that they were found in possession of the said cattle knowing or having reasons to believe they were stolen.

The appellants pleaded guilty and the court went ahead and convicted them on their own pleas of guilty and sentenced them to 3 years imprisonment each with hard labour and 2 strokes of the cane. They are dissatisfied with the conviction and sentence and have appealed. Each appellant had filed their appeal but the appeals have been consolidated and proceeded to hearing as HCCRA 190/03. They filed grounds of appeal which are similar and their prayer is that a fresh plea be taken or sentence be varied or reduced.

Basically the grounds of appeal are that the plea was not unequivocal, sentence was excessive and the appellants mitigation was not considered before sentence.

The counsel submitted that the appellants were arrested on 24.6.2004 evening and taken to court on 25.6.2003 which was too fast as they were not yet ready for plea. That submission by counsel is surprising. The police officer concerned should be commended for upholding the appellants constitutional rights of taking the appellants before a magistrate within 24 hours of their arrest. Such action is rare to come by as we always get complaints of suspects being kept in police custody for too long. That allegation does not hold any reason.

As per the charge sheet it shows that the appellants were facing 2 counts. Counsel for appellants contents

that it is not clear which charge they pleaded to. Although it is not clearly indicated, the 2nd charge should have been an alternative charge to the 1st as is the normal practice. The record clearly shows that the appellants only pleaded to count 1. Counsel cannot say it is not clear. The languages used were English and Kikamba. The facts were read to them which reveal an offence of theft of stock and they admitted the facts as being correct following which they were convicted.

Counsel cited the authority OMBENA VERSUS REPUBLIC CR. APP. 36/1981 in which the court observed that each plea should be recorded separately so that the appellant would apply his mind to each count as he makes his plea.

In the present case the 2nd charge was not read to them at all. There was no confusion as to which count they pleaded to. If the 2nd charge had been read it would be duplication of the charges. In addition, on page 2 of the record the Magistrate indicated what charge he was convicting the appellants of. I do find that the plea was unequivocal. There is no doubt that the plea was properly read to appellants. They understood it, the facts and confirmed that they were correct.

The last question is whether the sentence was excessive. The appellants were treated as 1st offenders. They had pleaded guilty. It is only appellant who said something in his mitigation while the 1st opted to be quiet. Counsel for appellants contends that the court should have gone further to enquire the circumstances that led to the theft and the court should have considered a corrective sentence as they are young men, in their 20's. If one refuses to say anything in mitigation the court can not force them to do so. However, considering that they had pleaded guilty and were just offenders, the court should have called for a home report from the Probation officer or Community Service Office to consider if the appellants could benefit from non custodial sentence.

To sum up, I do find that the conviction was proper. Failure to read the 2nd charge which was supposed to an alternative charge does not prejudice the appellants. The offences carry a maximum of 14 years each. As for the sentence I do find that the magistrate should have called for home reports first before the said sentence. The appellants have been in jail since 25.6.2003 which translates to about 8 months. The court will call for their home reports and therefore decide whether to vary the sentences or not.

Dated, read and delivered at Machakos this.....day of.....,2004.

R. WENDOH

JUDGE