



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 370 OF 2004
 (From original conviction(s) and Sentence(s) in Criminal case No. 5253 of 2004 of the Chief Magistrate’s Court at Kibera (Ms. Mwangi – S.P.M.)

JAMES GITHINJI ODANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 371 OF 2004

(From original conviction(s) and Sentence(s) in Traffic case No. 5253 of 2004 of the Chief Magistrate’s Court at Kibera (Ms. Mwangi – S.P.M.)

DAVID LUVANZE LIGANDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The Appellants, **JAMES GITHINJI ODANGA** and **DAVID LIVATSE LUGANDA** pleaded guilty to a charge of STEALING contrary to Section 275 of the Penal Code. They were convicted and sentenced to serve 18 months imprisonment. The Appellants were dissatisfied with the conviction and sentence and lodged this Appeal.

Initially the two Appellants were set to argue an Application for bond pending Appeal. However, after considering the nature of the offence and sentence, I directed that they both argue the Appeal instead.

In their Appeal, both Appellants sought a reduction or variation of the sentence arguing that it was harsh and excessive on the grounds that they were both first offenders.

MR. ONDARI, learned counsel for the State conceded to the Appeal against sentence. He submitted that considering the Appellants had pleaded guilty to the charge, the nature of the offence and fact that the stolen items were recovered, the sentence was excessive.

After the charge was read to the Appellants and was admitted, the Prosecution gave the following facts of the offence: -

“On 12.7.2004 at 6.00 a.m. guards for Aga Khan Hospital were at the gate when they saw the two carrying a parcel. It was a black paper and stopped them to be searched. Inside they found chicken (10) and 6 Kgs of meat. After asking them where they got the same they led them to the Kitchen and it was ascertained the items (meat and chicken) were from there. The two were arrested, taken to the Police Station and charged with the offence. The meet is before court as exhibit.”

Having considered these facts I am of the view that they do not disclose the offence charged. The facts do not establish that the Appellants were in the process of stealing or had stolen the meat at the time the guards intercepted them. It is not clear how the two had gained access to hospital kitchen. Were they, for example workers, or suppliers to the Kitchen? What exactly led them to the Kitchen. The other issue not established was whether the hospital kitchen lost any meat and therefore whether they were complaining.

In my considered view, the facts of the Prosecution case left many questions begging for answers and did not establish any theft against the Appellants.

I find further that the learned trial magistrate did not give the Appellants an opportunity to mitigate. At least both Appellants raised this as a ground of Appeal.

Even though the Appellants did not challenge the conviction, I find that it would occasion a miscarriage of justice if I fail to consider that aspect of the case as well. I find the facts and particulars of the charge led by the Prosecution did not establish the offence charged. The conviction was unsafe and should not be allowed. Accordingly I quash the conviction and set aside the sentence. I order that the Appellants be set at liberty unless they are otherwise lawfully held. I decline to order a retrial as period served is sufficient punishment for the offence.

Dated at Nairobi this 21st day of October 2004.

LESIIT

JUDGE

Read, signed and delivered in the presence of;

LESIIT

JUDGE