



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO
CRIMINAL APPEAL 104 OF 03

Edwin Kimutai Ngeno

vs

Republic

Criminal Appeal No 104 of 2003
(Appeal from original Kericho Principal Magistrate's Court Cr. Case. 2080/03.)

Judgment.

The appellant faced three counts in the lower court. The first count was of stealing by agent contrary to section 283 of the Penal Code. That section has five subsections (a) to (e). It was not specified under which of the above subsections he was being charged.

Counts two and three were also for stealing by agent contrary to section 283 (b) of the Penal code but the amounts involved and the complainants were different.

When the charges were read out to him on-the day of plea that is 4.8.03 the appellant pleaded guilty to the three counts. The trial Magistrate ordered that the facts of the charge be read the following day. On 5.8.2003 the prosecutor read out facts relating to count one and count two only. No facts were read out with respect to count three. The appellant stated that the facts as read out were true. However the learned trial magistrate went ahead to convict the appellant on all the three counts and sentenced him to two years imprisonment for each count and the sentences were to run consecutively.

The appellant appealed against the conviction and sentence on four grounds which are as follows:-

1. That the learned Trial Magistrate erred in law and fact in convicting the appellant on a defective charge.
2. That the sentence is irregular and bad in law.
3. That the learned Trial Magistrate erred in law and fact in convicting the appellant on an equivocal plea.
4. That the sentence is manifestly harsh and excessive.

During the hearing of this appeal, Mr. Orina, the learned Counsel for the appellant argued that the Charge was defective because it did not specify the subsection of section 283 of the Penal Code under which the appellant was charged. He submitted that the omission was prejudicial to the appellant. He further argued that the facts in the charge differed from the facts as read out to the appellant after his plea was taken. I have looked at the particulars of the offence in count one and realised that they state that the appellant stole one cow and an ox both valued at Kshs. 15,000/= which had been received by him for and on account of **ABIGAELE OSEBE MORACHA**.

The facts on count one as read out to the appellant after his plea was taken stated that the complainant approached the appellant for milk. The appellant was dealing in cattle sales and the appellant gave to the complainant a cow valued at Kshs. 17,500/= and the complainant paid the money to the appellant. The appellant told the complainant that the cow was six months pregnant but later the complainant realised it was not pregnant and he contacted the appellant who went and took it away without refunding the money.

It was improper to convict the appellant on this count firstly because the Charge did not indicate the appropriate subsection of section 283 of the Penal Code under which the appellant was Charged.

Secondly, the particulars of the offence were that the appellant stole one cow and an ox both valued at Kshs. 15,000/= yet the facts as read but indicated that he took away a cow valued at Kshs. 17,500/= yet the facts as read out indicated that he took away a cow valued at Kshs. 17,500/= but did not refund the sum of Kshs. 17,500/= which had been given to him by the complainant. There is no mention of an Ox. Again, the intention to steal the cow does not come out because it is the complainant who contacted the appellant to tell him that the cow which he had bought was not pregnant as had been indicated by the appellant. The complainant should have demanded refund of his money or replacement of another cow as the appellant was in cattle selling business.

The learned state counsel did not support the appellants conviction under Count one because the appropriate subsection of the law was not stated. He also stated that the facts did not seem to disclose an offence. For the reasons aforesaid, the appellant's conviction on this count is quashed and sentence set aside.

Count two was of stealing by Agent contrary to section 283(b) of the penal code and the particulars of the offence were that on 10th September, 2002 at Nyagacho Estate in Kericho district within Rift Valley Province the appellant stole one freshian cow valued at kshs. 13,000/= and cash 8,000/= which had been received by him for and on account of **JOHN OGECHA MOTARI**, the complainant.

The facts on count two as read out after the plea are as follows:

“On 2nd count on 10/9/2002 accused approached complainant. He promised to give him a cow. He took one to him. He intended to sell it. It was not a good one. Later accused approached complainant and asked him to give him cow and it was valued at Kshs. 13,000/=. He was to bring another valued at 21,000/=. Complainant gave him the cow and added him 8,000/=. Accused took another to him and said it was pregnant. This was not the case. Accused went and took it away saying he was to give another”.

The Appellant pleaded “guilty” to count two and admitted the facts as read out to him. Section 348 of the Criminal Procedure Code states that:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence”.

One may then ask whether indeed the appellant has a right of appeal in this matter in light of the provisions of section 348 of the Criminal Procedure Code.

In the Case of Uganda –vs- SISTO ANGALIFO WELL: (1966) E.A. 324 it was held that if the Charge does not disclose an offence then the plea of guilty is null and void and therefore the conviction and sentence have to be quashed. Count two as read together with the facts do not disclose an offence of stealing by agent. It has not been shown that the appellant was an agent of the complainant. What the court was told was that the appellant was a cattle dealer and there was a transaction between the appellant and the complainant involving a cow. The appellant was given by the complainant a freshian cow valued at kshs. 13,000/= and cash. 8,000/= and in return the appellant gave to the complainant a cow said to be worth Kshs. 21,000/= and which according to the appellant was pregnant but it turned out that it was not pregnant. The appellant then went and took the cow from the complainant promising to give him another one but he did not. There is no agency disclosed here. It is also doubtful if there was any intent on the part of the appellant to permanently deprive the complainant of his cow and money. The definition of stealing in section 268 of the Penal code and particularly section 268 (2) (a) has to be borne in mind.

I therefore hold that count two as read together with the facts did not disclose an offence of stealing by agent and so the plea of guilty was null and void and as a result proceed to quash the conviction and set aside the sentence of two years.

With regard to count three, the appellant's Counsel stated that the facts of the court were not read to the appellant but the learned Trial magistrate proceeded to convict and sentence the appellant.

The Learned State Counsel did not support the conviction and sentence under this count. I have carefully looked at the record of appeal and it is true that the prosecutor did not read out the facts relating to count three. This was a serious procedural error. The procedure of recording a plea of guilty was authoritatively set out by the court of Appeal in ADAN –VS- REPUBLIC (1973) E.A. 445 and it makes it mandatory for the prosecution to state the facts and then the accused is given an opportunity to dispute or explain the facts, or to add any relevant facts.

The purpose of the statement of facts is to show whether the plea was unequivocal or not and to provide material for assessing an appropriate sentence.

It was not proper for the learned Trial Magistrate to convict and sentence the appellant in count three without the facts having been read out to the appellant and before according him an opportunity to respond thereto. I therefore quash the conviction and set aside the sentence. The end result is that this appeal is allowed, convictions are quashed and sentences are set aside. The appellant shall be set free unless otherwise lawfully held.

In conclusion it is evident that the appellant had some business transactions with the complainants and the appellant had not fully discharged his part of the business deals. He should immediately upon his release from prison do so failing which the complainants shall be at liberty to take the appropriate Civil actions against him.

High Court, at Kericho November 28, 2003

Musinga Ag J