



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO.38 OF 2016

*(An appeal from original conviction and sentence of Kilgoris SPM'S C Criminal Case No. 909 of*

*2013 by Hon. B. Ochieng Ag. SPM dated 28<sup>TH</sup> October, 2013)*

LEONARD MUSHARU .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein **LEONARD MUSHARU**, together with his co-accused **SAMUEL KOIPAT** were jointly charged with one count of stealing stock contrary to **Section 278 of the Penal Code**. The particulars of the offence were that on the night of 22<sup>nd</sup> and 23<sup>rd</sup> October 2013 at Osupuko area in Transmara West District within Narok County, jointly stole 3 bulls (oxen) valued at Kshs. 90,000/= the property of SALIM LESHAN OLOLWASAS.

2. The appellant and his co-accused also faced the alternative charge of handling stolen goods contrary **Section 322 (2) of the Penal Code**. The particulars being that on 24<sup>th</sup> October 2013 at Aitong area in Narok County, jointly otherwise than in the course of stealing dishonestly detained three oxen (bulls) knowingly or having reason to believe them to be stolen goods.

3. Both the appellant and his co-accused pleaded guilty to the main charge of stealing stock contrary to **Section 278 of the Penal Code** and were consequently convicted on their own plea of guilty and sentenced to serve 10 years imprisonment.

4. The appellant was dissatisfied with both the conviction and sentence and has now filed the instant appeal in which he has listed the following grounds of appeal in his supplementary petition of appeal:

**1. That the learned trial magistrate erred in law and in fact in convicting on a plea of guilty that was equivocal and/or not properly taken.**

**2. That the learned trial magistrate erred in law and in fact in failing to take such precaution and administer such warning so as to ensure that the appellant understood the nature and the consequences of the charge he was pleading guilty to before he entered a plea of guilty.**

**3. That the learned trial magistrate erred in law and in fact in failing to appreciate that the appellant who is a Maasai may not have properly understood the language used by court (sic) English/Swahili.**

**4. That the sentence that was meted out by the against the appellant was manifestly harsh and excessive considering that the appellant had pleaded guilty.**

5. At the hearing of the appeal on 24<sup>th</sup> November, 2016, the appellant relied on the written submissions he had filed on 16<sup>th</sup> November 2016 in which he stated that his guilty plea was not unequivocal since the language used during the plea taken had not been indicated. The appellant submitted that the plea was not properly taken as he neither understood the nature of the charge nor the consequences of the guilty plea.

6. The appellant added that the court did not take judicial notice of the fact that he had been attacked and injured by a mob prior to his arrest and that the said injuries could have caused him confusion during the taking of the plea.

7. In a rejoinder to the appellant's submissions, Miss Mbelete for the state opposed the appellants appeal on conviction and submitted that the plea was properly taken. She added that the appellant's attack and assault by a mob during his arrest could not have affected him at the time the plea was taken since the appellant had, as at that time, already been taken to hospital for treatment.

8. Miss Mbelete however submitted that the sentence of 10 years imprisonment meted out on the appellant was harsh in the circumstances of the case considering that the appellant was a first offender who had pleaded guilty to the main charge and that the stolen oxen had been recovered.

9. This being a first appeal, I am obligated to analyze the evidence tendered before the trial court afresh with a view to arriving at my own independent conclusion while bearing in mind the fact that I neither heard nor saw the witnesses testify. **See Okeno vs Republic [1972] EA 32.**

10. In the instant case, no evidence was tendered before the trial court because the appellant pleaded guilty to the main charge. Under those circumstances, I am still duty-bound to scrutinize the proceedings taken during the taking of the plea with a view to establishing if the same was properly done in line with the provisions of **Section 207 of the Criminal procedure Code** and in accordance to the guidelines for recording a guilty plea as were set down in the celebrated case of **Adan vs Republic (1973) EALR 445.**

**11. Section 207 of the Criminal Procedure Code** provides as follows:

**“207 (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**

**Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.”**

12. In **Adan vs Republic (supra)**, it was held as follows:

**“When a person is charged, the charge and the particulars should be read out to him so far as possible in a language which he can speak and understand. The magistrate should explain to the accused person all the essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to “not guilty” and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts, relevant to sentence. The statement of facts and the accused's reply must of course, be recorded.”**

13. In the instant case, I note that the trial magistrate recorded the guilty plea as follows:

**“28/10/2013**

**Coram: Hon. B. Ochieng Ag. SPM**

**Ip: Kirui Prosecutor**

**Rose court clerk**

**Interpretation**

**Accused present**

**Represented by None**

**Court: Charge element read out and explained to accused in Kiswahili and understood all replied as follows:**

**Accused 1: True I did it**

**Accused 2: True I did it**

**Pros: The facts are that on the 26<sup>th</sup> April 2013 at Osipuko the complainant locked her cattle and went to sleep. The following day 23<sup>rd</sup> October 2013 at 5.00 a.m. the complainant woke up for routine checkup. He noticed the entry to the Boma had been broken into and found 3 bulls missing, which was valued at Kshs. 90,000/=. They raised alarm. They traced the cattle heading then to Narok South, however they couldn't trace the cattle any further.**

**On 27<sup>th</sup> October 2013 they went up to Aitong, Narok South. They got information that 2 people were seen driving two heads. Police laid ambush. They were confronted near Aitong. The police arrested the two and beat them. Police saved the two from lynching. They were taken to Oranti police post. The two were charged with the offence hereof. The heads of cattle were photographed and handed over for safe keeping. The photos are here (accused also sees them). I produce them as exhibits. The two accused were treated and discharged. The treatment notes are here. I produce them as exhibits P (a) and (b). The treatment notes are here.**

**Accused 1: it is true the facts are true**

**Accused 2: the facts are true.**

**Court: Guilty as pleaded and convicted both.”**

14. From the above extract of the proceedings, I note that indeed the language used by the court at the time of taking plea was noted as Kiswahili and it is clear that the appellant understood the language and pleaded guilty to the charge unequivocally. Consequently, I find that plea of guilty was unequivocal and I uphold the conviction. I note that there were errors on the date that the offence is alleged to have been committed, but the error does not wash away the fact that the appellant pleaded guilty unequivocally.

15. The appellant submitted that the injuries he sustained following the attack and assault by members of the public during his arrest prevented him from understanding the nature of charges that he was facing. I find this contention by the appellant to be false and far-fetched as he did not raise his inability to take plea before the trial court and that he had already undergone treatment at the time the plea was taken.

16. On sentence, Section 278 of the Penal Code under which the appellant was charged provides for a maximum sentence of 14 years for the offence of stock theft. In the instant case, the appellant was sentenced to 10 years imprisonment and therefore the sentence was lawful and within the limits provided for under the law. The state however conceded to the appeal on sentence on the basis that it was harsh and manifestly excessive taking into account the fact that the appellant was a first offender. I accept the state counsel's position that the sentence meted out on the appellant was harsh in the circumstances considering that the appellant was reported to be a first offender, that the stolen cattle had been recovered and that he pleaded guilty to the main charge thereby saving the court's time that could have been spent in a lengthy trial.

17. Consequently, I uphold the appellant's conviction but allow the appeal on sentence. I hereby set aside the sentence of 10 years imprisonment and substitute it with a term of imprisonment equivalent to the period that the appellant has been in jail from 2<sup>8th</sup> October, 2013, when judgment was delivered before the trial court, to the date of the delivery of this judgment with the net effect that the appellant shall be set free forthwith unless he is otherwise lawfully held.

18. This judgment will apply to the appellants co-accused SAMUEL KOIPAT who will similarly be set free forthwith unless otherwise lawfully held.

**Dated, signed and delivered in open court this 2<sup>nd</sup> day of March, 2017**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Miss Mbelete for the State
- Appellant in person for the Appellant
- Omwoyo court clerk