REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 220 of 2010

STEPHEN OUMA ONYANGO …………………………..……….. 1ST APPELLANT

COLLINS OTIENO ASETO ……………………………………… 2ND APPELLANT

AND

REPUBLIC ……………………………………………………….. RESPONDENT

(Being an appeal from the conviction and sentence of Hon. R. Ngetich, PM, dated

and delivered on the 5th July 2011 in the original Oyugis PCRC No.483 of 2011)

JUDGMENT

1. The two appellants herein, Stephen Ouma Onyango and Collins Otieno Aseto were the 2nd and 1st accused respectively in Oyugis Principal Magistrate's Court Criminal Case No.483 of 2011. They were each convicted on their own plea to one count of stealing stock contrary to **section 278** of the **Penal Code** and sentenced to 7 years imprisonment. It was alleged that they committed the offence on the 1st day of June 2011 at Koyugi Location in North Rachuonyo District within Homa Bay County when they stole one heifer valued at Kshs.8000/=, the property of John Oyugi Opapa.

2. The facts of the case, according to the record are that on 1st July 2011 at around 6.00 a.m., one Charles Ogeto was on his way to Adiedo Market when he met the two appellants driving a cow. The appellants looked suspicious, so the said Charles Ogeto (Ogeto) stopped them and asked them where they were going and where they had come from. The appellants told Ogeto that they were heading for Adiedo market. A short while later as the trio was still talking, some members of the public arrived at the scene and informed Ogeto that the two appellants were driving a stolen cow. The two were taken to Adiedo market where they were detained. The owner of the cow later went to Adiedo market and identified his cow. The appellants were arrested and escorted to Kendu Bay police Station. The cow was photographed before being released to its owner. The 3 photographs of the cow, taken from different angles were produced as **P. Exhibits 1-3**.

3. The appellants were aggrieved by both conviction and sentence. They instructed the firm of Oguttu-Mboya & Co. Advocates to file appeal. The two appeals Nos.220 and 221 of 2011 were duly filed. On the 25th April 2012 when the appeals came up for hearing, the appeals were consolidated under CRA NO.220 of 2011. The common grounds of appeal are as follows:-

1. *The Learned Trial Magistrate erred in law in entertaining and* proceeding with the Trial of the

Appellant, in violation and/or contravention of the Appellant's Constitutional Rights under and in terms of Article 49 of the Constitution, 2010.

2. *The Learned Trial Magistrate erred in law in convicting and sentencing the Appellant in respect of proceedings that were invalid, unconstitutional and a nullity ab initio.*

3. *The Learned Trial Magistrate erred in law in entering, endorsing and returning a conviction and sentence on an equivocal plea of guilty, contrary to trite and established principles of law. Consequently, the learned trial magistrate occasioned a miscarriage of justice.*

4. *The Learned Trial Magistrate failed and/or neglected to conduct appropriate inquiry into the suitability and/or appropriateness of the plea of guilty before entering and/or endorsing the said plea and thereby deprived the appellant of his Constitutional Rights.*

5. *The Learned Trial Magistrate erred in convicting and sentencing the Appellant on the basis of an offence that was at variance with the facts rendered to the Court and which facts negated the plea of guilty rendered to the court.*

6. *The entire trial, proceedings, conviction and sentence before the Trial Court, was void and therefore legally untenable.*

7. *The sentence of the learned trial magistrate is illegal and unlawful.*

4. The appellants pray that the appeal be allowed and the conviction be quashed and the sentence imposed upon the appellants be varied and/or set aside.

5. At the hearing of the appeal, the 7 grounds of appeal were clustered as follows: **(a)** Grounds 1 and 2 together; **(b)** Grounds 3-5 together and **(c)** Grounds 6 and 7 were abandoned. I heard submissions on the 3 new grounds. Under the combined grounds 1 and 2, counsel for the appellant submitted that the appellants were not arraigned before court within 24 hours as provided by **Article 49 (1) (f)** of the **Constitution of Kenya 2010,** and that in the circumstances of this case, and the prosecution having offered no reason for the delay, there was gross violation of the appellants rights under the constitution thereby nullifying the entire trial. Reliance was also placed on **Article 20 (2)** and **(3)** of the **Constitution of Kenya**.

6. With regard to grounds 3-5, counsel contended that though the offence to which the appellants allegedly pleaded guilty was committed on 1st June 2011, the facts as per the record related to an offence allegedly committed on 1st July 2011. In the circumstances, counsel submitted that the plea upon which the appellants were found guilty and subsequently convicted was not unequivocal. Further that bearing in mind the discrepancy between the facts and the charge sheet, there was no basis for the conviction, since according to counsel, the discrepancy was not curable by **section 214** of the **CPC**nor **sections 348** and **382** thereof. Counsel urged the court to allow the appeal.

7. The appeal was conceded. Mr. J. Mutai, Principal State Counsel submitted that the conviction of the two appellants could not stand on the basis of grounds 3-5 because the facts do not support the particulars of the offence as set out in the charge sheet.

8. Counsel also stated that the trial court departed from the provisions of **section 270 (2)** of the **CPC**which sets out the procedure to be followed by courts in plea taking. Counsel stated that the trial court did not clearly record the entry of plea of guilty immediately after the appellants admitted the charges. Under **section 207** of the **CPC**, the steps to be followed in taking a plea are as follows:-

a) **The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to agreement;**

b) **If the accused admits the truth of the charge otherwise than by a plea agreement, his admission shall be recorded as nearby 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;**

c) **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.**

Also see the case of**Adan –vs- Republic [1973] EA 445**and **Chege –vs- Republic [1983] KLR 425**.

9. While conceding the appeal, counsel for the respondent asked the court to order a retrial since the case is a fairly recent one and the prosecution can avail all the witnesses as to do otherwise would deny the complainant an opportunity to ventilate his case.

10. In reply, Mr. Oguttu-Mboya for the appellants submitted that the respondent had not made out a case for a retrial which can only ensue where there was a mistrial or where the trial was a nullity or where there is a lapse in the proceedings. That a retrial should never be ordered for the sake of benefitting any one as it would appear that a retrial in this case would benefit the prosecution.

11. This matter is before me as a first appeal, and in the circumstances, I am under a duty to rehear the case. See **Okeno –vs- Republic [1972] EA 32** and **Kinyanjui –vs- Republic [2004] 2 KLR 322**.

12. After a careful scrutiny of the record, I am inclined to agree with both counsel that this appeal should be allowed for reasons that the plea was not unequivocal. Under **section 207** of the **CPC** once an accused is called upon to answer to the charge, the court must record, as nearly as possible the words which the accused uses to answer to the charge. in the instant case, the trial court simply recorded:-

Accused 1 – It is true
Accused 2 – It is true.

13. Such statements as **"It is true"** have never been construed to be an answer to the charge. Further, after the court recorded the purported plea, it did not proceed to record **"Plea of Guilty entered"**as required by law. Instead, the case was adjourned to the next day for giving of facts. On the following day, the facts were stated by the prosecution whereupon the appellants answered thus:-

"Accused 1 – Facts are correct

Accused 2 – Facts are correct."

The court then correctly proceeded with the next step of convicting the

appellants on their own plea of guilty.

14. From the above synopsis, it is clear that the plea of guilty in this case was not unequivocal, and accordingly the conviction was not safe. The appeal is accordingly allowed. The conviction is quashed and the sentence set aside.

15. Having allowed the appeal for the reasons as above given, should this case go back to the lower court for retrial? Counsel for the appellant opposes the prosecution's prayer for retrial, arguing that the prosecution has not met the conditions for retrial. Reliance was placed on the case of **Tajiri Kalume Kahindi –vs- Republic – Court of Appeal at Mombasa – Criminal Appeal No.270 of 2006**.

16. In the case, the Court of Appeal allowed the appeal on the grounds that the conviction could not stand as it was vitiated by certain irregularities. The court was then faced with the question as to whether or not to make an order for retrial as requested by counsel for the respondent. It was submitted before the Court of Appeal that an order for retrial was appropriate because the witnesses would be readily available

to testify to ensure an early disposal of the retrial and that the evidence before the superior court was credible and could sustain a conviction if a retrial was ordered. The Court of Appeal referred to the case of **Ahmed Sumar –vs- Republic [1964] EA 481at p. 483** where the Court of Appeal for Eastern expressed itself thus:-

"It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the court will not order a retrial. But when a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not, in our view, follow that a retrial should be ordered."

The court continued at the same page at paragraph H and stated further:-

"We are also referred to the Judgment in Pascal Clement Braganza –vs- R [1957] EA 152. In this judgment the Court accepted the principle that a retrial should not be ordered unless the Court was of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person."

And in the case of **Bernard Lolimo Ekimat –vs- Republic Criminal Appeal No.151 of 2004** (unreported) Court therein stated:-

"There are many decisions on the question of what appropriate case would attract an order of retrial but on the main, the principle that has been acceptable to courts is that each case must depend on the particular facts and circumstances of that case but an order for retrial should only be made where interests of justice require it."

17. The court in the **Kahindi case** (above) also stated that the period the appellant had been in custody must be taken into account, as well as whether the witnesses would be traced in good time to mount a successful retrial. The court also said that an accused ought not to be subjected to another trial where the magistrate had misdirected himself as to the onus of proof. See case of **Elirema & another –vs- Republic[2003] KLR 537**.

18. In the instant case, the alleged offence was said to have been committed only in June or July 2011. The appellants pleaded guilty and were sentenced on 5th July 2010. Mr. Mutai says that the defect in the proceedings lies squarely at the feet of the court and not on the prosecution, namely that the court did not adhere to all the steps required for taking a plea of guilty. Counsel for the appellants contends that the defect in the record, namely giving of facts that are not consistent with the charge sheet lies squarely at the feet of the prosecution and that it was incumbent upon the prosecution to give facts that were in tandem with the particulars of the offence in the charge sheet.

19. I have noted the discrepancy between the facts as given and the particulars of the offence in the charge sheet. It is not clear whether the offence took place on 1st June 2010 or 1st July 2010. This discrepancy goes to the root of the prosecution case against the appellant. It is clear therefore that a retrial in this case would be affording the prosecution an opportunity to rectify an error that is apparent on the face of the record in an effort to secure a conviction of the appellant. In the circumstances, an order for retrial would be prejudicial to the appellants and would not be in the interests of justice.

20. Accordingly, and for the reasons stated above, the respondent's plea for a retrial is refused. Each of the appellants is to be set free forthwith unless otherwise lawfully held.

21. Lastly, the delay in delivering this judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

Dated and delivered at Kisii this 4th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Kaburi for Oguttu-Mboya (present) for Appellant

Mr. Mutai (present) for Respondent

Mr. Bibu (present) - Court Clerk

RUTH NEKOYE SITATI

JUDGE.