



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA

Criminal Appeal 101 of 2009

(From original WBY SRM Criminal Case No.1152 of 2009)

BENJAMIN KIPLIMO TUWEI.....APPLICANT

~VRS~

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant Benjamin Kiplimo Tuwei was convicted by Webuye Resident Magistrate for the offence of stealing by servant contrary to section 281 of the Penal Code and sentenced to serve five (5) years imprisonment. Being aggrieved by the conviction and sentence, he appeals to this court.

The grounds in his petition are that his rights were violated under section 72 (3) of the Constitution since he was remanded for three days in police custody before being arraigned in court. The language used in court was not translated to him and therefore did not understand the proceedings. He adds that he was tortured in custody and forced to plead guilty to the charge.

During the hearing, the Appellant submitted additional grounds of appeal which can be summarized as mitigation for a non-custodial sentence. He pleads that he was aged 19 years at the time of conviction and was a student in Weaver Bird Academy in Kitale.

The state did not oppose the appeal. Mrs Leting, state counsel conceded to the appeal on grounds that the Appellant was over-remanded in custody beyond the twenty four (24) hours allowed by the law and that the state had no explanation to give for the delay. It was submitted further that the proceedings of the court were defective in that the conviction and sentence were put together and given a sub-heading “*order*”. The state argued that this is contrary to the laid down procedure on conviction and sentence.

Section 72 requires that the accused be accorded an expeditious trial. The accused faced a minor offence and ought to have been arraigned in court within 24 hours. He was arrested on 17/6/2009 and taken to court on 20/7/2009. This was about 72 hours which is three times the maximum period allowed by the law. In the absence of any explanation, I declare that the constitutional rights of the Appellant were violated and continues to be violated because the charges were based on an illegality. The trial in the lower court was based on an illegality because of the said violation. The subsequent conviction and sentence is also *void ab initio*.

The charge was read to the Appellant in a language that is not indicated. The proceedings read:

“The substance of the charge and every element thereof has been stated to the accused person in the language that he understands and on being asked whether he admits or denies the truth of charge, he replies: It is true.”

Section 72(2) of the constitution requires that the proceedings be conducted in the language that the accused understands. The language used

must be indicated and the court must ensure that the accused understands that language. Interpretation in the language accused understands must be accorded to him. The magistrate therefore erred by failing to comply with the law and failing to record the language used during taking of the plea.

On sentence, the maximum provided by section 281 of the Penal Code is seven (7) years imprisonment. The Appellant was a first offender and there were no extraneous circumstances calling for a harsh sentence. He was a young person and he could have been given a non-custodial sentence. He informed the court that he was a student during mitigation. This a factor which the court ought to have considered while imposing sentence.

For the foregoing reasons, I find that the appeal is successful and it is allowed. The conviction is quashed and sentence set aside. The accused is set at liberty unless otherwise lawfully held.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma this 2nd day of March, 2010.
In the presence of the Appellant and the state counsel Mrs. Leting.