



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET**

Criminal Appeal 26 of 2005

(Being an appeal from the conviction and sentence in Iten Senior Resident Magistrate’s Court Criminal Case No. 385 of 2005 delivered on 22nd April 2005 by Innocent Maisiba (Esq). R. M.)

JAMES WAITHAKA)

HASSAN JUMBO)

..... APPELLANTS

PHILEMON KIPRONO)

VERSUS

REPUBLIC

**.....
RESPONDENT**

JUDGMENT

JAMES WAITHAKA, HASSAN JUMBO and PHILIMON KIPRONO Were originally convicted of two counts, the first one being stealing from the person contrary to section 279(a) of the Penal Code, while the second one was having or conveying suspected stolen property contrary to section 323 of the same Code

The particulars in the first count were that on the 20/4/2005 at Kapcherop Trading Centre in Marakwet District of the Rift Valley Province, the three jointly Stole cash Kshs. 1,500/- of Hunderson Kiptanui from the said from the said person of the said Hunderson Kiptanui, while in the second count, the particulars was that on the 21/4/2005 at Kapcherop Trading Centre in Marakwet District of the Rift Valley Province, JAMES WAITHAKA and HASSAN JUMBO jointly having been detained by Police Officers as a result of the exercise of powers conferred by section 26 of the Criminal Procedure Code had in their possession one TV. Set make Philips S/No. 14pp3506 (2) Panasonic radio cassette S/No. RXCT850 reasonably suspected to have been stolen or unlawfully obtained.

Each of the three accused was convicted after pleading guilty to the first count, and was sentenced to serve 3 years imprisonment. Each was also convicted on the second count and fined 5,000/- or in default to serve 6 months imprisonment.

Being aggrieved by the said convictions and sentences, JAMES WAITHAKA HASSAN JUMBO and PHILIMON KIPRONO, who I shall now refer to as the 1st , 2nd and 3rd appellants respectively, have now preferred this appeal which is based on the following grounds, which learned counsel chose to urge as one ground:

- ‘1. THE Learned Resident Magistrate erred in Law and in fact in sentencing the Appellants on a defective charge sheet.*

2. *The learned Resident Magistrate erred in Law and in fact in sentencing the Appellants on unclear particulars of the offence.*
3. *THE learned Magistrate erred in law and in fact in convicting the Appellants on an improper plea.*
4. *THE learned Magistrate erred in law and in fact in convicting and sentencing the Appellants without consideration that they were first time offenders.*
5. *THE learned Magistrate erred in law and in fact in sentencing the Appellants on count II with no plea of guilt.*
6. *THE learned Magistrate erred in law and fact in imposing fine on all Appellants on count II whilst the charge sheet contained the names of only two accused persons.*
7. *The trial Magistrate erred in entering a plea of guilt without considering the surrounding circumstances in that the Appellants were under the custody of police officers as at the time of arrest and who intimidated them prior to their arraignment in court.*
8. *The learned Magistrate erred in law and in fact in meting out an excessive sentence and fine to the appellants in the circumstances.'*

Miss Gichuhi's submission on the appeal against the conviction and sentences in the 2nd count, was that the pleas were improperly taken, as though it was only the 1st accused who pleaded guilty, the other two appellants were convicted of the offence yet the 3rd appellant had not even been charged with it, and the 2nd appellant had pleaded not guilty, and therefore that the learned trial Magistrate proceeded in contravention of Section 208 of Criminal Procedure Code.

It was also her submission that the sentences, which were to run concurrently, were harsh, yet the appellants were first offenders, whose mitigation was disregarded by the court.

She urged the court to allow the appeal against the convictions and sentences in the first count, and to order a retrial in the second count.

Mr. Omutelema, conceded to the appeal against conviction and sentence in the second count. He agreed with counsel for the appellants, that though the plea of 1st appellant who had pleaded guilty was properly taken, and that the conviction was thus proper, the convictions of the 2nd and 3rd appellants were not proper, as while the former pleaded not guilty, the latter had not even been charged with that particular offence. He however opposed the appeal against the convictions and sentences in the first count, as the pleas were properly taken; and that the appellants had admitted the facts which disclosed the offence, to be true, and that in the circumstances, the subordinate court was entitled to convict them on their own pleas of guilty.

He however conceded that considering the amount stolen in the first count and the fact that the three had pleaded guilty, the sentences of 3 years were harsh in the circumstances, but that the sentence in the second count was not harsh.

I have reviewed the proceedings of the subordinate court. It is not disputed that their pleas in the 1st count were unequivocal and that the three were properly convicted on their own pleas of guilt. That being the case, they can only appeal against the sentences. Bearing in mind the fact that they were first offenders and further that a larger portion of the money was recovered from them, I would quash the sentences, which I consider harsh in the circumstances, and instead order that they serve 12 months imprisonment.

The 1st appellant's appeal against the conviction and sentence in the 2nd count cannot lie as he was convicted on his own plea of guilt, and after he confirmed the facts to be true. I find that the sentence was not harsh, and in the circumstances his appeal fails.

I do however quash the conviction and set aside the sentence of the 3rd appellant who was wrongly convicted of an offence which he was not charged with.

I do order that a retrial be held for the 2nd appellant who was wrongly convicted on the 2nd count on the assumption that he had pleaded guilty to it. His matter shall be mentioned before the Resident Magistrate at Iten on 11th July 2005.

Dated and delivered at Eldoret this 5th day of July 2005.

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Omutelema for the state, Mr. Birir holding brief for Gichuhi for the appellants and the three (3) appellants.