



REPUBLIC OF KENYA
Kisivi v Republic

High Court, at Mombasa
January 31, 1991

Wambilyangah J

Criminal Appeal No 422 of 1990

(From original conviction and sentence in Criminal Case No 2482 of 1990 of

the Resident Magistrate's Court at Kwale, Areba Esq Ag RM)

Criminal Practice and Procedure - plea - procedure in taking a plea - charge of stealing livestock - duty of a trial court to be careful and vigilant in recording a plea where the offence is of a technical nature and a plea of guilty by a lay person may be unequivocal.

The appellant was charged and convicted of stealing livestock and sentenced to four years imprisonment with corporal punishment. The appellant was recorded as having said "Yes it is true" to the facts which were read by the prosecution.

The accused was recorded as the one who locked the shed from which the cattle was subsequently stolen before being found in this compound of one Dzuya. However there was no evidence linking the accused with the movement of the animals to Dzuya's compound.

Held:

1. Some offences are quite technical and a layman may for instance never know the legal distinction between being in innocent possession of stolen property and the kind of possession contemplated by section 4 of the Penal Code.
2. Unless therefore the magistrate elicits and gets enough detail of what happened and how the accused before him was connected with the offence charged, it is likely that the plea will not be unequivocal.
3. In this case the facts of the prosecutor did not in any way demonstrate how the appellant was connected with the animals which were recovered.

Appeal allowed.

Cases

No cases referred to.

Statutes

Penal Code (cap 63) section 278

January 31, 1991, **Wambilyangah J** delivered the following Judgment.

The appellant Mali Mutunga Kisivi was charged before the Ag Resident Magistrate Kwale Court for the offence of stealing stock contrary to section 278 of the Penal Code. He is recorded as having said “yes it is true”. After the prosecutor outlined certain facts which the appellant is recorded as having admitted to be true, the magistrate proceeded to convict him and subsequently felt that the offence was a serious one which deserved the sentence of 4 years. The magistrate overlooked to impose corporal punishment which is mandatory under section 278 of the Penal Code. There are 2 aspects to which my concern has been drawn by the appeal and they are:-

(a) The muddled aspect of the recorded facts.

(b) The facts which were narrated to the magistrate did not reveal that any offence had been committed let alone that it had been committed by the appellant.

On the first aspect, the man against whom the crime was committed appears to be the accused if the record is given its literal plain meaning. He is recorded in the first sentence under the heading Facts as being the one who locked the shed from which the cattle were subsequently stolen. That obviously is not right. It only calls for care in compiling court records. On the next aspect and to which I attach considerable significance is the fact that no offence is revealed from what the prosecutor told the magistrate. The mere fact that the cattle were discovered missing from their usual *boma* and were later on found in the compound of one Dzuya does not, *ipso facto*, follow that the same had been stolen. But even if they had been stolen, we still do not know, on reading the recorded facts, why the accused was arrested. The fact of the cattle missing from their *boma* and then subsequent recovery has not in any way been linked, as it should have been, to the appellant by those facts. He would have had no reason for disputing the facts which were not touching except saying that he was arrested, which was an uncontested aspect of the case. So his “yes” is still very ambiguous in those circumstances. I should commend to the learned magistrate to be careful and at the same time vigilant when recording a plea of guilty. Some offences are quite technical and a layman may for instance never know the legal distinction between being in innocent possession of the stolen property – such being the mere owner of the premises from whence the stolen items are recovered, and its “possession” contemplated by section 4 of the Penal Code. He could thus be admitting that the animals were recovered from his shamba without ever admitting that he had stolen them. Unless, therefore the magistrate elicits and gets enough details of what happened and how the accused before him was connected with the offence charged, it is likely that the plea will not be unequivocal. In this case the facts of the prosecutor did not in any way demonstrate how the appellant was connected with the animals which were recovered from the compound of Dzuya whose relationship with the appellant was not stated.

For these reasons I quash conviction, and set aside the sentence. I direct that the appellant should now be arraigned afresh on the same offence before the Chief Magistrate Mombasa.