THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 21/95

(ORIG. LUGAZI NO.21/95)

KAGUBE MOHAMED::APPELLANT

VERSUS

UGANDA::: RESPONDENT

BEFORE:THE HONOURABLE JUSTICE C.M.KATO

JUDGMENT

The appellant Mohamed Kagube was charged along with two Other people who did not appeal with the offence of theft of cattle c/s 255 of the Penal Code Act. He pleaded guilty and he was convicted and sentenced to 2 years imprisonment. He appealed against both the sentence and conviction. He gave 7 grounds of appeal which were as follows:-

1. That the conviction was based on an involuntary plea.

2. That the plea as improper.

3. That the facts as stated by the prosecutor were partly false, and also did not indicate the appellant's participation in the crime.

4. That the trial magistrate misdirected himself on the question of mitigation and thus occasioned a miscarriage of justice.

5. That the sentence was illegal in as far as it was omnibus.

6. That the sentence was excessive in the circumstances of the case.

7. That the trial magistrate erred in law and fact in passing a Sentence which did not provide for an option for a fine.

Arguing the first ground of appeal the learned counsel Mr. Olugwe who appeared for the appellant maintained that the appellant's plea was not voluntary as that plea was based on duress. In his affidavit in support of this appeal the appellant stated in paragraphs 3 and 5 of

the affidavit that he had been forced by one Kalyango to admit having committed the offence on the undertaking that if he did so he would only be fined but he would not ho sentenced to prison. I found this ground of appeal to be unhelpful to the appellant because on reaching the court there was no duress from anybody as he was standing in the dock alone and there is no record in court that he pointed out anywhere that Kalyango the LDU had forced him to admit the crime. I find ground no.1 of this appeal to have no merit and I reject it as such.

On ground no. 2 the learned counsel for the appellant maintained that the plea was improper and it did not amount to a plea of guilty. In the plea the accused simply said "I admit I did so." Here I must point out that it was quite irregular for the trial court to have takes the plea of the appellant for both main count and the alternative count after the appellant had pleaded guilty to the main count. There was no need to ask him to plead to the alternative count which automatically became redundant the moment the appellant pleaded guilty to the main count. It was irregular for the trial court to simply record: "I admit I did so," without complying with the provisions of section 122(2) of MCA and the rules laid down in Adan v. Republic (1973) EA 445.

Another irregularity is that after the plea of the accused had been taken the court ought to have recorded his plea as a plea of guilty but not to wait until the facts had been narrated and then record a plea of guilty; in the same breath it must be pointed out that this proceeding was not in accordance with the rules which were established in the case of Adan v. Republic (1973) EA 445. I find that the second ground of appeal was validly raised.

In the third ground of appeal the learned counsel for the appellant argued that the facts as stated by the prosecutor did not reveal that the appellant was one of the people who had participated in the theft of the bull. I have looked at the proceedings of the lower court and these proceedings do not show any where that the accused was one of the who stole the bull or that he was found with it. The salient part of the facts as narrated in the lower court reads as follows:- "The group took cover in the neighbourhood. While taking cover they saw Wante and Majembere coming and untying the bull. While, about to take it away they were arrested. Upon arrest they said they would lead detectives to A1". It is true that the appellant later on purportedly admitted the facts to be true but he might have admitted the facts being true because the above mentioned group went to him and nothing more. By provisions of

section 216 (3) of MCA an accused who pleads guilty can only appeal on the legality of the sentence and nothing more but this court in the case of: Yakubu Nabala v. Uganda Criminal appeal no. 3/94 (unreported) pointed out that where the plea is not in accordance with the established rules such a plea cannot be ignored and should not be relied upon. In this particular case I find that the facts as put against appellant by the prosecution did not in anyway show that the appellant had anything to do with the bull. The mere fact that two other suspects led detectives to where the appellant was does not mean he was a thief. I find the third ground of this appeal to have been properly raised, and on this ground alone the appeal, should be allowed.

I will deal with ground no. 4, 5 and 6 together as they all deal with the sentence. It was the case for the appellant**'s** counsel that the sentence passed upon the accused was excessive and harsh and that it was also omnibus sentence. It is not true to say, as the learned counsel says, that the learned magistrate did not consider the mitigating factors. The learned trial magistrate did not consider the mitigating factors. The learned trial magistrate did point out among his reasons for sentence that he had considered the fact that the accused was a first offender, he did not however take into account the fact that the bull which was stolen had been recovered and that the accused had saved court's time and expense by pleading guilty. The learned trial magistrate pointed out that the maximum sentence for this kind of offence is 7 years and he thought 2 years was not out of proportion. I agree with him on that point considering all the circumstances of this case.

Mr. Okwanga who appeared for the respondent conceded that the sentence imposed upon the accused was an omnibus sentence. I agree with the views expressed by both counsel on this point the trial court having purportedly convicted the appellant for both the alternative and main counts should have expressly pointed out which sentence was in respect of the main count and the alternative count but as I said earlier the moment the accused pleaded guilty to the main count the alternative count was automatically cancelled out and according to the proceedings of the lower court I am inclined to hold that this sentence was only in respect of one count which was the main count so it is not illegal.

Mr. Olugwe finally contended that the learned trial magistrate was wrong not to have given the appellant the option of paying a fine. It is true under section 189 (2) of MCA magistrates have the discretion of imposing fines instead of imprisonment but in the present case, I feel that the discretion not to impose the fine was judiciously exercised.

Considering the views expressed in grounds no. 2 and 3 of this appeal I feel there were material irregularities in the manner the accused's plea was taken and more especially as the facts did not incriminate him I feel this appeal should be allowed on this ground alone. The appeal is accordingly allowed; the conviction is quashed and sentence is set aside. Appellant is to be released from prison forthwith unless he is being held there for some other lawful purposes.

C.M. KATO

JUDGE

27/10/95