



REPUBLIC OF KENYA



KENYA LAW
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**Cheptoo v Republic (Criminal Appeal E021 of 2021)
[2023] KEHC 3329 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3329 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E021 OF 2021
SM MOHOCHI, J
MARCH 29, 2023**

BETWEEN

JAMES KIPSABONY CHEPTOO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the sentence in Chief Magistrate’s Criminal Case No. E863 of 2021 - Kabarnet, Republic v James Kipsabony Cheptoo, delivered by P.C. BIWOTT, S.P.M. delivered on 18.08.2021)

JUDGMENT

Introduction

1. The Appellant was convicted and now files this Petition of Appeal that is couched in the nature “appeal of mitigation” against the sentence of 4 years’ imprisonment for the offence of stock theft contrary section 278 of the [Penal Code](#) based on the following seventeen (17) “mitigation grounds for leniency”:

- i. He is totally remorseful of what transpired to him;
- ii. He is ready to compensate the complainant;
- iii. That the complainant in her testimony wanted the case referred back to the chief for compensation;
- iv. That he is a 1st offender;
- v. That he has young children two in secondary school that he supports;
- vi. That he is the sole bread earner;
- vii. That he prays for a fine;



- viii. That he prays for a second chance;
 - ix. That the four (4) year imprisonment is harsh under the circumstances;
 - x. That he prays for a non-custodial sentence if not a fine;
 - xi. That he is fond of sickness while in prison custody;
 - xii. That he promises to be an upright citizen who will pay school fees for his children;
 - xiii. That he has an aged grandmother depending on him;
 - xiv. That his children are suffering;
 - xv. That he is an ordinary Kenyan depending on hustle and bustle to make ends meet;
 - xvi. That he prays that his mitigation be heard and considered during determination of this case; and
 - xvii. That the complainant returned her goat home upon recovery.
2. The Appeal seeks the substitution of imprisonment with that of a fine or a non-custodial sentence.
 3. The Appeal is opposed by the state who filed written submissions dated June 3, 2022 urging that the only substantial ground challenging the judgement is ground nine (9) where the Appellant alleges that the sentence was harsh.
 4. I concur with the respondent's submission that three issues emerge for the consideration of this Court namely: -
 - i. Whether the four (4) year imprisonment sentence of the appellant was harsh and excessive under the circumstances;
 - ii. Whether the appellant's the four (4) year imprisonment sentence should be disturbed.
 5. The duty of this first Appellate Court in Criminal Cases was restated in the case of *Charles Mwita –vs- Republic*, C A Criminal Appeal No 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that: -

“In *Okeno v R* [1972] E.A. 32 at page 36 the predecessor of this Court stated: - “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya –v- R* [1957] EA 336) and to the appellate Court's own decision on the evidence”.
 6. Being a 1st Appeal Court, I must, weigh conflicting evidence and draw conclusions, (*Shantilal M Ruwalla –v- R* [1957] EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA 424.”
 7. While the Appeal is framed and grounded on Seventeen (17) grounds, the scrutiny of the same by the Court reveals that the said grounds are not strictly grounds but rather a regurgitation of mitigation



comingled together with the relief(s) sought. It is however the duty of the Court to hear the appeal upon admission.

8. The Appeal was opposed on one main ground namely if the sentence was harsh and excessive under the circumstances urging that the same was lenient as the maximum sentence provided is fourteen (14) years imprisonment, the state equally argued that while the Courts require a probation report as a matter of course the same inform the exercise of judicial discretion reliance was placed in the case of *Kabeni Vs Republic* [1970] EA 503.
9. The respondent equally submitted that while the Courts encourage and promote reconciliation the same was unsuccessfully applied on the Appellant who was non-committal to reconciliation and that the circumstances applicable to provisions of Section 176 of the *Criminal Procedure Code* are express in nature.
10. The Trial had five (5) prosecution witnesses called in support of the case while the Appellant elected to give an unsworn statement.
11. PW1 told the Court that on the June 3, 2021 at 8.00am he received a phone call from PW2(her mother), that her goat had been stolen and she immediately embarked on a search mission by calling her brother in Kabarnet to monitor the slaughter house and it was her brother who traced the goat to PW4 who had purchased the same from the Appellant.
12. PW2 narrated how the goat was stolen on the June 3, 2021 at 2.00am, PW4 an assistant chief gave evidence how he re-arrested the Appellant rescuing him from a lynch mob on the June 4, 2021 and PW4 gave evidence how the Appellant came together with another person to his hotel in Kabarnet on the June 3, 2021 and sold him a goat for Kshs 3,500/- and upon discovery that the goat was stolen he surrendered the goat to the police.
13. PW5 was the investigating officer who told the Court that the goat was stolen, sold to PW4 from where it was recovered, that he photographed the goat and surrendered it back to PW2. The witness produced Exhibits 1(a-c) the photographs of the stolen goat.
14. The Appellant denied selling the goat to PW4 while alleging an unnamed third party had sold the goat in his presence and that he was arrested for no reason and charged when he refused to record his statement.
15. Set against the instant Appeal, it emerges that the Appellant seeks to re-mitigate his case as a way of his sentence being reviewed. The Court appreciates the findings of the *Muruatetu* decision with regard to the right to mitigation and the need to afford an Appellant, if the same was not offered in the trial Court. However, in this instant case the Appellant mitigated, prayed for pardon, that he was a casual laborer and asked to be given a non-custodial sentence he was treated as a 1st offender.
16. The Trial Court in sentencing observed that the Appellant was a 1st offender, remorseful and was unable to reconcile with the Complainant.
17. It is a well-established principle that sentencing is at the discretion of the Trial Court and that an Appellate Court can only interfere with the sentence under very specific circumstances. This principle was emphasized by the Court of Appeal in *Bernard Kimani Gacheru vs Republic* [2002] eKLR where it stated that: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the Trial Court. Similarly, sentence must depend on the facts of each case. On appeal, the Appellate Court will not easily interfere



with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the Trial Court overlooked some material factor, or considered some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court on sentence unless, any one of the matters already stated is shown to exist.”

18. In the instant case, the Appellant was sentenced to 4 years’ imprisonment, contrary Section 278 of the Penal Code which provides that: -

“A person who commits an offence of theft of stock is liable upon conviction to imprisonment for a term of not exceeding fourteen years.”

19. I have considered this Appeal and find that the sentence as imposed was lenient, not excessive and that the Trial Court considered all factors including mitigation in sentencing.

20. I find that the Trial Court did exercise its discretion in sentencing judiciously and no material has been placed before Court to persuade me to disturb the sentence imposed.

21. The appeal thus fails for lack of merit and is accordingly dismissed.

22. The Sentence of the Trial Court is hereby affirmed.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 29TH MARCH 2023

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Mohochi S.M

JUDGE

29.03.2023

In the Presence of: -

Appellant in Person

Mr. G. A. Mongare for the Republic

Mr. Kemei C.A

