



REPUBLIC OF KENYA



KENYA LAW
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**Napir v Republic (Criminal Appeal E008 of 2022)
[2023] KEHC 18334 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18334 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E008 OF 2022
RB NGETICH, J
MAY 31, 2023**

BETWEEN

CALVIN NAPIR APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the sentence from the Judgment and/or Decree
of Honourable P.C BIWOTT (SPM) dated at Kabarnet Principal
Magistrate's Court Criminal Case No. E731 of 2021 on 1st October, 2021)*

JUDGMENT

1. The Appellant jointly with another was charged with two main counts and alternative charge. Count I is the offence of stealing stock contrary to section 278 of the Penal Code. Particulars of the offence are that on the 25th day of April, 2021 at around 0500hours at Kampi Wakulima village in Marigat Location in Baringo south sub-county within Baringo County, the accused persons jointly stole Two she-goats both brown in colour valued at Kshs 10,000/- the property of Moses Tuikong Katikit.
2. Count II is the offence of Stealing stock contrary to Section 278 of the Penal Code. Particulars are that the accused on the 25th day of April,2021 at around 00500hours at R-5 village in Eldume sub-location in Baringo south sub-county within Baringo county, the accused persons jointly stole he-goat valued at Kshs 7,000/= the property of Beatrice Sianteni Leweri.
3. The alternative charge is the offence of Handling Stolen goods contrary to Section 322(1)(2) of the Penal Code. Particulars are that on the 25th Day of April, 2021, at around 0800 hours along Marigat –Kampi samaki road, in Marigat location in Baringo South sub-county within Baringo County, the accused persons dishonestly received or retained one (1) he-goat valued at Kshs 7,000/= the property of Beatrice Siateni Leweri and two (2) she-goats valued at 10,000/= the property of Moses Tuikong Katiki, knowing or having reason to believe them to be stolen property.



4. The Appellant and his co-accused denied the charges and the case proceeded for full trial with the prosecution calling 4 witnesses in support of their case. The accused gave unsworn statement in his defence. By the judgment delivered on October 1, 2021, the lower Court found that the prosecution proved their case beyond reasonable doubt in both count I and II and sentenced each accused to serve 3 years imprisonment for each count.
5. The Appellant being aggrieved and dissatisfied with the decision of the trial court, filed a miscellaneous Application No E026 of 2021 seeking leave to appeal out of time and was granted leave by the court through a ruling delivered on 26.01.22; the Appellant granted 14 days to file and serve the appeal.

Appellant's Submissions

6. In his written submissions, the appellant sought leniency on the grounds that he is a first offender, that he has never committed any crime before. He admitted that he got the goats from a stranger not knowing that they were stolen and the perpetrator disappeared leaving him to bear the cross. He sought for leniency from the court considering the circumstances of the case.
7. The Appellant further submitted that his children and wife were displaced by insecurity in his home area to a place he did not know and they are suffering due his absence; the children are lacking parental care and support. He urged this court to pardon him to go and salvage the worsening situation.
8. He further submits that he has learned a lesson and promises to abide by the rules and regulations of the land and shun any sorts of immoral behaviours; that he has reformed while in prison and has acquired skills in carpentry and joinery which he will utilize to sustain his family instead of engaging in crime. He added that he has also joined bible study.
9. When the matter came up for hearing on the 2/05/2023, the Appellant clarified to the court that he was not appealing against conviction. He urged the court to reduce sentence. He said he was sentenced to 3 years imprisonment from October, 2021 and that he was remaining with 4 months to complete his sentence. He told the court that he was remanded for one month before being released on bond and that the one month spent in remand was not factored in during his sentencing by the trial court.

Respondent's Submissions

10. In response to the application by the Appellant, the state counsel Ms. Ratemo informed the court the state was not opposed to the sentence being reviewed and that she leaves it to the discretion of the court.

Analysis and Determination

11. The appellant from his submissions is no longer challenging conviction but seeks review of the sentence. Section 333(2) of the [Criminal Procedure Code](#) provides:-

“Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody.”
12. It is clear from the above proviso that the law requires courts to consider the period the convict spent in custody.



13. There is no doubt that the appellant is entitled to computation of period served in remand in the sentence finally imposed; Reduction of Period served in custody from sentence imposed by trial court.
14. What remain for consideration is whether the appellant deserve review of sentence. In considering review of sentence, I wish to consider whether the sentence imposed by the trial court was harsh in the circumstances of the case.
15. The provisions of the law under which the appellant was charged provide sentences as hereunder: -
Section 278 of the *Penal Code* provides,
“If the thing stolen is any of the following things that is to say a horse, mares, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe whether goat or pig or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”
16. From the above provision, the maximum sentence for stealing stock is 14 years. The trial court-imposed sentence of 3 years imprisonment. I also note that the appellant was given a chance to mitigate and he said that his relatives rely on him. The trial magistrate while imposing the sentence remarked that he should learn to earn a living without stealing and imposed the sentence of 3 years imprisonment.
17. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of *Mbogo & another v Shah* [1968] 1 E.A. 93 thus:-
“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”
18. Further, the Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this issue as follows:-
“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”
19. In determining whether the sentence herein should be reduced or not, I should take into consideration similar cases and their decisions which include the following:
 - a. Kisii High Court Criminal Appeal No 17 of 2016, the accused had stolen one cow valued at Kshs 20,000/=. A sentence of 5 years was reduced to 3 years.
 - b. Lodwar High Court Criminal Appeal No 93 of 2016, the accused had stolen two goats valued at Kshs 5,000/=. A sentence of 5 years was upheld.
 - c. Voi High Court Criminal Appeal No 47 of 2014, the accused had stolen three bulls valued at Kshs 150,000/=. A sentence of 10 years was reduced to 5 years.
 - d. Nairobi High Court Criminal Appeal No1229 of 2000, the accused had stolen stock valued at Kshs 6,000/=. A sentence of 7 years was reduced to 5 years.
20. I have looked at the above decisions. There is no doubt that circumstances of each case may be different but in my view, sentences across the country for similar offence ought to be comparable with variance occasioned by special circumstances for each case.



21. On Appeal, the appellant has the burden of advancing reasons to persuade the appellate court to interfere with sentence imposed by the trial court. As observed by the learned trial magistrate, I do agree that stealing is a vice that should be frowned upon and deterrent sentence ought to be imposed.
22. Having considered the above authorities, circumstances of this case and submissions by both the appellant and the learned state counsel, I am of the view that the sentence of 3 years is neither harsh nor excessive.

Final Orders

1. Application for review of sentence is hereby dismissed.
2. Period served by the appellant in remand be considered in computation of sentence.
3. Right of Appeal 14 days.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 31ST DAY OF MAY 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

Appellant present.

