



REPUBLIC OF KENYA



**Agulenyang & another v Republic (Miscellaneous Criminal Appeal
E084 of 2023) [2023] KEHC 24050 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24050 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
MISCELLANEOUS CRIMINAL APPEAL E084 OF 2023
RN NYAKUNDI, J
OCTOBER 25, 2023**

BETWEEN

ERUKON AGULENYANG 1ST APPLICANT

HASSAN AGULENYANG 2ND APPLICANT

AND

REPUBLIC RESPONDENT

(Being a review from original conviction and sentence in Kakuma Senior Principal Magistrates Court criminal Case No. E64 of 2023, Hon. I K Rono RM on 20th February, 2023)

RULING

1. The applicants were convicted on their own plea of guilty with the offence of stealing contrary to section 278 of the [penal code](#) and were sentenced to 5 years imprisonment.
2. The particulars of the charge were that on the 26th day of January, 2023 at Kakuma Township in Turkana west sub county within Turkana County, jointly with another not before court, stole 5 donkeys valued at Kshs. 75,000/= the property of Edung Lobiria.
3. In mitigation, the Applicants herein supplied separate grounds which I have considered and in my view the same ought to have been presented to the trial court for consideration while meting out an appropriate sentence.

Analysis and Determination

4. I have considered the mitigation advanced by the applicants and it is evident that they are only praying for a lenient sentence.



5. It is trite that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances. This position was re-emphasized by the Court of Appeal in *Benard Kimani Gacheru v 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 took into account 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.”

6. In the present case, the Applicants pleaded guilty to the offence of stealing contrary to section 278 of the *penal code*.

7. Section 278 provides for the offence of stealing stock whilst Section 389 provides for punishment for attempt to commit a felony or a misdemeanour where no other punishment is provided. In such a case, the person is liable to imprisonment to one half of such punishment as may be provided for the offence attempted, but if that offence is one punishable by death or life imprisonment, he shall not be liable to imprisonment for a term exceeding seven years.

8. Further, under Section 278, theft of stock is punishable by a term not exceeding 14 years imprisonment. Hence, for attempted theft of stock, the punishment should not exceed seven years imprisonment. The Applicants were sentenced to five years imprisonment.

9. In the present case, the applicants pleaded guilty to stock theft. In my view, the sentence of 5 years was well within range and I shall not disturb the sentence meted by the trial court.

10. In *Ogolla s/o Owuor* (1954) EACA 270, the Court stated as follows:

The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

11. The 2016 *Judiciary of Kenya Sentencing Policy Guidelines* list the objectives of sentencing at page 15, paragraph 4.1 as follows:-

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims’, communities’ and offenders’ needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender’s contribution towards meeting the victims’ needs.
5. Community protection: To protect the community by incapacitating the offender.
6. Denunciation: To communicate the community’s condemnation of the criminal conduct.”



12. I have considered the submissions made by the applicants with regard to this application to revisit the nature of the sentence imposed by the trial court. Incidentally for reasons which are not crystal clear the probation officers report was non responsive and it contributed to the long custodial sentence imposed by the learned trial magistrate. What is not disputed is the nature of the relationship between the applicants and the complainant. The applicant's knowledge and attempt to deprive the complainant permanently of his livestock. That the applicants, cooperated with the police during investigations, arrest, and arraignment in court. It is also not disputed that the two applicants pleaded guilty to the offence in question. The other unusual features of the case is the recovery of the stolen livestock. Therefore the permanent loss and deprivation premeditated by the applicants was mitigated by that recovery. No one ever told the court that the applicants were habitual offenders within the community in which they are domiciled. Reliance on this case seems to have been placed on outright recovery of the stolen livestock and the non-responsive probation officer's report. Time has come in this regard for the defendants to challenge some of the contents in the probation officer's report which adversely impeaches their character without tangible evidence. In my considered view mitigating factors outweigh aggravating factors to this offence to demand of the court to look elsewhere on other alternatives to sentencing than the elective of custodial sentence. The plea of guilty counts for something. It is not just a mechanical factorial to sentencing. The learned trial magistrate did not indicate a starting point nor did he illustrate how he increased that number of 4 years based on the mitigating and aggravating factors he identified. Further having not stated a starting point, he did not indicate what would have been the appropriate sentence had the matter gone to trial. As a result he did not demonstrate what deduction he made if any for the guilty plea. I am therefore of the strong view that this decision on sentence was arrived at by taking into account irrelevant matters of fact, wrong principles of the law on sentencing and other extraneous issues which impaired the judgment of the sentencing court. This is where we come in to interfere with a sentence which on the face of it is punitive, excessive and harsh when tested within the ambit of the law. In this matter based on the record, mitigation offered by the applicant, factors like plea of guilty and recovery of the stolen property the applicants sentence of four (4) years be and is hereby reviewed to a period of eighteen (18) months with effect from 27th January, 2023.

13. Orders accordingly.

DATED AND SIGNED AT LODWAR THIS 25TH DAY OF OCTOBER, 2023

In the Presence

The Applicant

Mr. Yusuf for the DPP

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R. NYAKUNDI

JUDGE

