Lowuale v Republic (Criminal Appeal 59 of 2019)
[2022] KEHC 14311 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14311 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 59 OF 2019

WK KORIR, J

OCTOBER 27, 2022

BETWEEN

ADOKETI LOWUALE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in the judgement delivered on 16/10/2019 by Hon. P.C. Biwott, SPM in Kabarnet SPM Court Criminal Case No. 72 of 2019 Republic v Adoketi Lowuale)

JUDGMENT

1. The Appellant, Adoketi Lowuale, was in count one charged with the offence of stealing stock contrary to Section 278 of the *Penal Code*. The particulars of the offence being that on the night of 8th and January 9, 2019 at Chemolingot Trading Centre, within Baringo County, he jointly with others not before court stole 25 goats valued at Kshs. 139,500/= the property of Intalo Isaak.

2. In the second count, the Appellant was charged with handling stolen property contrary to Section 322(1) & (2) of the *Penal Code*. The particulars being that on January 20, 2019 at Cheptunoyo Village, Silale Location within Baringo County otherwise than in the course of stealing, he dishonestly retained goats valued at Kshs. 20,000/= having reason to believe them to be stolen property.

3. The Appellant pleaded not guilty to the charges and at the conclusion of the full trial, he was found guilty, convicted and sentenced to four years in respect to the first count. The trial court indicated that the second count was held in abeyance.

4. Although the decision of the trial magistrate in respect of the second count is not a subject of this appeal, it is important that I say something about that decision. The Appellant was charged with two different counts. From the way the charges were drafted, it is apparent that they were independent of each other. The second count was not an alternative to the first count. The trial court was therefore

obliged to make a finding on each of the two counts. The statement that the decision on second count was put in abeyance was therefore erroneous.

5. I have perused the evidence of the four prosecution witnesses who testified at the trial and find that no *iota* of evidence was advanced to support the second count. The Appellant was therefore entitled to an acquittal in respect of the second count. I will leave this issue at this point and move on to the matters raised in the appeal.

6. The Appellant through his amended petition of appeal filed on September 29, 2021 reduced his appeal to the harshness of the sentence and asked this Court to reduce his sentence to the period already served. His submissions filed on June 3, 2022 also succinctly spoke to this point. I will therefore honour him by addressing the issue of his sentence only.

7. Through submissions dated June 10, 2022 and filed on the same date, the Respondent opposed the reduction of the Appellant's sentence. This Court was asked to uphold the sentence imposed by the trial court and dismiss the appeal.

8. As already stated, this appeal is confined to the issue of the sentence imposed in respect to the first count by the trial court. The role of an appellate court in sentencing is clear. In *Joseph Gitau Macharia v Republic* [2003] eKLR, the Court of Appeal highlighted the jurisdiction of an appellate court on sentencing as follows:

> "The principle upon which this Court will act in exercising its jurisdiction to review or alter a sentence imposed by the trial court have been firmly settled as far back as 1954, in the case of *Ogalo s/o Owuor* (1954) EACA at page 270 wherein the predecessor of this Court stated:
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> "The Court does not alter a sentence on the mere ground that if the member of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in *James v R*, (1950) 18 EACA 147 "it is evident that the judge has acted upon some wrong principle or overlooked some material factors' To this we would also add third criterion namely, that the sentence is manifestly excessive in view of the circumstances of the case: *R v Shershewsky* (1912) C C A 28 TLR 364"."

9. The Appellant was charged with the offence of stealing stock contrary to Section 278 of the *Penal Code* which attracts a maximum sentence of 14 years. The Appellant was sentenced to 4 years in prison. Although the Appellant seeks leniency for the sake of his family and claims that he is a first offender, the trial court record speaks differently. Prior to the sentencing of the Appellant, the prosecutor told the trial court that the Appellant had been sentenced to 18 months' imprisonment in Kabarnet Magistrate's Court Criminal Case No. 548 of 2019. The Appellant did not dispute this fact and he was therefore not a first offender. The sentence meted on the Appellant cannot therefore be said to be harsh and excessive in such circumstances. In stating so, this Court takes note of the fact that stock theft is rampant within this jurisdiction and deterrent sentences for the crime are recommended.

10. For the stated reasons, I find this appeal without merit and dismiss it.

DATED AND SIGNED AT NAKURU THIS 24TH DAY OF OCTOBER, 2022.

W. KORIR,

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT KABARNET THIS 27TH DAY OF OCTOBER, 2022.

H. K. CHEMITEI

, JUDGE