



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 3 OF 2018

FLORA WANJIKU WAMBUI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the conviction and sentence in Criminal Case No. 77 of 2017 at

Kangema by D. M. Kivuti, Senior Resident Magistrate, dated 19th January 2018]

JUDGMENT

1. The appellant was adjudged guilty of *stealing stock* contrary to section 278 of the Penal Code. She was sentenced to *five years* imprisonment.
2. The particulars were that on 12th February 2017 at Kiria-ini Township within Murang'a County, she jointly with another person stole a cow valued at Kshs 35,000 the property of Gabriel Mwangi Kariuki.
3. The appellant lodged the original *petition of appeal* on 31st January 2018 14th August 2019, her counsel, *Ms. Mumbi Muritu*, lodged an amended petition *without* leave of the court. The latter is obviously breaches the mandatory provisions of section 150 of the **Criminal Procedure Code**. It is a nullity.
4. The appeal will thus proceed on the basis of the original petition and grounds of appeal. There are four grounds: I will compress them into three: Firstly, that the sentence was draconian considering that the appellant was a first offender and her mitigation. Secondly, that the trial court failed to take into account her defense or "defence witnesses". Thirdly, that the lower court denied her request to settle the matter out of court.
5. The appellant elected to be absent at the hearing of the appeal as per an affidavit sworn on 20th July 2020 by her counsel. Her learned counsel relied on written submissions filed on 21st July 2020.
6. The appeal is opposed by the Republic. Learned Prosecution Counsel, *Mr. Mutinda*, also relied on submissions filed on 23rd July 2020.
7. This is a *first appeal* to the High Court. I have re-evaluated the evidence on record and drawn *my* conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32.
8. On 12th February 2017, the complainant (PW1) discovered that his cow was missing. He made a report at Kiria-ini Police Station. In the meantime, he got information that the appellant, who is his cousin, sold the cow through a broker known as Peter Kimari at Kagicha Market. It is instructive that the appellant declined to cross-examine PW1.
9. Peter Kimari died in the course of the trial. The lower court rightfully allowed the prosecution to produce the deceased's statement under section 34 of the **Evidence Act**.
10. The statement (exhibit 1) is dated 17th February 2017 and was presented by Corporal Phillip Rob (PW2). It stated that on 13th February 2017, the appellant, who was a waitress at a bar in Kagicha, approached him to sell a "*black and white striped cow with no horns*". The cow was kept in the compound of one Njogu. The broker got an unnamed buyer who negotiated a price of Kshs 27,000 with the appellant. The purchaser took away the cow on a pick-up towards Kangema. The cow was never recovered. Again, the appellant had no questions in cross examination.
11. When the appellant was placed on her defence, she elected to remain mum.

12. From the unchallenged evidence of the prosecution witnesses, I am satisfied that the appellant was positively identified by PW2 as the person who had stolen the cow, hidden it at Njogu's place at Kagicha and sold it through the broker, Peter Kimari. The appellant did not offer any explanation. I readily find that the conviction was *safe*.

13. Regarding the ground that the lower court denied her an opportunity to settle the complaint, I have found nothing on the record indicating such a request by either the appellant or the complainant. It is clearly unfounded and a red herring.

14. I will now turn to the appeal on *sentence*. Section 354 (3) of **Criminal Procedure Code** empowers the High Court to "*maintain the sentence, or with or without altering the finding reduce or increase the sentence*".

15. In **Macharia v Republic** [2003] 2 E.A. 559 the Court of Appeal had this to say on sentencing-

"The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors."

16. The learned trial magistrate considered the mitigation and the fact that the appellant was a first offender. The appellant said in mitigation that she was a single mother of a young child. Stock theft is a serious offence. But considering all the circumstances of the case, the sentence of five years was a little harsh. See **Orwochi v Republic** [1976-80] 1 KLR 1638 and **Marando v Republic** [1976-80] 1 KLR 1639. I think the principle to be distilled from these cases is that sentencing must take into account the unique circumstances of each case.

17. For all of those reasons the appeal on conviction is *dismissed*. However, the *sentence* passed against the appellant is *set aside*. The appellant has been in prison for *over two years and seven months*. She must have learnt a painful lesson. I reduce the sentence to the period already served. The appellant shall be set free forthwith unless held for some other lawful cause.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 29th day of September 2020.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr. T. Kariuki holding brief Ms. Muritu for the appellant instructed by Mumbi Muritu & Company Advocates.

Mr. S. Mutinda for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.