



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**CRIMINAL APPEAL NO. 64 OF 2019**

**EVANS KANDIE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**[An appeal from the original conviction and sentence of the Senior Principal Magistrate's Court**

**at Kabarnet Criminal Case no. 803 of 2019 delivered on the 31<sup>st</sup> October, 2019 Hon. P.C. Biwott, SPM]**

**JUDGMENT**

***Introduction***

1. The appellant was upon conviction for the offence of Stealing Stock contrary section 278 of the Penal Code, sentence to three (3) years imprisonment from the 31<sup>st</sup> October 2019. The particulars of the offence were that the appellant had “*On the 27<sup>th</sup> day of October, 2019 at unknown time at Kimoso Village in Baringo Central Sub County within Baringo County jointly with another not before court stole a brown Cow valued at Ksh45,000/= the property of BENJAMIN CHEPYEGON KIMUNGEMOI.*”.

***Appeal from sentence***

2. The appellant now seeks a reduction of the sentence on appeal. The Petition of Appeal dated 1/11/2019 seeks leniency by **Mitigation** grounds set out therein.

3. The DPP does not object to the reduction of the sentence as requested by the appellant noting that the appellant has substantially served his three-year sentence, having been in actual custody for almost one (1) year as at the date of the hearing. Mr. Abwajo for DPP also observes as a mitigating factor that the appellant pleaded guilty.

***Effect of plea of guilty***

4. Having pleaded guilty to the charge of theft of stock contrary to section 278 of the Penal Code, the appellant is under the terms of section 348 of the Criminal Procedure Code disentitled to appeal from the conviction and may only appeal on legality and severity of the sentence.

5. The Court has noted the fact that the appellant in this case pleaded guilty to the charge of theft contrary to section 278 of the Penal Code and that the item stolen namely a cow was restored to the complainant owner, who is the father of the appellant, and who has before this court on oath confirmed that he has forgiven his son and regretted that he could not earlier seek to withdraw the complaint because he was sick and could not come to court, and only came to find that the appellant had already been convicted of his own plea of guilty and taken to prison.

***Credit in sentence for plea of guilty***

6. This court accepts as guided by **Wanjema v. R** (1971) EA 493, that an accused should be credited with a plea of guilty as showing remorse and conscientious use of judicial resource. In the words of Trevelyan, J. in **Wanjema**, at p.494-

***“A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it***

*overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court's interference with it on each of these grounds. **No account was taken, as it should have been, of the fact that the appellant pleaded guilty:** Skone (1967), 51, Cr. App. R. 165 and Geoffrey (1967) 51 Cr. App. R. 449. (This admits no doubt because the magistrate awarded the maximum sentence to this offender: which of itself is unusual)."*

7. The trial court herein was plainly wrong in failing to give credit to the appellant for the plea of guilty. The appellant has been in custody for one year shy only by a week which equals to substantial performance, with remission, of the three-year sentence (actual custody of two years) by the trial court. That the appellant has substantially served the three-year sentence and there being no indication on record that trial court gave credit to the appellant for his plea of guilty, the sentence shall be reduced appropriately.

### **Orders**

8. Accordingly, for the reasons set out above, the court makes the following orders on the appellant's appeal herein:

1. The sentence imposed on the appellant is, pursuant to section 354 (3) (b) of the Criminal Procedure Code, reduced to the time that he has already served.

2. The appellant shall be released from custody forthwith.

*Order accordingly.*

**DATED AND DELIVERED THIS 22<sup>ND</sup> DAY OF OCTOBER 2020.**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Appellant in person.

Mr. Abwajo, Prosecution Counsel for the Respondent.