



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

CRIMINAL REVISION NO 9 OF 2018

FRUMENCE MAGHANGA.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

1. By a letter dated and filed on 2nd February 2018, Frumence Maghanga, the Applicant herein filed an application for Revision seeking the alternative of imposition of a fine.

2. He had been convicted for the offence of stealing stock contrary to Section 278 of the Penal Code Cap 63 (Laws of Kenya). The Learned Trial Magistrate, Hon M Onkoba SRM sentenced him to serve twelve (12) months imprisonment without the option of a fine. He termed this penalty harsh considering the value of the stock and that he was a first offender.

3. Counsel for the State also noted that the Applicant was a first offender and that the she – goat he was said to have stolen was valued at Ksh 5,000/- and that it was recovered. Counsel did not therefore have an objection to the Applicant being granted the option of a fine as Section 278 of the Penal Code provides for a maximum sentence of fourteen (14) years and that Section 26(3) of the Penal Code provides for the option of a fine.

4. According to the Charge Sheet, on 25th July 2016, the Applicant stole one (1) she – goat valued at Ksh 5,000/-, the property of Mwema Mwasya Mwany at an unknown time at Maungu Trading Centre within Taita Taveta Centre.

5. As counsel for the State pointed out, Section 278 of the Penal Code provides as follows:-

“If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen (14) years.”

6. The use of the word **“liable”** means that the sentence of fourteen (14) years is the maximum and not the minimum sentence. It was therefore clear that the Learned Trial Magistrate was well within his discretion to sentence the Applicant to twelve (12) months imprisonment.

7. Having said so, the Learned Trial Magistrate could also have exercised his discretion to impose a fine upon the Applicant as the she – goat was valued at Ksh 5,000/-, it was recovered and the Applicant was a first offender.

8. Section 26(3) of the Penal Code stipulates as follows:-

“A person liable to imprisonment for an offence to or in substitution of imprisonment (emphasis court):-

provided that where the law concerned provides for a minimum (emphasis court) sentence of imprisonment, a fine shall not be substituted for imprisonment.”

9. Accordingly, the Applicant herein qualified for the imposition of a fine. Going further, this court deemed it prudent to consider the value of the goat with a view to assessing a fair fine and default sentence.

10. As has been pointed out hereinabove, the she-goat was valued at Ksh 5,000/- and it was recovered. It was the view of this court that whereas the sentence of one (1) year was well within the discretion of the Learned Trial Magistrate, the same was harsh and severe in the circumstances of the case.

11. In the case of **Beshick Mombo Mwake vs Republic (2016) eKLR**, this very court reduced a sentence of three (3) years imprisonment to six (6) months imprisonment where the appellant therein had stolen three (3) pieces of timber worth Ksh 1,500/-.

12. In the case of **Ezekiel Mwakaba Mwachora vs Republic (2017) eKLR**, this very court also reduced a sentence of six (6) years to three (3) months imprisonment where the appellant therein had stolen one (1) he – goat valued at Ksh 3,500/-, as the prosecution therein had requested that he be treated as a first offender.

13. In the premises foregoing, it was the view of this court that a sentence of six (6) months imprisonment in this case where the she-goat was valued at Ksh 5,000/- would have been fair and reasonable.

14. As the section under which the Applicant was convicted did not provide for a minimum sentence, this court found and held that a fine of Ksh 20,000/- was also fair in line with Section 28(2) of the Penal Code.

DISPOSITION

15. For the foregoing reason, the Applicant's application for Revision dated and filed on 2nd February 2018 was merited and the same is hereby allowed on sentence only. The sentence of imprisonment for twelve (12) months without the option of a fine is hereby set aside and/or vacated and replaced with a fine of Ksh 20,000/- and in default, the Applicant to serve six (6) months imprisonment which shall run from 31st January 2018 when he was convicted of the offence of stealing stock.

16. Orders accordingly.

DATED and DELIVERED at VOI this 22nd day of February 2018

J. KAMAU

JUDGE

In the presence of:-

Frumence Maghanga - Applicant

Miss Anyumba - for State

Susan Sarikoki – Court Clerk