



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 17 OF 2017

GEORGE ODINGA OJWANG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 361 of 2015 of the Chief Magistrate's Court at Busia by Hon. D.O Ogolla – Chief Magistrate)

JUDGMENT

1. The appellant, **GEORGE ODINGA OJWANG**, was convicted after pleading guilty to a charge of injuring animals contrary to section 338 of the Penal Code.
2. The particulars of the offence were that on 22nd February 2015 at **BUKIRI** village, **SAMIA** Sub County within **BUSIA** County, wilfully and unlawfully maimed two cows and a goat all valued at Kshs. 35,500/= the property of **JOHN JUMA OJWANGÍ**.
3. He was sentenced to serve five years imprisonment.
4. The appellant was in person. He appealed against the sentence which he contended was harsh and excessive.
5. The state opposed the sentence through Ms. Ngari, learned counsel.
6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **OKENO vs. REPUBLIC [1972] EA 32**.
7. It is trite law of practice that an appellate court can only interfere with the sentence meted out by the trial court upon satisfaction of some circumstances. These circumstances were well illustrated in the case of **NILSSON VS REPUBLIC [1970] E.A. 599,601** as follows:

The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does 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 will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewcity (1912) C.CA 28 T.LR 364.

8. Section 338 of the Penal Code provides as follows:

Any person who wilfully and unlawfully kills, maims or wounds any animal capable of being stolen is guilty of a felony and is liable, if the animal is an animal such as is referred to in section 278, to imprisonment for fourteen years, and, in any other case, to imprisonment for three years.

Section 278 of the Penal Code states:

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 years.

The animals the appellant maimed fall within the category of animals referred to under section 278 of the Penal Code.

The appellant maimed three animals. The sentence that was meted out by the learned trial magistrate cannot be described as harsh or excessive. I am not persuaded to interfere with it.

9. The upshot of the foregoing is that the appeal is accordingly dismissed.

DELIVERED and SIGNED at BUSIA this 17th day of May, 2018

KIARIE WAWERU KIARIE

JUDGE