



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERicho

CRIMINAL APPEAL NO. 5 OF 2018

ROBERT KIPKEMOI TIROP.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence in Kericho CM Cr. No. 412 of 2017 by Hon. B. Limo (RM) dated 9th October 2017)

JUDGMENT

1. The appellant was convicted on his own plea of guilty to a charge of injuring an animal contrary to section 338 of the Penal Code. He was sentenced to serve a term of imprisonment of fourteen years. In his petition of appeal dated 19th March 2018 filed on his behalf by his Advocates on record M/s E. M. Orina & Co. Advocates, he asked the court to reverse the sentence imposed on him, set it aside or vary it. The appeal is based on the following grounds:

- 1. That the learned trial magistrate erred in law and fact in awarding a sentence that was manifestly harsh and excessive in the circumstances.***
- 2. That the learned trial magistrate erred in law and fact in sentencing the appellant without the alternative of a fine.***
- 3. That the learned trial magistrate erred in law and fact in sentencing the appellant without a presentence report being made.***
- 4. That the learned magistrate erred in law and fact in sentencing the appellant without a presentence report being made.***
- 5. That the learned magistrate erred in law and fact in passing a harsh and excessive sentence against the appellant disproportionate to the offence charged and violation of the sentencing guidelines published under the Judicial Service Act via gazette Notice No.2970 dated 29th April 2016.***

2. The appellant also filed a supplementary petition of appeal dated 19th April 2018 in which he raised the following grounds:

- 1) That the learned trial magistrate erred in law and fact in convicting the appellant on a plea that was not unequivocal.***
- 2) That the learned magistrate erred in law and fact in convicting the appellant on a defective charge.***
- 3) That the learned trial magistrate erred in law and fact in convicting the appellant on facts which were at variance with the charge.***
- 4) That the learned trial magistrate erred in law and fact in convicting and sentencing the appellant on proceedings which were procedurally flawed.***

3. Mr. Orina argued on behalf of the appellant that the appellant's conviction was not safe. It was his submission that the language used in taking the plea was not indicated as the record indicates English/Kiswahili/Kipsigis. He contended that the plea was therefore not unequivocal as the accused did not understand the charge read and the language used.

4. Mr. Orina further submitted that the particulars of the charge were very scanty. That the particulars indicated that the accused willfully and unlawfully killed an animal and the particulars state that he tied and killed the animal. Counsel contended that it was not clear whether it was tying the animal that caused the death or there was a fact of killing that was not explained. He referred to section 17 of the Penal Code to submit that the unlawful nature of the offence should have been brought out.

5. Counsel relied on **Kesivi vs Republic (1991) KRL** to submit that even on a plea of guilty, evidence must be adduced in the facts to link the accused with the commission of the offence.
6. Counsel also submitted that the court should have considered whether there were unusual circumstances that would affect the plea. His submission was that in this case, there were, in that the accused was brought to court after 3 days and no explanation was offered for the delay.
7. With respect to the sentence imposed, it was submitted that the appellant was a first offender and should have been given a non-custodial sentence. The sentence imposed was against the sentencing guidelines and was imposed without the benefit of a pre-sentencing report, and further, that it was harsh and excessive and should be set aside.
8. The State's response is that this appeal is without merit. The plea was taken in a language that the appellant understood, and he pleaded guilty. He admitted the facts read to the court which included photographs of the animals in question. The submissions of Learned Senior Principal Prosecution Counsel, Mr. Ayodo, was that the appellant understood the charges he was facing clearly and he pleaded guilty to the said charges.
9. To the submission that the court should have taken certain facts into consideration before passing sentence, the State's response is that some of those circumstances include the conduct of the accused. In this case, the accused was asked whether he had anything to say and he had stated that he would not apologise as he knew what he was doing. In the State's view, a maximum sentence in the circumstances was justified.
10. I have considered the record of the trial court and the submissions of Counsel on this appeal. I note that the accused was charged in court on 9th October 2017. The record indicates that the language used was English/Kiswahili/Kipsigis. I must observe at the outset that there is a problem, in my view, with indicating the language used in this manner. One is left wondering whether the interpretation was from English to Kiswahili, or from English to Kipsigis, or to both Kiswahili and Kipsigis.
11. The record does indicate, however, that the accused understood the charges, for he replied, in Kiswahili 'Ni kweli', and a plea of guilty was entered. The facts were then read to him as follows:
- “On 16/10/2017 at 2.00 p.m a cow belonging to Bernard Kikwai went away from the owner’s residence and went to the accused home. (sic) The accused tied it and killed it. The complainant reported the matter at Chepseon Police Station. The officers visited the scene and found a cow already dead. The photos were taken. Later the accused was arrested and charged.”***
12. I note that photos of the cow were produced in evidence. The prosecution stated that the accused was a first offender. When asked if he had anything to say in mitigation, the appellant stated:
- “I will not apologise. I knew what I was doing.”***
13. The appellant has argued that his plea was not unequivocal, that he did not understand the charges or the facts. He is also aggrieved by the sentence passed on him.
14. Having considered the record of proceedings before the court, I am unable to find that the accused's plea was not unequivocal. He understood what he was charged with, and he replied in Kiswahili, which he clearly understood. The facts were read to him, and he stated that they were correct. He was not willing to say anything in mitigation, and contrary to Mr. Orina's submissions that the appellant said he would not apologise because he did not understand the proceedings, I find that he did understand, and his statement was an expression of his lack of remorse rather than an indication that he did not understand. I therefore find that the appeal with regard to the plea of guilty has no merit.
15. The same cannot, however, be said with respect to the sentence imposed. The accused admitted that he killed an animal, and was given the maximum sentence of fourteen years. Given that he was a first offender, I find that this sentence was indeed harsh and excessive. The appellant did not express any remorse for his deliberate act of killing his neighbour's animal when it ventured onto his land, and the trial court was therefore within the law in finding that he was not deserving of a non-custodial sentence. However, in my view, a brief period of incarceration was sufficient to give him time to consider his act and the error of his ways. I am therefore of the view that a sentence of 12 months would have been sufficient in the circumstances.
16. I therefore reduce the sentence to one year's imprisonment from the date of the lower court's judgment.
17. Orders accordingly.

Dated Delivered and Signed at Kericho this 29th day of June 2018.

MUMBI NGUGI

JUDGE