



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 202 OF 2017

MUSYOKA KIMATU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant was charged with offence of stealing stock contrary to Section 278 of the Penal Code.
2. Particulars being that on 22/12/2015 at Ngaa Village, Ngaa Sub-location, Ngiluni Location in Mbooni East District within Makueni County, stole one she cow brown in colour valued at Kshs. 15,000/= the property of Koki Musyoka Kavindu.
3. The alternative charge was handling stolen property contrary to Section 322(2) of the Penal Code.
4. Particulars being that on 03/12/2015 at Kiambwa Village, Kiambwa Sub-location, Kiteta Location in Mbooni East District within Makueni County, otherwise than in the course of stealing, handled a she cow brown in colour valued at Kshs. 15,000/= the property of Koki Muyoka Kavindu knowing or having reasons of belief it to be a stolen property.
5. The Appellant pleaded guilty and was convicted on his own plea and was sentenced to serve 6 years imprisonment after mitigation.
6. The Appellant being aggrieved by the aforesaid verdict, lodged an appeal and set out 2 grounds of Appeal namely:-
 1. *The plea of guilty was not un-equivocal.*
 2. *The sentence was manifestly excessive in the circumstances.*
7. The parties agreed to canvass appeal via written submissions which were filed and exchanged.

APPELLANT SUBMISSIONS

8. The Appellant was charged with the offence of stealing stock contrary to section 278 of the Penal Code on the 03/12/2015. When the matter came up for plea the Appellant pleaded guilty and was convicted on his own plea of guilty.
9. It is submitted that the plea was not unequivocal. The charge was read to the Appellant in a language that has not been disclosed on record whether English or Kiswahili.
10. Although the Appellant had stated that he was conversant with Kiswahili, it is not shown that the plea was read to the Appellant in Kiswahili.
11. The proceedings just show that the charge was read in a language that he Appellant understood.
12. On the other hand, the proceedings are quite clear that the facts were explained in English and were subsequently interpreted to the Appellant in Kiswahili.
13. The record is not clear what happened in interpretation of the charge sheet and the facts of the case, which were written in English and there was interpretation from English to Kiswahili there is a possibility the plea was unequivocal.
14. The proceedings that were recorded on 03/12/2015 by the Magistrate as follows:-

Before H.M Nganga – Resident

Court prosecutor – C.P. Kaino

Court clerk – Catherine

Accused – present.

Accused – I understand Kiswahili.

“The substance of charge(s) and every element thereof has been stated by the court to the accused person in her language that he/she understands who being asked whether he/she admits or denies the truth of the charge (a) replies.”

15. The charge sheet was written in English language and it is not clear on the record if there was an interpretation from English to Kiswahili.
16. The record should show that the charge sheet was written in English language and it is not clear on the record if there was an interpretation from English to Kiswahili.
17. The record should show that the charge sheet was interpreted from English to Kiswahili.
18. It is shown that facts were interpreted into Kiswahili. The facts were present by the prosecutor in English and there was interpretation into Kiswahili by the court clerk.
19. There is nothing to show that the proceedings were done in Swahili and there was interpretation into English. The plea was not equivocal.
20. It is therefore not clear in what language the charge was read. The court of law is a court of record. It is not upon the appeal court to assume what may have happened rather to read from the record.
21. The Appellant was handed a very severe sentence. Although the charge carries a maximum of up to 14 years, it is submitted that there were mitigating circumstances herein.
22. Firstly, the prosecutor admitted that the Appellant was a first time offender who had never been in court.
23. Secondly, the Appellant admitted to the charge and prayed the court to be lenient with him hence saving the courts time to administer justice.
24. Thirdly, the stolen cow was recovered and returned to the owner.
25. Fourthly, the Appellant is a young man with a wife and a child aged 1 year at the time of his conviction and who no doubt need him very much.
26. While appellant doesn't trivialize the charge before the court, it was argued that the court to consider these mitigating circumstances.
27. In **Munyika Bati Kamanzia –vs- Republic (2016) eKLR**, the Appellant was convicted on his own plea of guilty. He was sentenced to six years in prison for a similar charge. During appeal the court considered the mitigating circumstances and reduced the sentence to 3 years imprisonment starting with the date of conviction.
28. In **Iryan Letupukwa –vs- Republic (2016) eKLR**, the Appellant was convicted in his own plea of guilty and sentenced to six years in prison for a similar charge. On appeal, Justice A. Odera held;

“The trial magistrate ought to have given consideration to the following factors in deciding upon the sentence. Firstly, the Appellant pleaded guilty to the charge thus saving court from conducting a trial in the matter. Secondly, the stolen bull was recovered and returned to its owner. Thirdly, the Appellant was a first time offender. In the circumstances the court ought to have considered the option of a non-custodial sentence. I do agree given the circumstances the custodial sentence was harsh.”

RESPONDENT SUBMISSIONS

29. **Was the plea of guilty equivocal?** Upon reading the charge and particulars of the same, the Appellant answered, *“It is true.”* (Page 4 of the proceedings).
30. The facts were then read and the exhibit produced. The court then called upon the Appellant to state whether he understood the facts to which the Appellant answered *‘yes I have understood’*.
31. The court then asked if the facts were true and the Appellant answered, *“The facts are true. The cow (refers to exhibit 1) is the one I was found with.”*

32. The court then proceeded to enter a plea of guilty.

33. It is contended that, the plea by Appellant was clear and not ambiguous at all. It was unequivocal. The same was only capable of being interpreted to mean one thing.

34. Section 348 of Criminal Procedure Code provides;

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

35. Was the sentence excessive? Section 278 of the Penal Code provide 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, of the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”

36. The law provide for a sentence up to fourteen years. That means that the same should be considered within the law. The sentence of the Appellant in the instant case was six years.

37. The same was legal and infact not excessive. The intention of the legislators was clear that one could be sentenced to serve up to fourteen years.

38. Sentence is an exercise of discretion depending on the circumstances of each case and provided that the discretion is exercised within the provisions of the law.

39. This court may therefore not interfere with sentence imposed by the lower court except where it is shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself was excessive. All these factors are not present once have not been proved.

40. The issues emerging herein are;

Whether plea was equivocal and whether the sentence was excessive?

41. When the plea was read to the accused/appellant, he answered it is true. He had earlier told court that he understood Kiswahili. He never complained that he did not understand.

42. The facts were read to him and he once again admitted the same. He said the facts are true .The is the one I was found with. He referred to the exhibit before the court. He never complained.

43. The court finds that the complaint now is an afterthought and the same ground fails. The plea by Appellant was clear and not ambiguous at all. It was unequivocal. The same was only capable of being interpreted to mean one thing.

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“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”

45. Was the sentence excessive? **Section 278 of the Penal Code** provide as follows;

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48. Sentence is an exercise of discretion depending on the circumstances of each case and provided that the discretion is exercised within the provisions of the law.

49. This court may therefore not interfere with sentence imposed by the lower court except where it is shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself was excessive. One aspect on sentencing ignored is Judicial policy on sentencing.

50. The Judiciary Sentencing Policy para 23.9 Sub-para 2 stipulates that; on **Presence of mitigating circumstances**: The effect of mitigating circumstances/factors is to lessen the term of the custodial sentence.

51. These are such as pleading guilty thus saving court time, recovery of the stolen property, being first offender *inter alia*. See also **Iryan Letupukwa –vs- Republic (2016) eKLR**.

52. The trial court did not take into account above elements when awarding the sentence. Thus this court will lessen the sentence accordingly.

53. Thus court makes the following orders;

i. The appeal has no merit on conviction and same is dismissed and affirmed.

ii. On sentence same is set aside and appellant is sentenced to serve 3 years imprisonment from the date of conviction.

SIGNED, DATED AND DELIVERED THIS 18TH DAY OF JUNE, 2018, IN OPEN COURT.

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C. KARIUKI

JUDGE