REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 12 OF 2018

BENSON NKARAMATA SAKITA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

The applicant Benson Nkaramata Sakita was arraigned in before the Chief Magistrate court charged with two counts of stealing stock contrary to section 278 of the penal code. The nature of the particulars of the offences were that on diverse dated between 8th October 2016 and 11th October 2016 at IR Parosat village in Isinya Sub County jointly with others not before court stole 4 bulls, 6 cows and 6 goats all valued at Kshs. 736,000 the property of Philip Maleji Shankah.

In the second count of stealing stock contrary to section 278 of the penal code. The particulars were that on the 1st and 2nd December, 2016 at Mbirika village in Isinya Sub County within Kajiado county with others not before court stole 17 (seventeen) herds of cattle valued at Kshs. 15,000,000 the property of Simon Lakaiti Kiramat. In both indictments which apparently occurred on different dates and involving different set of circumstances the appellant pleaded guilty to each of the counts.

The evidence and facts constituting the commission of the offences and placing the appellant at the scene were presented before court by the prosecution. The trial court relying on the faces and being satisfied that the ingredient of the offences have been established convicted and sentenced the appellant to 10 years imprisonment in Cr. Case No. 616 of 2017 and 7 years prison custody in Cr. Case no. 621 of 2017.

Being aggrieved to the orders on sentence the appellant applies to this court to reconsider the sentence as being punitive, excessive and harsh in the circumstances of the case. The gist of the appellants appeal is for this court to be pleased to find that Section 333 of the Criminal Procedure Code is applicable to his case.

Legal Analysist decision

At the hearing of the case before the trial court it is acknowledged that the appellant pleaded guilty to the respective offences which occurred on diverse dates and involving different complainants. Secondly, in challenging the decision of the plea court the appellant grievance is on sentence and not conviction. In the case of ***Keith Smith v 1992 WLR*** the court highlighted the point on a plea of guilty in this way "***it is accepted that a plea of guilty may properly be treated as a mitigating factor in sentencing as an indication that the offender feels remorse for what he has done. It is also clear that an offender with a good or relatively good record may have his sentence reduced to reflect that record"***

Having perused the trial court record there were two separate stock theft offences involved in this case. The acts of stealing committed by the appellant in which he pleaded guilty were of different transactions to each other with no correlation of facts constituting the criminal offences. The single common denominator from the facts of the offence was the identification of the appellant as the perpetrator of the stock theft. On the other hand the criminal intention and unlawful acts involved stealing stock from two different complainants residing in the same sub-county.

According to Section 278 of the penal code upon conviction for the offence of stock theft an accused person is liable to be sentenced to 14 years imprisonment. There is no doubt from the provisions of Section 278 on stealing stock and the sentence prescribed it is ranked as a serious felony. There is therefore a particular weight to be attached by the sentencing court when imposing sentences.

The summary in our sentencing policy guidelines has set out deterrence and community protections as one of the key objectives to be considered by the court when imposing respective sentences with regard to concurrent and consecutive sentences. The policy provides as follows: ***"Where the offences emanate from a single transaction the sentences should run concurrently. However while the offences are committed in the course of multiple transactions and where there are multiple victims the sentences should run consecutively. The discretion to impose concurrent or consecutive sentences lies in the court"***.

The full direction that ought to be given consideration on sentencing was clearly set out in ***Republic v Howells 1999 1 ALL ER. 50*** where the court held:

> ***"courts should always bear in mind that criminal sentences are in almost every case intended to protect the public, whether by punishing the offender or reforming him and others, or all of these things. Courts cannot and should not be unmindful of the importance public dimension of criminal sentencing and the importance of maintaining public confidence in the sentencing system".***

In view of the above principles it is not always easy for the appellate court to exercise discretion with regard to review of sentences passed by a competent trial court. That is why there is stringent conditions imposed by law upon the appellate court to consider before interfering with any such order on sentence.

On this appeal the court must be guided by such well-known principles on review of sentences that are laid down in ***Ogola S/o Owuor 1954 21 EACA 270, Nilsson v. Republic 1970 EA 599 –* 601** it is necessary to repeal these principles stated as follows: "***The principles upon which appellate court will act in exercising of its jurisdiction to review sentences are firmly 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 Republic 19 EACA 147, "it is evident that the judge has acted upon some wrong principles or over looked some material factor. To this, we would also add a third criteria, namely that the sentence is manifestly excessive in view of the circumstances of the case"***

This leads me to question whether the present appeal falls within the above principles to necessitate this court to exercise discretion in reviewing the sentence. In the circumstances of this case what comes to mind is the anchor and scale on the principles of proportionality in sentencing. The acceptable guideline on proportionality principle is that a reasonable proportion be maintained between overall levels of punishment and the gravity of the offence. The aspects of this principle confers that a sentence should be increased or reduced taking into account the relevant aggravating or mitigating factors in respect with the offence and the offender.

In the appeal before me the appellant was convicted on his own plea of the two stock theft offences committed two months apart. The trial magistrate imposed a sentence of 10 years custody in Cr. Case no. 616 of 2017 and 7 years imprisonment in Cr. Case no. 621 of 2017. There is no judicial explanation from the learned trial magistrate why the critical principles of achieving consistency and fairness on sentence were not factored in this trial.

It is true our sentencing policy guidelines sets out various compelling objectives and principles such as denunciation, deterrence, rehabilitation, reparation and accountability for the offender.

The question which lingers on the basis of the sentences imposed is why the learned trial magistrate didn't apply the principles of parity and proportionate to further embody what is generally defined as a just sentence in similar like offences. A more significant concern identified in the trial below is the extent of that quantum of aggravation and the degree of the appellant involvement in stock theft within the same sub-county.

In determining this appeal this court has to take cognizance of the degree of culpability of the appellant and the use of imprisonment not only to punish crime but also protect the community from further risk of their livestock being driven away by the appellant and his co-conspirators.

I am persuaded on my part to follow the principles laid down on proportionality test in **P Craig G Dedurea 5th Edition 2011 526** namely:

1. **There must be a legitimate aim for a measure**

2. **The measure must be suitable to achieve the aim**

3. **The measure must be necessary to achieve the aim, that there cannot be any less onerous way of doing it.**

4. **The measure must be reasonable, considering the compelling interests of different groups at hand.**

After considering all the relevant factors the sentences arrived at by the trial court can only be interfered with on the principles of disparity and fairness. There is no formulae assigned to the appellate court in exercising discretion to interfere with the order on sentence imposed by a trial court. I would emphatically assert that the principles are as rested in the case of ***Ogola and Nilsson Supra*** cited elsewhere in this ruling.

In my conceded view by reason of a plea of guilty and for such other reason of the disparity of sentence between Cr. Case no. 616 of 2017 and 627 of 2017 I cannot remain undisturbed.

As a consequence the sentence so imposed in Cr. Case No. 616 of 2017 is hereby revised and substituted with 7 years imprisonment to be in line with that of Cr. Case No. 621 of 2017 in light of the evidence and facts of this case. The two sentences do run consecutively. The effect of this the appellant's appeal on sentence partially succeeds to that extent on the period to be served.

Dated, signed and delivered in open court at Kajiado this 23rd day of October, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

The appellant

Mr. Meroka for DPP