



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEALS NOS 259 AND 452 OF 2013

(Appeals against original Convictions and Sentences in Murang'a CM Criminal Case NO 769 of 2012 – J Wekesa, SRM)

1. JAMES KIMANI MAINA

2. JOSEPHINE WATHIRA MWANGIAPPEALANTS

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellants **James Kimani Maina** and **Josephine Waithira Mwangi** (2nd and 1st accused respectively before the trial court) were convicted after trial of **stealing stock** contrary to **section 278** of the **Penal Code**. It was alleged in the charge that on 27th June 2012 at **Wandaka Village** of **Gikindu Location** in **Murang'a County**, they jointly stole one **Friesian** heifer valued at KShs 8,000/00, the property of one **Eunice Njoki Karega**. They were each sentenced to the maximum fourteen (14) years imprisonment. They have appealed against both conviction and sentence.

2. At the hearing of the appeals, the Appellants' learned counsel stated that he had instructions to abandon the appeals against conviction and proceed only with the appeals against sentence. He proceeded upon that basis.

3. Before sentencing the Appellants the trial court called for probation reports on them. The reports filed were not favourable. The following are the trial court's notes on sentencing –

“The reports tendered in respect of the accused persons herein by the Probation Officer, Murang'a are unfavourable. The people in the village from where both the accused persons come from are fed up with each of them, and even their area chief has described them, especially the second accused, to be a security risk. Their neighbours do not want them to be released back to the society. To top it all, both...accused...are not even remorseful.... Their unremorseful attitude coupled with the desire of their neighbours to see them locked behind bars leave the court with no option.....to mete out an alternative form of (punishment).... Each of the accused persons is hereby sentenced to serve 14 years imprisonment....”

4. With the greatest respect to the learned trial magistrate, her approach to the sentencing of the Appellants was all wrong and amounted to a serious misdirection on principle. The purpose of obtaining a probation report on a convicted accused person is to enable the court to consider a period of probation

as an appropriate sentence instead of a term of imprisonment or fine, or other punishment. See **section 4(1) and (2) of the Probation of Offender Act, Cap 64** which provide –

“4(1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but it is of the opinion that, having regard to the youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may –

- a. **convict the offender and make a probation order; or**
- b. **without proceeding to conviction, make a probation order,**

and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.

2. **Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the young, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which, the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.”**

5. Probation reports are never meant to provide the court with justification for a much stiffer sentence than the court would otherwise have meted out were there no such report!

6. In the present case, it was not alleged that the Appellants had previous relevant convictions, and there was no evidence of such. And contrary to what the trial court stated, the Appellants were indeed remorseful and pleaded for leniency. It is so stated in the probation reports! Both of them earnestly pleaded for leniency before the court, prompting the court to call for the probation reports.

7. It is also to be noted that the one heifer that the Appellants stole was recovered live and restored to the owner.

8. In these circumstances I am satisfied that the sentence of 14 years imprisonment meted out to each Appellant was manifestly harsh and excessive in the circumstances. Learned Prosecution Counsel properly does not support the sentences.

9. I will allow the appeals against sentence by setting aside the sentences imposed and substituting therefore for each Appellant a sentence of imprisonment equivalent to the period each of them has now served sentence. In other words, the Appellants shall be forthwith set at liberty unless otherwise lawfully held. It is so ordered.

10. For the avoidance of doubt, the Appellants’ appeals against conviction having been abandoned, those appeals are hereby dismissed.

DATED AT SIGNED AT MURANG’A THIS 23RD DAY OF FEBRUARY 2016

H.P.G. WAWERU

JUDGE

DELIVERED AT MURANG’A THIS 26TH DAY OF FEBRUARY 2016