



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 44 OF 2014

KATANA ALI..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 210 of 2012 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon M. Chesang (Mrs) (RM) on 4th September 2012)

JUDGMENT

INTRODUCTION

1. The Appellant, Katana Ali, was tried and convicted by Hon M. Chesang (Mrs), Resident Magistrate for the offence of stealing stock contrary to Section 278 of the Penal Code. He was sentenced to serve ten (10) years' imprisonment.
2. The particulars of the charge were as follows :-

“On the 4th May 2012 at Lualenyi Ranch, Mwachobo location within Taita Taveta County jointly stole three bulls valued at Kshs 150,000/=, the property of ABDI ABDULLAHI.”

3. Being dissatisfied with the said judgment, on 5th November 2012, the Appellant filed a Petition of Appeal. The Grounds of Appeal were as follows:-
 1. **THAT the Learned Trial Magistrate erred both in law and fact without looking that the charge as which were read to him before him were defective according to section 278 of the stock theft (sic).**
 2. **THAT the Learned Trial Magistrate erred both in law and fact without looking that he was arrested at the scene of crime and not only that the said complainant contradict himself at the time of testifying giving contradicting evidence. (sic)**
 3. **THAT the Learned Trial Magistrate erred both in law and fact in convicting him to serve 10 yrs imprisonment and the law states clearly that any person who would be found in the circumstances of stock theft under sec 278 would be sentence to serve 5 years imprisonment. (sic).**
 4. **THAT there wasn't any evidence convincing the said cow which was made by the said investigating officer concerning the matter in honourable court of laws to prove the burdens. (sic)**
 5. **THAT the Learned Trial Magistrate erred in both law and fact without looking that 1st complainant the report which was made to court concerning the cattle was not true and full**

of false allegations. He said that the cows were three hence only photo was brought to court which has the burden. (sic)

4. When the matter came up in court on 22nd February 2016, the Appellant's appeal with that of **Muktar Shogolo vs Republic HCCRA No 47 of 2014** and **Mohammed Hassan vs Republic HCCRA No 51 of 2014** which were both filed at High Court of Kenya, Voi were consolidated purely for purposes of hearing the appeal as they all arose out of the proceedings in **Criminal Case Number 210 of 2012** in the Senior Resident Magistrate's Court at Wundanyi.
5. On the said date, this court directed that the Appellants file their respective Written Submission. However, the Appellant did not file any Written Submissions but instead filed Mitigation Grounds of Appeal on 8th March 2016. It became apparent to the court that the Appellant herein was no longer contesting the facts of the case in the Trial Court but rather, he was seeking a reduction of the sentence which he argued was harsh and excessive in the circumstances of the case herein. This was a position that counsel for the State confirmed to have been his understanding of the purport of the said Mitigation Grounds of Appeal.
6. His Mitigation Grounds of Appeal could be summarised as shown hereunder:-
 1. **THAT he had come from a poor family and had to drop out of school due to financial constraints.**
 2. **THAT he was brought up by a single parent who was suffering from asthma and having being the sole breadwinner of his family, his continued incarceration meant that his single parent would continue to suffer.**
 3. **THAT he was a first offender and a layman on issues pertaining to the law as a result of which he ought to benefit from being handed down the least severe penalty as provided for under the law, which he proposed ought to have been seven (7) years.**
 4. **THAT he promised to go back to school and utilise his skills to earn a living so as to assist his family.**
7. The State's Written Submissions were dated and filed on 15th March 2016.
8. When the matter came up for the hearing of the appeal on the same date, both the Appellant and the State asked this court to deliver its Judgment based on their respective Written Submissions.

LEGAL ANALYSIS

9. As can be seen from the Appellant's Grounds of Appeal, the Appellant did not challenge the fact that the Prosecution had proved its case to the required standard. No value then would be added in analysing the evidence that was adduced during trial.
10. The question that this court was being asked to consider and determine was whether or not the Appellant had advanced good reasons to persuade it to set aside the aforesaid sentence which he argued was harsh in the circumstances of the case.
11. Section 278 of the Penal Code Cap 63(Laws of Kenya) provides 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, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years."

12. The import of the penalty is that a Trial Court cannot sentence a person convicted to the offence of stealing stock to imprisonment to not more than fourteen (14) years. The sentence of ten (10) years was therefore proper and in accordance with the law.
13. Before the Learned Trial Magistrate read out the sentence herein, the Appellant said the following in mitigation:-

"I have three people who depend on me. I ask that the court looks at both sides."

14. The Learned Trial Magistrate then recorded the following:-

“Taking into consideration the nature of the offence which each accused has been convicted of and the stiff penalty provided at law, each accused is sentenced to serve ten (10) years imprisonment.”

15. In its Written Submissions, the State submitted on all the grounds of the Appeal. However, it was clear from the Mitigation Grounds of the Appeal that Appellant was arguing that the sentence was too harsh. The court thus addressed itself to the State’s submissions on Sentence only.
16. The State pointed out that the value of the two (2) stolen cows was Kshs 150,000/=. One (1) was recovered. It contended that in view of the fact that the Appellants had been imprisoned for more than three (3) years, the court could exercise its discretion to reduce the sentence from ten (10) years to a period this court would deem fit to grant.
17. Accordingly, having considered the submissions by the Appellant and the State, this court noted that as the evidence that was adduced by the Prosecution was overwhelming, consistent and proven beyond reasonable doubt, a non-custodial sentence as had been sought by the Appellant herein was thus untenable for the reason that the Learned Trial Magistrate exercised her discretion judiciously.
18. However, as the State indicated that the value of the stolen cows was Kshs 150,000/= and asked this court to exercise its discretion in reducing the sentence herein, purely on the principle of proportionality, this court was persuaded to accede to its request and hereby the sentences the Appellant to five (5) years’ imprisonment.

DISPOSITION

19. For the foregoing reasons, this court hereby sets aside the sentence that was meted upon the Appellant by the Trial Court and substitutes the same with five (5) years’ imprisonment that is to run from the date he was imprisoned.
20. The upshot of this court’s judgment, therefore, is that the Appellant’s Appeal filed on 5th November 2012 is hereby allowed on the aspect of sentence only.
21. It is so ordered.

DATED and DELIVERED at VOI this 31st day of March 2016

J. KAMAU

JUDGE

In the presence of:-

Katana Ali..... Appellant

Miss Mukangu..... State

Simon Tsehlo– Court Clerk