



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 51 OF 2014

MOHAMMED HASSAN..... 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, Mohammed Hassan, 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 by convicting him despite, the fact of breaking and stealing as prepared against him was totally and incurably defective when given that other fact the ingredients under section 306(a) penal code were not properly analysed. (sic).**
 2. **THAT the Learned Trial Magistrate erred in law and fact by failing to note that he was held in police custody for more than 24 hours hence section 72(3)(B) of the constitution was overlooked.(sic)**
 3. **THAT the Learned Trial Magistrate erred both in law and fact in convicting him to serve 12 years imprisonment without proper finding that. (sic).**
 4. **THAT Prosecution witnesses evidence a contradictory and inconsistency. (sic)**
 5. **THAT Prosecution failed to shift the burden of proof beyond reasonable doubt and did not give proper consideration to his unsworn evidence. (sic)**
4. When the matter came up in court on 22nd February 2016, the Appellant’s appeal with that of **Katana Ali vs Republic HCCRA No 44 of 2014** and **Muktar Shogolo vs Republic HCCRA No**

- 47 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 was the sole breadwinner of his aging parents. His continued incarceration meant that they would continue to suffer and in particular his mother who was suffering from diabetes which had serious financial implications.**
 2. **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.**
 3. **THAT he promised not to repeat the mistake again and having reformed, he would be a good ambassador of the law who would promote and care for justice in the society.**
 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. In fact, his contention that he was a reformed man who now wished to be an ambassador of the law was reflective of his guilt of the offence he was charged with. 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 of 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 pray for leniency.”
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 the Appellant was arguing that 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, the court acceded 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:-

Mohamed Hassan..... Appellant

Miss Mukangu..... State

Simon Tsehlo– Court Clerk