REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA CHUKA

MISC CRIMINAL CASE NO. 7 OF 2015

JACOB GICHARI…….APPLICANT

VERSUS

REPUBLIC……PROSECUTOR

(An Appeal from the Judgment and conviction of F.M. NYAKUNDI made on 10/7/2014 in Marimanti Principal Magistrate's Criminal Case No. 669 of 2013).

R U L I N G

1. On the night of 10th and 11th December 2013, Daniel Njagi Nthuuku found at his only cow had gone missing. On 19th December, 2013, the state arraigned Jacob Gichari Kiambea (hereinafter "the Applicant") and two (2) others with the offence of stealing stock contrary to section 278 of the Penal Code. It was alleged that on the night of 10th and 11th December, 2013 at an unknown time at Mukothima sub-location, Gikingo location within Tharaka Nithi County, the Applicant jointly with two (2) others stole one cow valued at Kshs.40,000/- the property of the said Daniel Njagi Thuuku. The Applicant faced alternative charge of handling stolen property contrary to section 322 (1) (2) of the Penal Code. It was alleged that on 15th December 2013, at Kathangacini location otherwise than in the course of stealing, the Appellant and his co-accused jointly dishonestly handled one cow valued at Kshs,40,000/- the property of Daniel Njagi Thuuku.

2. The Appellant denied the charge, but after the prosecution paraded five (5) witnesses, the Applicant and one of his co-accuseds were convicted of the alternative charge of handling stolen property. On 13th August, 2014, the Appellant applied that the said sentence be reversed. The revision was based on the grounds that the Applicant's siblings were left under the care of a 70 year old mother who is unable to provide for them as well as herself, that the Applicant was suffering from Asthma and tuberculosis; that he should be given a non-custodial sentence for him to seek medical attention and also provide for his family. That the sentence was excessive in the circumstances.

3. I have considered the record and the application. The Applicant did not opposed or complain about his conviction. He was only complaining about the sentence as being excessive in the circumstances of the grounds he raised.

4. The application was brought under the provisions of section 362 and 364 of the Criminal Procedure Code. Section 362 provides:-

> ***"362 The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the***

regularity of any proceedings of any such subordinate court".

It is clear from the foregoing that the purpose of the revision jurisdiction is for this court to satisfy itself of ***"the correctness, legality or propriety of any……..sentence or order recorded or passed, and to the regularity of any proceedings……"***. The Applicant's complaint is about the sentence. His complaint was that the sentence was excessive in the circumstances of the case.

5. Section 278 of the Penal Code under which the Applicant was convicted provides:-

> ***" 278***
>
> ***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."***

From the foregoing, it is clear that the trial court could have sentenced the Applicant from any period ranging from one (1) day to fourteen (14) years. The Applicant was sentenced for four (4) years. The record shows that when metting out the said sentence, the trial court took into consideration certain matters. The court is recorded to have stated as follows:-

> ***"Mitigation is considered. I have noted that the cow was found but this is a rampant offence in this area. It needs a deterrent sentence."***

It is clear that the trial court considered the Applicant's mitigation. It was also guided by the rampancy of the offence in the area the offence was committed. Thus the sentence metted on the Applicant took into consideration the Applicant's mitigation as well as the nature of the offence.

6. The question that arises is whether in the circumstances of this case, the sentence of four (4) years was excessive and whether this court should reduce the sentence into that of non-custodial. The circumstances which the Applicant set out was that his siblings were under the supervision of a 70 year old mother who is unable to take care of them; that the Applicant was unwell and that for that reason, he should be considered for a non-custody sentence.

7. From the foregoing, it is clear that the Applicant was not challenging the sentence on the grounds set out under section 362. Those grounds that have been raised by the Applicant are not statutory. In this regard, this court is unable to exercise its powers on since jurisdiction given to it under section 362 has not been satisfied. The grounds set out by the Applicant can be properly exercised under the Community Service Order Act. The only advice this court can give the Applicant is that he maintains good conduct and he may be able to convince the prison authorities that he is entitled to a chance during the decongestion exercised by this court at the Meru G.K. prison.

8. In the circumstances, I find the application to be without merit and I dismiss the same.

<u>DATED</u> AND DELIVERED at Chuka this 9th day of June, 2016.

A.MABEYA

JUDGE

Ruling read and delivered in open court in the presence of all parties.

A.MABEYA

JUDGE

9/6/2016