



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO. 246 OF 2011

(From original conviction and sentence in Criminal Case No. 1429 of 2011 of the Principal Magistrate's Court at Nyahururu, A. B. Mongare, SRM)

NAHASHON KIARIE NJENGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The Appellant Nahashon Kiarie Njenga with others were charged with the offence of stealing stock contrary to Section 278 of the Penal Code before the Principal Magistrate's Court at Nyahururu in Criminal Case No. 1492 of 2011. The particulars of the offence are that the Accused on the 13th July 2011 at Mugetho village in Laikipia County jointly with others stole two freshian cows and one jersey cow all valued at shs. 200,000/= the property of Herman Wangondu Gichigo. In the alternative charge the Appellant was charged with handling stolen goods contrary to Section 322(2) of the Penal Code. The particulars are that the Appellant on the 14th July, 2011 at Oljoro Orok village within Laikipia County otherwise than in the cause of stealing dishonestly retained three cows knowing the same to be stolen, the property of Herman Wangondu Gichigo, all valued at shs. 200,000/=. After a full hearing, the trial court found the Appellant guilty and convicted him on the alternative charge and sentenced him to serve seven years imprisonment.

2. Being aggrieved by the conviction and sentence, the Appellant preferred this appeal and upon six (6) grounds that may be summarized as two (2) hereunder:

(1) that the trial magistrate erred in law and fact in convicting the Appellant against the weight of evidence.

(2) that the trial magistrate erred in law and fact in convicting the Appellant on evidence that did not connect him to the offence alleged to have been committed.

He urged this court to quash the conviction and set the sentence aside and set him at liberty.

3. The appeal was opposed by the Learned State Counsel Ms. Rugut when the appeal came up for hearing before me on the 4th November 2014, the Appellant abandoned the appeal on conviction.

4. In his oral submissions, he urged the court to be merciful to him and set him free, or reduce the

sentence of seven years imprisonment. In his very spirited submission, he told the court that for the 3¹/₂ years he had served in prison, he had reformed, and learnt his lesson and vowed never to be involved in any other crime. He told the court that he had done his form four examinations and obtained a B+ grade and has a Diploma in Theology and would wish to continue with education and that he has surrendered his whole life to God and this court.

5. In opposing the appeal, and specifically reduction of the sentence, the State stated that the offence committed was serious, and the sentence was lawful as provided by the law. The court was urged not to interfere with the sentence.

6. I have carefully considered the proceedings before the trial court and submissions by both the Appellant and the Learned State Counsel. This court is vested with discretion to alter terms of sentence.

7. The purpose of sentencing is to disapprove or denounce unlawful conduct as a means to deter the offender from committing other offences. In the case **Kennedy Indiemu Omuse –vs- Republic, Criminal Appeal No. 344 of 2000**, the Court of Appeal held that the sentence imposed on an accused person must be commensurate with the moral blame worthiness of the offender, and that the trial court must look at the facts and circumstances in its entirety before settling for any given sentence.

8. I am minded that notwithstanding the wide discretion of the court in altering any sentence, it must do so only on clear circumstances. Further, in exercising that discretion, it has to be shown that the trial court took into account extraneous matters or failed to take into account material factors thus arrived at a wrong decision. In its absence, the court should be very slow, and would rarely interfere with the sentence imposed, unless it is shown, in addition, that the sentence was unlawful or manifestly excessive in the circumstances as to amount to a miscarriage of justice. See **Ogola s/o Owuor –vs- R (1954) 21 EACA 270**.

9. The Appellant herein was charged under Section 278 of the Penal Code, and in the alternative charge of handling stolen property contrary to Section 322(2) of the Penal Code. The trial court found him guilty of the alternative charge. Section 322(2) reads:

“A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.”

10. In sentencing the Appellant, the trial court in its very well reasoned Judgment considered the evidence in its totality and commented that the Appellant was caught in the doctrine of recent possession as expanded in the case of **Malingi –vs- R (1989) KLR 225** where court, under Section 119 of the Evidence Act, Cap. 80, Laws of Kenya, may presume the existence of any fact which it thinks likely to have happened, regard being had to the common cause of natural events, human conduct, in private and public business, and in relation to facts of a particular case. He concluded that the offence of theft or of handling recent possession raises a presumption of fact that the one in possession is either the thief or the guilty receiver the Appellant was unable to offer a persuasive explanation to his possession of the stolen cows hence the conviction and sentence to seven years imprisonment.

11. I have analysed the evidence on record before the trial court. The court observed that the Appellant's act was deliberate and intentional. It was also observed that the Appellant was a first offender and not remorseful. In his submissions, he put up a very spirited mitigation, and vowed never to commit any other crime. As I stated above, the purpose of sentence is to disapprove and denounce unlawful conduct with a view to reforming the offender.

12. The Appellant says he has reformed and has learnt in the 3¹/₂ years he has served in prison, and has undergone training in theology, and wishes to proceed with education. The Learned State Counsel however submitted that the trial court was very lenient in the sentencing and urged the court not to interfere with the sentence. This court has noted that the stolen cows were recovered and handed back to the owner. I should not ignore the Appellant's submissions as aforementioned. This court is vested with wide discretion to reconsider and re-evaluate the facts and circumstances leading to the conviction and

sentence. The sentence provided under Section 322(2) of the Penal Code is imprisonment for a term not exceeding fourteen (14) years. I agree with the State that the sentence of seven (7) years was lenient. However in view of my findings and the reformation by the Appellant during the period of imprisonment, I shall exercise my discretion in his favour and reduce the sentence to 3^{1/2} years. I order that the said sentence do run from the date of sentence. Mention on the 21st April 2015.

Dated, signed and delivered at Nakuru this 27th day of March 2015

JANET MULWA

JUDGE

In the presence of:

Rugut for the State/Respondent

Appellant – present

Omondi – Court clerk