



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL APPEAL NO.62 OF 2014**

**DAVID KIPNGENO KIMETO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal against the Conviction and Sentence by the Resident Magistrate Hon. B. Limo at Kericho in Cr. Case No.1312 of 2014 on 13.05.2014)*

**J U D G M E N T**

1. **David Kipngeno Kimetto** hereinafter referred to as the Appellant was charged with the offence of stealing stock contrary to **Section 278** of the **Penal Code**.
2. The particulars in the charge sheet were that the appellant on the 5<sup>th</sup> day of April, 2014 at about 11.00am at Kapsitei Village, Kaplelartet Location in Kericho West District within Kericho County, jointly with another not before Court stole 18 sheep valued at Kshs.80,000 the property of **EDDY ODHIAMBO AWINO**.
3. He also faced an alternative count of handling stolen goods contrary to **Section 322 (2)** of the **Penal Code**.

The particulars being that the appellant on the 5th day of April, 2014 at Kapsitii Village, Kaplelartet Location in Kericho West District within Kericho County, otherwise that in the course of stealing dishonestly received or retained 18 sheep knowing or having reasons to believe them to be stolen goods.

4. The appellant through Mr. Motanya advocate filed this appeal citing the following grounds;
  - i. *The learned Magistrate erred in fact and in law in failing to consider that the appellant pleaded guilty, was a first offender and was remorseful.*
  - ii. *The learned Magistrate erred in law and in fact in failing to ascertain that the facts well stated to the appellant and he was given an opportunity to dispute or explain the facts or to add if the appellant did not agree to the facts or raised any question of his guilt and his reply ought to have been recorded.*
  - iii. *The learned Magistrate erred in law and in fact by failing to satisfy himself that the plea was totally unequivocal and that the appellant understood the elements of the offences and their penalty.*
  - iv. *The learned Magistrate erred in imposing three years jail term despite the plea of guilt and without*

*considering the appellant's mitigating factors and the fact that he was a first offender.*

v. *The learned Magistrate erred in not considering the alternative punishment where it was open to impose a fine, probation or any other non-custodial sentence.*

vi. *The learned Magistrate erred in law in making excessive sentence to the appellant.*

5. In his submissions when the appeal came for hearing, Mr. Motanya did not raise any issue with the conviction.

He submitted on sentence saying the appellant did not understand what Mitigation is.

Further he said the trial Court should have called for a Pre- Sentence report to assist him mete out a more appropriate sentence.

6. The State through learned Senior Counsel M/s Mwangi opposed the appeal saying that the plea was unequivocal and that the sentence was lawful and lenient.

7. I have perused the record which reveals that the Appellant was arraigned in Court on 6<sup>th</sup> May, 2014 when the charge was read and explained to him. He pleaded guilty to the Principal Count. The Prosecution was however not ready with the facts on this date.

8. The learned trial Magistrate fixed the matter for mention on 13<sup>th</sup> May, 2014 for facts.

9. On 13<sup>th</sup> May, 2014 the appellant was arraigned before the same Court. When he appeared, the record shows that the prosecution began by stating the facts, which were admitted by the appellant. He was then convicted.

10. The procedure adopted by the learned trial Magistrate has errors which I must point out;

*(i) The plea was taken on 6<sup>th</sup> May, 2014. Facts were not ready until 13<sup>th</sup> May, 2014. How sure was the court that the appellant was still pleading guilty?*

*(ii) The proper procedure was for the charge to be read to the appellant afresh and a fresh plea to be taken.*

*(iii) The record does not show in what language the facts were read to the appellant. It is indicated that there was a clerk present in Court. Considering that this was a serious offence it was imperative that the language of interpretation be shown in the coram.*

*(iv) The record also shows that the appellant though given an opportunity to mitigate did not say anything. Did he really understand the language used?*

*(v) My finding is that failure to read the charge to the appellant on 13<sup>th</sup> May, 2014 before the facts were stated was unprocedural and renders the plea unequivocal, and the conviction cannot therefore stand.*

11. Can the Court order for a fresh plea to be taken?

12. In the case of **EKIMAT V R (2005) 1 KLR 184** the Court of Appeal gave a guidance on matters to be considered before ordering a retrial. It stated thus;

*1. It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the*

*prosecution is not to blame it does not follow that a retrial should be ordered.*

*2. A retrial should not be ordered unless the Court is of the opinion that on a consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on its particular facts and circumstances but an order for the retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to an accused person.*

13. In the present case the Appellant has already served one (1) year out of the three (3) years imprisonment, ordered by the Court.

The facts indicate that all the stolen sheep valued at Kshs. 80,000/= were recovered and handed back to the Complainant, as the same were not produced in Court.

14. Upon considering these facts and circumstances of the case, I do not find this case to be one where a retrial should be ordered.

15. I allow the appeal, quash the conviction and set aside the sentence.

The Appellant to be released unless lawfully held under a separate warrant.

**Dated, signed and delivered in open court this 26th day of May, 2015.**

**H.I.ONG'UDI**

**JUDGE**

**In the presence of:**

M/s Kivali for State

Mr. Motanya for Appellant- absent

Kipyegon- court assistant

Appellant-present in person

Interpretation-English/Kipsigis