REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 178 OF 2012

PAUL MWANGI MUNYIRI……..APPELLANT

VERSUS

REPUBLIC…….RESPONDENT

JUDGMENT

The appellant was charged and convicted of the offence of stealing stock contrary to **section 278** of the **Penal Code**; according to the particulars of the offence, it was alleged that on the night of 22nd and 23rd day of May, 2012, at Rugatha village, Gacuiro location in Mathira West District within Nyeri County, the appellant stole an Ayrshire cow valued at Kshs. 35,000/= the property of Grace Muringo Theuri.

The appellant appealed against the conviction and sentence on the grounds that:-

1. The learned Hon Magistrate erred in law and in fact in founding a conviction when section 137 (D) of the Criminal Procedure Code had been violated;

2. The learned magistrate erred in law and in fact in convicting the appellant when section 169 (2) of the Criminal Procedure Code had been violated;

3. The learned magistrate erred in law and in fact in basing his conviction on photographs admitted in evidence as exhibits;

4. The earned magistrate erred in law and in fact yet section 50 (2) of the Constitution had been violated;

5. The learned magistrate erred in law and fact in failing to find that the prosecution case had not been proved beyond reasonable doubt.

When the appeal came up for hearing, the appellant abandoned all these grounds and did not attempt to argue any of them except to ask the court to consider reducing his sentence. I would assume that the appellant is only challenging the sentence but not the conviction and in such circumstances, it would be prudent to restrict myself in this judgment to the legality of the sentence.

Ordinarily, and legally speaking, this court being the first appellate court, would have had to evaluate the evidence at the trial afresh but a question whether the sentence imposed is legal or not is strictly a question of law which does not warrant a fresh evaluation of the evidence as presented at the trial.

If it is not in dispute that the learned magistrate's findings on the facts are correct and therefore he arrived at the correct decision, afresh evaluation of the evidence would, in my view, be uncalled for. I understand

this to be consistent with the Court of Appeal's position on the obligation of the first appellate court to examine and evaluate the evidence afresh in **Okeno versus Republic (1972) EA 32**, where it held that:-

> ***An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrates' findings can be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."(See page 36 of the decision thereof.***

If the findings on facts would influence the sentence, it would have been necessary to navigate through the entire evidence and analyse it afresh, bearing in mind the precautions this court has been asked to consider, to determine whether the trial court arrived at the correct conclusions and accordingly imposed the correct sentence but this is not the case here.

Section 278 of the **Penal Code** under which the appellant was charged and subsequently convicted reads:-

> **278. Stealing stock** ***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.***

This provision of the law is clear that the maximum sentence upon conviction for the offence of stock theft is fourteen years; the appellant in this case was sentenced to serve five years imprisonment; in meting out this sentence, the court noted that the appellant was a first offender and took his mitigation into account.

I find no basis for interfering with the sentence imposed by the learned magistrate; considering that the maximum sentence for the offence for which the appellant was convicted is fourteen years, the five years that the appellant was handed may even be considered as lenient. Most importantly, however, the sentence is lawful and there is no basis for interfering with it even at this appellate stage. For this reason I find that the appellant's appeal has no merit and the same is hereby dismissed.

Dated, signed and delivered in open court this 15th May, 2015

Ngaah Jairus

JUDGE