

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 127 OF 2013

SAMUEL NGUGI WAIRIMU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal against sentence and conviction in Kangema Senior Magistrate's Court Criminal Case No. 211 of 2010 (Hon. D.Orimba) on 28th June, 2010)

JUDGMENT

The appellant was charged with the offence of stealing stock contrary to **section 278** of the **Penal Code**. It was stated in the charge sheet that on the night of 21st and 22nd May, 2010 at Gathondia village, Mukangu sub-location in Murang'a North district within central province, the appellant stole one goat valued at Kshs. 7000/- the property of Margaret Njeri Macharia.

The appellant faced two other counts of burglary and stealing contrary to **section 304(2)** and **279 (b)** of the Penal Code. In the first of the two counts, it was stated in the particulars of the offence that on the night of 17th day of May, 2010, at Gathondia village, Mukangu sub-location in Murang'a North district within central province, the appellant broke and entered a dwelling house of Justus Kamau Gatiti and stole from therein one mattress, a television set make Samsung and one pair of black shoes all valued at Kshs. 13,000/- the property of the said Justus Kamau Gatiti. In the second count the appellant is alleged to have broken into the dwelling of John Maina Mwangi where he stole one steel window and an assortment of clothes all valued Kshs. 6000/- the property of John Maina Mwangi.

When the charges were read to the appellant he entered a plea of guilty on all the three counts. In his mitigation the appellant told the court that he stole because he had no parents and his uncle whom he was living with had evicted him from his house. The record shows that the learned magistrate considered his mitigation and sentenced him to serve three years imprisonment on the first count, seven years imprisonment on the second count and 5years imprisonment under the third count. The learned magistrate also sentenced him to serve seven years imprisonment under **section 279(b)**; all the sentences were to run concurrently.

Although the appellant indicated that he was appealing against the conviction and the sentence, the conviction is not questioned anywhere in the grounds of his appeal; if anything, he has reiterated in those grounds that he pleaded guilty to the charges and it is also apparent from the record that the plea was unequivocal.

The grounds upon which his appeal is based can only be summarised into two; firstly, that the sentences were severe and secondly, that he was detained in police custody in contravention of **section 72** of the Constitution before he was charged.

The penalty on conviction of stealing stock under **section 278** of the Penal Code is a prison term of up to fourteen years while that of burglary and stealing under **section 304(2)** is a prison term of up to ten years. The penalty upon conviction under **section 279 (b)** is imprisonment for a term of fourteen years. The learned magistrate did not impose maximum sentences and the sentences meted out were well within the law. There is no basis for allegations that the sentences were stiff or severe. In meting out these sentences the learned magistrate, no doubt, took into account the appellant's mitigation and the fact that he was a

first offender.

On the question of violation of his constitutional rights under section 72 of the old constitution, the remedy for such violation does not lie in an acquittal if proved. It has now been established that where an accused person alleges breach of his constitutional rights, his remedy lies in damages in a civil action. (See the decision of the court of appeal in **Criminal Appeal No. 50 of 2008 (Nairobi) Julius Kamau Mbugua versus Republic**).

For the reasons I have given the appellant's appeal is dismissed.

Dated, signed and delivered in open court this 17th February, 2014

Ngaah Jairus

JUDGE