



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 83 OF 2013**

**JOHN KOSGEI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the original conviction and sentence in Criminal Case No. 2536 of 2013 Republic vs John Kosgei & 2 others in the Principal Magistrate's Court at Eldoret by F. N. Kyambia, Principal Magistrate dated 12<sup>th</sup> June 2012)***

**JUDGMENT**

1. The appellant was convicted on his own plea of guilty for the offence of stealing stock contrary to section 278 of the Penal Code. He was sentenced to five years imprisonment. The appellant has appealed against the sentence.
2. The petition of appeal is entitled *Mitigation of Appeal*. It was filed on 2<sup>nd</sup> May 2013. The appellant prays for leniency. He states he is a first offender; that he is the first born in a family of seven who all depend on him; that his father is deceased; and, that his mother is of advanced age. He pleads with the court to substitute the custodial sentence with a non-custodial punishment.
3. At the hearing of this appeal, the appellant acted in person. He added that he is unwell; and, that he has a plate on his leg as a result of a road traffic accident. He submitted that his appeal is limited to the severity of the sentence.
4. The appeal is contested by the State. The case for the State is that the plea of guilty was unequivocal. Since the sentence provided for stock theft is up to fourteen years, the State submitted that the sentence of given was lenient. I was thus implored not to disturb the sentence.
5. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
6. I have carefully studied the records of the trial court. I am satisfied that the proceedings were conducted in *Kiswahili*. Before the plea was taken, the court enquired from the appellant the language he understood. At page 5 of the record, he replied that he “*understood Kiswahili*”. The substance and ingredients of the charge were then read to him. The appellant pleaded *guilty*. The appellant never raised any issue relating to the language or proceedings.
7. The facts read in court were as follows:

*“On 9/6/2012 the complainant Samuel Wanasika a resident of Irula Village securely locked his four cows and retired to bed. At 1:00a.m. He woke up for a call of nature and on checking discovered his four cows missing valued at Kshs. 200,000/-. He woke up neighbours in an effort to trace the animals in the village but he could not trace the same. He made a report at Kapsoya Police Station. At around 6:00a.m. he received information that the cows had been seen at Langas. He went to Kapsoya Police Station and*

*informed the officers. He together with police officers went to Langas. The two accused had already been arrested. The two accused and another were re-arrested and taken to Kapsoya Police Station and charged with present offence.”*

8. When the facts were read to the appellant, he confirmed them to be correct. A plea of guilty was entered. The appellant even mitigated and told the court: “*I have a family I am taking care of. I pray for leniency*”. The trial court considered the mitigation offered by the appellant before handing down the sentence. Upon reappraisal of those facts, I have reached the conclusion that the appellant’s plea of guilty was *unequivocal*.
9. That leaves the matter of the sentence. Section 278 of the Penal Code provides for a sentence *not* exceeding fourteen years. The offence of stock theft is grave. At page 3 of the typed proceedings, the trial court took into consideration the mitigation of the appellant; and, that he was a first offender. I have considered the fresh plea for mercy.
10. Sentencing is at the discretion of the trial court. But power still reposes in an appellate court to review the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.
11. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

*“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.....(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or..... ”*

12. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

*“The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. ...The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.”*

13. In the present case I cannot say the learned trial Magistrate *acted upon some wrong principles or overlooked some material factors*. He considered the mitigation; he considered the appellant was a first offender. Despite the fresh clamour for leniency, I remain alive that stock theft is a *serious* offence against *property*. The value of the four cows that were stolen was placed at Kshs 200,000. As stated in *Macharia v Republic* [2003] 2 E.A 559, the sentence imposed on an accused person must be *commensurate* with the *moral blameworthiness* of the offender. See also *Omuse v Republic* [1989] KLR 214. In this case, the law provides for a sentence of up to *fourteen* years. Considering the *gravity* of the offence, the sentence handed down of *five* years was quite *lenient*. I thus decline the invitation to review the sentence.
14. In the result, I find that the appeal is devoid of merit. I uphold the conviction and sentence handed down by the learned trial Magistrate. The entire appeal is dismissed.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 27<sup>th</sup> day of November 2014

**GEORGE KANYI KIMONDO**

**JUDGE**

**Judgment read in open court in the presence of**

The appellant (in person).

Ms. Busienei for the State.

Mr. J. Kemboi, Court clerk.