



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 35 OF 2013

WILIAM LEMUALE MWIKAL.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original sentence in Kangundo Senior Principal Magistrate's Court Criminal Case No. 26/2013 by Hon. I.M. Kahuya on 25/3/2013)

JUDGMENT

1. The Appellant, **William Lemuale Mwikal** was charged with the offence of stealing stock contrary to section 278 of the Penal Code. The particulars of the offence thereof were that on the 13th day of January, 2013 at about 3.00pm at Mukengesya village of Kamarock location in Matungulu District within Machakos Country jointly with others not before the court stole two (2) cows each valued at Kshs. 40,000/= all valued at Kshs. 80,000/= the property of **Joshua Mbesa Nguli**.
2. Having pleaded not guilty to the charge the appellant was tried, convicted and sentenced to three (3) years imprisonment. Being aggrieved by the sentence imposed the appellant now mitigates for reduction of the sentence meted out.
3. At the hearing the appellant mitigating on sentence asked the court to be considerate to him as he has a nuclear family and parents who depend on him.
4. The learned State counsel, **Mr. Mwangi** opposing the appeal argued that the sentence imposed was lenient as the maximum sentence for the offence that the appellant was charged with is 14 years imprisonment.
5. This being the first appeal, I am aware of the requirement to scrutinize circumstances and mitigating factors on record of the Lower Court so as to reach an independent conclusion whether or not the sentence meted out by the court was reasonable in the circumstances.
6. This appeal being only on sentence, I will not be obliged to delve into evidence that led to conviction that is not challenged.
7. In his mitigation the Appellant stated that he was a sole breadwinner of his elderly parents.
8. In passing the sentence the trial magistrate took into consideration mitigating factors. She however, noted that the offence committed was a serious one. She also noted that the act committed by the appellant would have plunged the community into ethnic clashes.
9. In his defence the appellant claimed he was innocent. He gave a story of having been accosted by a mob of people who beat him up. Thereafter he was surprised to be charged. Now that he admits having stolen the animals, he has demonstrated that he is not a person who can be taken seriously. The appellant was sentenced on the 25/3/2013. He has only served 5 months out of three years meted out. The prescribed sentence for the offence he committed is 14 years imprisonment.
10. In the case of **S versus Mal gas 2001(1) SACR 469 (SCA)** the Supreme Court of Appeal set out the determinative test to be applied in matters where sentence becomes a factor. The court held thus:-

“If the sentencing court on consideration of circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and needs of society, so that an injustice would be done by imposing the sentence, it is entitled to impose a lesser sentence”.

- 11.Guided by the above determinant test, I do note that the appellant stole two cows valued at Kshs. 80,000/=. Having imposed a three years sentence in circumstances where no explanation could be found why the appellant chose to steal was considerate on the part of the trial magistrate.
- 12.Therefore the mitigating factors advanced by the appellant are not compelling enough to necessitate a deviation from the sentence imposed.
- 13.In the circumstances, I do uphold the sentence imposed. Accordingly the appeal on sentence is dismissed.

DATED, SIGNED and DELIVERED at MACHAKOS this 23RD day of OCTOBER, 2013.

L.N. MUTENDE

JUDGE