



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 24 OF 2010

(From the Original Conviction and Sentence in Criminal Case No. 238 of 2009 of the Senior Resident Magistrate's Court MARIAKANI- M.K. MWANGI- S.R.M)

JUMA CHIWAYA MGALAAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

JUMA CHIWAYA MGALA herein referred to as “**the appellant**” was charged with the offence of stealing Stock Contrary to Section 278 of the Penal Code.

The particulars of the offence are that on the 31st day of August, 2009 at Kaberani Village Matope location in Kwale District within the Coast Province jointly with another not before the court stole 16 cows valued at Kshs. 60,000 the property of Umazi Rai.

In the alternative count, the appellant was charged with the offence of Handling stolen property contrary to section 322 (2) of the penal code.

The particulars thereof states that on the 1st day of September, 2009 at Malomani market Mukamini Location in Kwale District within Cost Province. Otherwise in the course of stealing dishonestly retained six (6) Cows knowing or having reason to believe to be stolen goods.

The appellant was arraigned in Court on the 3rd September, 2009 at The Senior Resident, Magistrate's Court at Mariakani before Hon. M.K. Mwangi SRM. He pleaded guilty to the main count, and was convicted and sentenced to serve **FIVE (5) years** imprisonment. Being aggrieved with the sentence, he has appealed, relying on the following grounds.

- 1. My Lordship as a first offender, I humbly beg this honourable High Court to have mercy upon me for these just come by mistake and I will never repeat again.**
- 2. My Lordship I humbly beg this to be considered that I was the only one in the family who was providing for them please my Lordship consider this.**
- 3. That my Lordship the sentence that I was given was too harsh and excessive to me by this I beg the sentence to be reduced or removed.**

4. My Lordship since I met the gates of the prison and high wall my mind have come back in senses and what I did from the moment I repented my deeds and I am ready to be a good example to my co-villagers now.

At the hearing of the appeal, the appellant fully relied on the submissions he filed in Court. In a nutshell he alleges that the Sentence meted upon him was harsh and excessive and that, he has reformed and will not repeat such an offence again.

In opposing the application, Ms Macharia submitted that under Section 278 of the Penal Code the maximum sentence is 14 years. That, the appellant was sentenced to 5 years which sentence is lenient. That, the appellant is not a first offender and therefore the Court should uphold the sentence.

I have considered the appeal, the grounds thereof, and the oral submissions by the parties. I find that in determining the appropriate sentence, the Court exercises its discretion depending on the circumstances of the case (**Graffin Vs Republic (1981) KLR 121**). As a general rule, imprisonment should not be imposed on a first offender except where the offence is particularly grave, aggravated or widespread in an area of imprisonment acts as a **shock deterrence**. Where there are no aggravating circumstances the emphasis in sentencing first offenders ought to be on reformation.

Again the general rule in sentencing is that maximum sentence should not be imposed on a first offender. **Otieno Vs Republic (1983) KLR 295 and Arrisol Vs Republic (1975) EA 447**. Where there is a maximum sentence, the sentence imposed should not be above the maximum **Vasongo Vs Republic (1985) KLR 465**, similarly the Court should not impose a sentence below minimum where the law so prescribes, **Rotich Vs Republic (1983) KLR 541**

In considering the appropriate sentence, the Court has to consider such factors as

- The nature of the offence.
- The attitude of the accused person.
- The seriousness of the offences.
- The circumstances under which the offence was committed.
- The effect of the sentence on the accused person.
- The fact that the maximum sentence is intended for the worst offenders. **Makonga Vs Republic Criminal Appeal No. 72 of 1983 (unreported)**.
- The Court should also consider the value of the subject matter of the charge **Mathai vs Republic (1983) KLR 422** and
- Whether, there has been restitution of property by the accused **Hezekiah Mwaura Kibe Vs Republic (1976) KLR 118**.
- The previous records of conviction.

In the instant case, the maximum sentence for the offence is **14 years**. The accused was sentenced to **five years**. **He was not a first offender**. He had been convicted over a similar offence and sentenced to three years imprisonment. He had just come from prison. In that case I find that, the appellant did reform from the previous record of conviction. The reasons he gave that he stole because he is poor makes no sense. I therefore uphold the sentence imposed and dismiss the appeal accordingly.

**G.L. NZIOKA
JUDGE
15TH MARCH, 2012**

Court: The Judgment is dated, signed and delivered in an open Court at Mombasa.

**G.L. NZIOKA
JUDGE
15TH MARCH, 2012
In the presence of :-**

Jamii for the state

Appellant in person

Cc Matano