



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 105 of 2010

ATANUS MALOMBE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the convicting and sentence in Kitui Principal Magistrate's Court

Criminal Case No. 989/2009 by Hon. E. Juma ,SRM on 7/5/2010)

JUDGMENT

The appellant, **Atanus Malombe**, faced the main charge of stealing stock contrary to section 278 of the Penal Code before the Principal Magistrate's Court, Kitui. The particulars as outlined were that the appellant on the night of 18th and 19th August, 2009 at unknown time at Kilungu Village in Mutune Sub-location, Kyangwithya East Location in Kitui District of the Eastern Province stole one bull valued at Kshs. 15,000/= the property of **Musee Koki**. He also faced an alternative charge of handling stolen goods contrary to section 322 (1) (2) of the Penal Code. The particulars being that he on the 19th of August, 2009 at about 10.00 p.m. at Mutune shopping Centre, Mutune Sub-location, Kyangwithya East Location in Kitui District of the Eastern Province, otherwise than in the cause of stealing dishonestly retained a bull valued at Kshs. 15,000/= the property of **Musee Koki** knowing or having reasons to believe it to be stolen or unlawfully obtained. The appellant denied the charges.

A total of 4 prosecution witnesses were called in support of its case on one side and on the other side the appellant opted to give unsworn defence when placed on his defence and called no witnesses.

The prosecution case in brief was that on 18th August, 2009, PW1 locked his bull in a cow shed at 7 p.m for the night. When he woke up at 6 a.m., the following day, he found the bull missing and, a search was immediately mounted. In the process PW1 received information that a suspect had been arrested with a suspected stolen bull and was being held at Mutune Chief's Office. He proceeded there and positively identified the bull as his.

The investigating officer, PW2, **Police Constable, Ominde Tula**, was on 19th August, 2009 at Kitui Police Station, Crime Branch when an Administration Police Officer from Mutune escorted to the station the bull and a suspect in the company of the complainant. He placed the appellant in the cells and took the witnesses statements after interrogating the appellant. Later he was convinced that the appellant had committed the offence. He subsequently charged him in court.

Mr. Timothy Mwangangi Daniel, (PW3), the Assistant Chief, Mutune sub-location was on 18th August, 2009 in his office when a watchman went to him at around 10.00 p.m. and told him that the appellant had

been seen with a cow suspected to be stolen. He asked PW4, **APC Mwanake** to arrest the appellant which he did. PW3 confirmed to PW4 that the appellant did not own any bull. The appellant was then locked up and the following day, PW1 came and identified his bull.

In his defence the appellant in his unsworn Statement gave personal problems that were afflicting him. In a nutshell his defence was merely pleas in mitigation.

The learned magistrate having keenly evaluated the evidence adduced by the prosecution and defence was persuaded that the main count had been proved. She therefore convicted the appellant and sentenced him to 7 years imprisonment.

Aggrieved by the conviction and sentence, the appellant mounted this appeal on 5 grounds:-

§ Prosecution case was laced with inconsistencies

§ He was convicted on hearsay evidence

§ The exhibit was not produced

§ The case was poorly investigated, and

§ that the stolen bull was not found in his possession

When the appeal came up for hearing, the appellant opted to abandon the appeal on conviction. Instead he wished to prosecute the appeal on sentence only. The State not objecting, the appellant's wish was duly granted.

In support of his appeal on sentence, the appellant submitted that this court should consider imposing a fine as opposed to the custodial sentence he was serving. The Sentence imposed was otherwise harsh and excessive. He was aged 32 years, remorseful and felt that the term already served of 2 years was sufficient punishment. **Mr. Mwenda**, learned State Counsel opted to leave the appeal on sentence to court.

The principles upon which an appellate court may interfere with the sentence imposed by a trial court were succinctly set out by **Trevyan, J** in the case of **Wanjema vs Republic [1971] E.A. 494**. He stated thus: -

“A sentence must in the end, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case...”

I am content wholly to adopt this passage as epitomizing the principles by which I must be guided in determining this appeal.

So then what was the appropriate sentence in this case? After considering all the facts before me and the submissions of the appellant, I am satisfied that the sentence imposed was legal and the trial court did not act on any wrong principle, or took into account anything it should not have done, or left out of account anything it should have in imposing one. Nevertheless, after due consideration, I think that 7 years imprisonment for a first offender, was on the facts of the case, too severe and I am in the premises inclined to interfere with the same. I will reduce the sentence to the term so far served with the consequence that the appellant is to be set at liberty forthwith unless, otherwise lawfully held. In the result, the appeal succeeds to the limited extent I have indicated above.

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JULY 2012.

**ASIKE-MAKHANDIA
JUDGE**