

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 318 of 2009

SIMON LOSOLI ELOILOI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

CRIMINAL PROCEDURE & PRACTICE - On a conviction following a plea of guilty - accused can only appeal on ground of extent and legality of sentence - section 348 Criminal Procedure Code (Cap. 75, Laws of Kenya)

JUDGMENT

The Appellant was charged with the offence of **stealing stock** contrary to **section 278** of the **Penal Code**. He pleaded guilty and was convicted. The particulars were that on diverse dates of 6th and 7th September 2009 at unknown time at Magereka village Shomata Location in Nyandarua District within Central Province stole two sheep valued at Kshs 6,000/= the property of John Ngatia - the complainant.

When the facts were read to the Appellant, he confirmed that the facts were true. His conviction was therefore confirmed, in accordance with the procedure set out in the case of **ADAN vs REPUBLIC [1973] E. A. 445**.

In his mitigation the Appellant told the court that he has a wife and children for whom he is the breadwinner. The court called for a Probation Officer Report before sentencing the Appellant. The Report filed by the Probation Officer was adverse to the Appellant. It stated that the Appellant had a previous conviction and would be a threat to the community if he was given a non-custodial sentence.

The trial court's record does not show that this adverse information was brought to the attention of the Appellant for him to deny and comment on it. The trial court merely sentenced the Appellant to 5 years term of imprisonment.

Mr. Omutelema, I think, correctly observed that the adverse comments in the Probation Officer's Report ought to have been brought to the attention of the Appellant. Failure to do so certainly prejudiced the Appellant because the trial court relied upon the Probation Officer's Report in handing down the sentence of 5 years upon the Appellant. For that reason Mr. Omutelema submitted the appellate court could legitimately exercise its discretion and interfere with the sentence.

The punishment for the offence of stealing stock contrary to Section 278 of the Penal Code is imprisonment for a period not exceeding fourteen years. The Appellant was sentenced to five (5) years. The Appellant is not challenging his conviction. He is unhappy with the sentence which was indeed imposed pursuant to a Probation Officer's Report the contents and substance of which was not brought to his attention. As already observed, the adverse contents of the Report ought to have been brought to the Appellant's attention before sentence was passed on him.

In terms of **Section 354(3)(b)** of the **Criminal Procedure Code**, this being an appeal on sentence, the Appellate court has a

discretion to increase or reduce the sentence or alter the nature of the sentence.

In light of the appellant's own comment when asked by the court whether he had been convicted before, that he had been arrested and detained for 6 months without charge, there is probably a basis for the Probation Officer's adverse report. I would not therefore alter the Appellant's sentence from being custodial to non-custodial. I would however give the appellant the benefit of doubt in light of his answer to the court that he had been detained, and not charged, and reduce his sentence from 5 years to three (3) years to run from the time of his conviction and sentence.

The appeal therefore succeeds on sentence only.

The Appellant had alleged in his grounds of appeal that he was detained for a period of 10 days before being taken before a court contrary to section 72(3)(b) of the Constitution and that no explanation had been given.

Mr. Omutelema Learned Provincial State Counsel explained that there was no basis for this ground. A complaint was made to the Police on 20th September 2009. The Appellant was arrested on 21st September 2009 and was taken to court on 22nd September 2009, all in compliance with the provisions of Section 72(3)(b) of the Constitution that a person arrested and detained for a non-capital offence should be brought before a court within twenty-four hours of his arrest. The Appellant was brought before a competent court on 22nd September 2009, virtually within 24 hours of his arrest and in compliance with the provisions of Section 72(3)(b) of the Constitution. There is therefore no basis for this ground and it fails.

There shall therefore be orders as above.

Dated, delivered and signed at Nakuru this 23rd day of July 2010

M. J. ANYARA EMUKULE

JUDGE