



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL APPEAL NO. 225 OF 2009

NYABUTO OBED ROBERTAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

(From the original conviction and sentence of the PM's court at Kilgoris in Criminal No. 672 of 2009, Hon. R.A Oganyo (PM) dated and delivered on 29th October 2009).

The appellant in this appeal was charged before the Principal Magistrate's Court at Kilgoris with the offence of stealing stock contrary to **Section 278** of the **Penal Code**.

After the charge and every element thereof was read out and explained to him, the appellant pleaded guilty to the same. He was thereafter convicted on his own plea of guilty and sentenced to four (4) years imprisonment.

The facts in support of the charges as narrated by the prosecutor were that:-

“On 9th October, 2009 at Poroko village in Transmara District, the accused who was a herdsman took 11 heads of cattle to the grazing files near Nyangusu area in the company of the complainant's brother's herdsman.

Later on in the evening accused disappeared to an unknown destination. The other herdsman drove all the cattle home and he handed over the cattle to complainant's wife. The latter counted them and realized that three heads of cattle were missing. She called her husband who also came and found 3 cattle missing. So he called the area chief and also GSU officers from Keango and informed them. He also went to Kilgoris station to make a report.

On 10th October 2009 complainant got a call from a friend that a person had been cited at Keango centre with the said missing cattle. He rushed there and found accused already arrested by residents at Keango. He was taken to GSU camp with the cattle

They were;

- ***One bull brown in colour***
- ***White with brown dots bull***
- ***White and black female cow,***

They were photographed.

Aggrieved by the conviction and sentence aforesaid the appellant has come to me by way of a first appeal through Messrs Minda & co. advocates listing the following grounds:-

“1. The charges were read to the appellant in a language he did not understand well and pleaded as he did following threats that were made to him by police officers just before he took the plea.

2. The appellant did not have what he was charged with explained to him by the police officers or the court and the consequences appurtenants thereto before the plea was read to him and he answered as he did.

3. The sentence meted out by the trial magistrate was manifestly harsh in the obtaining circumstances as the Appellant was presented to be a first offender and the cows allegedly stolen were recovered.

4. The Honourable Magistrate did not at all consider the Appellant's mitigation which had he considered a non-custodial sentence would have been meted.

5. The reasons why the appellant was found unfit to serve a non-custodial sentence not stated in the judgment.”

When the appeal came up for hearing Mr. Minda learned counsel appeared for the appellant whereas the state was represented by Mr. Mutai learned Senior State counsel. The appellant instructed his counsel to abandon the appeal on conviction but pursue the appeal on sentence. His wish was granted.

In his brief address Mr. Minda pleaded for reversed sentence saying that the sentence imposed was harsh and excessive. The appellant was a first offender. The stolen cows were recovered and thus the complainant did not suffer substantial loss. The appellant was a young man of 23 years. The court should be lenient to him as he had reformed.

Mr. Mutai, concede to the appeal on sentence. He submitted that from the record, the appellant had pleaded guilty to the charge when presented to court and therefore saved the court valuable judicial time. According to Mr. Mutai, the period served in prison was sufficient.

I have considered the appellant’s plea for a less severe sentence and also what he has stated in support thereof. I have also carefully considered **Mr. Mutai’s** submissions as outlined above, but what has emerged is that even with those submissions in perspective, I think the sentence of four years in the circumstances was if anything quite lenient, taking into account the range of sentence for the offence. I have also taken into account the holding in the case of **REPUBLIC V. JAGANI & ANOR[2001] KLR 590** to the effect that this court can interfere with a sentence passed by the trial court in exercise of its discretion only where such sentence is against legal principles or when relevant factors were not considered or irrelevant or extraneous matters considered or normally where the sentence is manifestly excessive in the circumstances of the case. The trial magistrate had a mind of sentencing the appellant to a probation. She called for a probation officer’s report and the same was found not to be favourable to the appellant. Apparently he was untrustworthy and was a prima suspect in stock theft cases along Transmara – Kisii border. The grounds raised in this appeal do not fall under any of the above exceptions to warrant interference by the court. Accordingly, this appeal is dismissed.

Judgment Dated, signed and delivered at Kisii this 16th day of July, 2010.

M.A. MAKHANDIA
JUDGE.