



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Appeal 98 of 2004**

**(From original conviction and sentence in criminal Case No. 1377 of 2004 of the**

**Principal Magistrate's Court at Naivasha -J. Kiarie[P.M.]**

**ELIJAH MWANGI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Elijah Mwangi was charged with the offence of stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were that on the night of the 6<sup>th</sup> and 7<sup>th</sup> April 2004 at about 3.00 a.m. at Gilgil area in Nakuru district, jointly with others not before court, the appellant stole 28 heads of cattle valued at Kshs 560,000/= the property of Welles Chege Macharia. The appellant was alternatively charged with handling stolen property contrary to Section 322(2) of the Penal Code. The particulars of the offence were that on the 7<sup>th</sup> April 2004 at Delamere area within Nakuru District, other than in the course of stealing, the appellant dishonestly handled 26 heads of cattle valued at Kshs 520,000/- the property of Welles Chege Macharia knowing or having reason to believe the same to have been stolen or unlawfully obtained. The appellant pleaded guilty on the main count of theft. He was convicted on his own plea of guilty and sentenced to serve seven (7) years imprisonment. The appellant was aggrieved by the sentence imposed and has appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal basically pleading with this court to reduce the term of imprisonment imposed. The appellant stated that he was a first offender and was remorseful for having committed the offence which he was convicted. He stated that he ought to have been sentenced to serve a non-custodial sentence instead of a custodial sentence. He pleaded with the court to release him so that he could be enabled to go back to take care of his family. At the hearing of the appeal, the appellant reiterated the contents of his petition of appeal and pleaded that he had been sufficiently punished for the period that he has been in prison. Mr. Mugambi for the State submitted that the sentence that was meted out on the appellant was lenient taking into account of the fact that it was the minimum sentence.

I have carefully considered the plea for reduction of sentence made by the appellant and the response thereto made by Mr. Mugambi on behalf of the State. The appellant pleaded guilty to stealing 26 heads of cattle. According to the facts of the case, the appellant was arrested while he was driving the said cattle from the homestead of the complainant together with other accomplices who however escaped upon seeing the members of the Anti-Stock Theft Police Unit who were tracking them. For this court to interfere with the exercise of judicial discretion by the trial magistrate when he sentenced the appellant, it must be established that the trial magistrate exercised his discretion wrongly. The appellant must establish that the trial magistrate either failed to consider a material factor or considered an immaterial factor when he sentenced the appellant. The appellant must also establish that he was sentenced to an illegal sentence which was not in conformity with the law. Finally the appellant may plead that taking into consideration of the facts of the case, the trial magistrate sentenced him to a harsh and excessive sentence in the circumstances that it amounted to an erroneous exercise of judicial discretion.

In the present appeal, the appellant was sentenced to serve seven (7) years imprisonment. According to Mr. Mugambi, that was the minimum sentence which the appellant could have been sentenced to serve by the trial magistrate. It is apparent that the trial magistrate sentenced the appellant to serve seven (7) years imprisonment on the mistaken belief that that was the minimum sentence that he could have sentenced the appellant to serve. However the trial magistrate did not take into consideration the fact that Section 278 of the Penal Code was amended by the Criminal Law (Amendment) 2003, Act No. 5 of 2003 whereby the previous minimum sentence for a person who was convicted for stealing stock of seven years imprisonment was deleted and instead it was stated that;

*"The offender is liable to imprisonment for a period not exceeding fourteen years"*

Taking into account the facts of this case, including the fact that the appellant was a first offender and had pleaded guilty to the offence when he was first arraigned before court and thus had saved time both for the prosecution and for the trial court, I think it would be just that the plea of reduction of sentence by the appellant be favourably considered.

The upshot of the above reasons is that the appellant's appeal on sentence is hereby allowed. The sentence of seven (7) years imprisonment imposed by the trial magistrate is hereby set aside and substituted by a sentence of this court commuting the sentence of the appellant to the period already served. The appellant is ordered set at liberty and released from prison unless otherwise lawfully held.

It is so ordered.

**DATED at NAKURU this 13<sup>th</sup> day of March 2007**

**L. KIMARU**

**JUDGE**