



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 100 of 2006**

**HASSAN OSMAN MALAT .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From original conviction and sentence criminal case No.770 of 2004 of the Senior Principal Magistrate's Court Garissa – D. Orimba RM)*

**JUDGMENT**

HASSAN OSMAN MALAT, the appellant, was charged before the subordinate case with the offence of killing an animal with intent to steal contrary to section 289 of the Penal Code. The particulars of the offence were that on 18<sup>th</sup> August 2004 at about 9.30 am in Garissa District within North Eastern Province, killed an animal capable of being stolen namely goat, with intent to steal the carcass. He is recorded as having pleaded guilty to the charge. He was sentenced to serve 7 years imprisonment. Being aggrieved by the sentence imposed he has appealed to this court against the sentence only.

At the hearing of the appeal, the appellant submitted that he was sick in prison and had been undergoing treatment at Kenyatta National Hospital.

Learned State Counsel, Mrs. Gakobo, submitted that at the time of sentencing the offence did not carry a minimum sentence of 7 years imprisonment as stated by the magistrate. The maximum sentence had been amended to 14 years without a minimum sentence. The appellant was a first offender. The appellant had already served about 2 years in prison. Counsel contended that the sentence should be reduced to that already served.

I have considered the appeal, the submissions on both sides and also perused the record. Sentencing is essentially the discretion of the sentencing court. An appellate court will be slow to interfere with the exercise of that discretion unless it is shown that the sentencing court took into account an irrelevant factor or that it failed to take into account a relevant factor, or that it applied a wrong principle or short of these the sentence is so harsh and excessive that an error of principle must be inferred – see **SHADRACK KIPROTICH KOGO –vs- REPUBLIC – Criminal Appeal No. 253 of 2003 (ELDORET)** unreported.

The appellant was sentenced on 19/8/2004. In sentencing the appellant, the learned magistrate observed that the offence attracted a minimum sentence of 7 years and a maximum of 14 years imprisonment. As correctly pointed out by the learned State Counsel, there was an amendment of 1987, under Act No.22 of 1987 which removed the minimum sentence. There was a further amendment vide Act No. 5 of 2003, which removed corporal punishment. In taking into account the previous provisions for a minimum sentence of 7 years, therefore, the learned magistrate applied a wrong factor in determining the sentence. In addition, the appellant was a first offender. The animal slaughtered was also one goat. The appellant, in pleading guilty did not waste the court's time through the process of a full trial. Taking all these factors into account, I am persuaded to interfere with the sentence imposed by the learned magistrate. I find the sentence imposed by the learned magistrate to be harsh and excessive, in the circumstances of this case and will reduce the same. The appellant having been sentenced on 19/8/2004 has actually served more than three years now. I will reduce the sentence to the sentence already served.

Consequently, I allow appeal and reduce the sentence to that already served. The appellant will therefore be released forthwith, unless otherwise lawfully held.

Dated and delivered at Nairobi this 1<sup>st</sup> day of October 2007.

**George Dulu**

**Judge**

**In the presence of –**

Appellant in person

Mrs. Gakobo for State

Eric - court clerk