

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 136 of 2006

Court at (From original conviction and sentence of the Senior Resident Magistrate's
Maralal in Criminal Case No. 82 of 2006 – S. N. Mbungi [S.R.M.]

DAVID TINGASO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, David Tingaso was with the offence of Stealing Stock contrary to section 278 of the Penal Code. The particulars of the offence were that on the 27th March 2006, at Lemisigiyo grazing fields in Samburu District, the appellant stole two sheep valued at Ksh.3,000/=, the property of Lerenti Lesuyai. When the appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After a full trial, he was convicted as charged and sentenced to serve seven years imprisonment with hard labour. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

Although in his petition of appeal the appellant had appealed against conviction and sentence, at the hearing of the appeal, the appellant abandoned his appeal against conviction and instead pleaded with the court to exercise leniency on him and reduce the sentence imposed on him. He submitted that he was remorseful and had learnt his lesson while in prison. He stated that he is now reformed having learnt that crime does not pay. He submitted that while in prison, he was tested and found to be HIV positive. He told the court that he was now suffering from AIDS and was taking antiretroviral. He urged the court to consider his health and the fact that he was a first offender and order his release from prison. Mr. Mugambi for the State opposed the appeal. He submitted that the prosecution had established that it was the appellant who stole the two sheep belonging to the complainant. He submitted that the trial magistrate had not erred when he sentenced the appellant to serve the imposed custodial sentence. He urged the court to dismiss the appeal.

I have considered the plea by the appellant for reduction of sentence. I have also considered the submission made by Mr. Mugambi on behalf of the State in opposing the appeal on sentence by the appellant. The Court of Appeal in Samuel Githua Njoroge vs Republic CA Criminal Appeal No.53 of 2006 (Nakuru) (Unreported) held at page 2 as follows;

“The principles upon which an appellate court can interfere with the discretion of a trial [Magistrate] as regards sentence are well settled. The appellate court can only interfere where the trial [Magistrate] in assessing the sentence has acted on wrong principles or imposed a sentence which is manifestly inadequate or manifestly excessive. (See Diego vs Republic [1985] KLR 621).”

In the present appeal, the appellant has not stated that the trial magistrate acted on the wrong principles of the law when he sentenced him to serve the said custodial sentence. He has however pleaded with the court to consider the reduction of his sentence on account of his poor health and on account of his being a first offender. He has also stated that he was remorseful and had reformed in the period that he has served

in prison. I have considered the objection to the appeal by Mr. Mugambi on behalf of the State. It is the view of this court that the appellant has established a case for the exercise of leniency by this court. The appellant has been in prison for a period of one year and six months. During this period, he has learnt that crime does not pay. He is remorseful and pleaded with this court to consider his health situation. I am persuaded by the plea for leniency by the appellant. Taking into consideration the value of the property stolen and the fact that the appellant was a first offender, I am inclined to allow the appeal.

The upshot of the above reasons is that the appeal on sentence is allowed and the sentence of the trial magistrate is set aside. The said sentence is 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 forthwith and released from prison unless otherwise lawfully held.

DATED at NAKURU this 15th day of November 2007

L. KIMARU

JUDGE