

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 216 of 2006

JAMES GITU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence of the Senior Principal Magistrate's Court at Naivasha in Criminal Case No. 2329 of 2006 [J. G. Kingori {P.M.}])

JUDGMENT

The appellant, James Gitu Mwangi was charged with the offence of **Stealing stock contrary to Section 278** of the **Penal Code**. The particulars of the charge were that on the nights of the 23rd and 24th August 2006, the appellant jointly with another, stole one sheep valued at Ksh.4,500/=, the property of Robert Wamithi Mutahi. The appellant was further charged with being in possession of **Canabis Sativa (bhang) contrary to section 3** as read **with section 2(a) of the Narcotic and Psychotropic Substances (Control) Act**. The particulars of the offence were that on the 8th September 2006 at 10.30 p.m., at Kihanguru village in Nyandarua District, the appellant was found in possession of half smoked roll of bhang which was not in the medicinal preparation. When the appellant was arraigned before the trial magistrate's court, he pleaded guilty to both counts. He was sentenced to serve five years and eighteen months imprisonment respectively for the two counts. The said sentences were ordered to run concurrently. The appellant was aggrieved by his sentence and has appealed to this court.

In his petition of appeal, the appellant stated that he was remorseful and asked the court to treat him with leniency. He stated that he was a first offender. He had realised that crime does not pay and would not repeat the offence if this court reduces his sentences. He stated that he was a student at the time of his arrest. He pleaded with the court to sentence him to a non custodial sentence so that he could be able to continue with his studies. At the hearing of the appeal, the appellant reiterated the contents of his petition of appeal. He submitted that he was an orphan. He had stolen the sheep due to the problems that he was experiencing at the time. He urged the court to consider his plea for reduction of sentence. Mr. Mugambi for the State conceded to the appeal. He submitted that the plea of guilty that was recorded by the trial magistrate was equivocal since the language in which the court took the plea was not stated in the proceedings.

I have carefully considered the submissions made before this court. I have also read the proceedings of the subordinate court. The typed record of the proceedings does not reflect the correct record of the subordinate court. In the handwritten record of the trial magistrate, it was clearly stated that the plea was taken in Kiswahili, a language which the appellant professed to understand. The State therefore conceded to the appeal under mistaken misapprehension that the trial magistrate had failed to indicate the language in which the plea of guilty was recorded.

The issue for determination by this court therefore is whether the appellant made a case to enable this court revise the custodial sentence that was imposed by the trial magistrate. The principles to be considered by this court when determining whether or not to interfere with the exercise of discretion by the trial magistrate when sentencing a convict are well settled. 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 sheep which the appellant stole was recovered and returned to the owner. The appellant is a first offender. He told the court that he was remorseful and had learnt his lesson in the period that he has been in prison. He undertook that he would not repeat the offence if he is released. I have considered the plea for reduction of sentence by the appellant. Although the trial magistrate sentenced the appellant to serve a legal sentence, in the present appeal I have taken into account the fact that the appellant has served one year and three months of the sentence that was imposed upon him. I have also taken into account the value of the stolen item and the fact that the same was recovered and returned to the owner. The appellant is a first offender. I am of the view that the appellant has been sufficiently punished. He has learnt his lesson. I will favourably consider his plea for reduction of sentence.

The sentences imposed by the trial magistrate are hereby set aside and substituted by an appropriate sentence of this court. The sentence of the appellant is hereby commuted to the period already served. The appellant is ordered released from prison and set at liberty unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 20th day of December 2007

L. KIMARU

JUDG