



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAKURU

Criminal Appeal 234 of 2006

KOTOINE OLE MARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence of the Senior Principal Magistrate's Court at Naivasha in  
Criminal Case No. 2512 of 2006 [J. G. Kingori {P.M.})

JUDGMENT

The appellant, Kotoine Ole Maria 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 nights of the 25<sup>th</sup> and 26<sup>th</sup> September 2006 at Olcholo area, Mau Division of Narok District, the appellant stole two herd of cattle valued at Ksh.18,000/=, the property of Lonkisa Ole Mwaniki. When the appellant was arraigned before the trial magistrate's court, he pleaded guilty to the charge. He was sentence to serve six years imprisonment. He was aggrieved by his sentence and has appealed to this court.

In his petition of appeal, the appellant stated that he was a first offender. He further stated that he was remorseful and during his incarceration in prison, had learnt that crime does not pay. He promised that he would not commit another offence if he is released. He stated that he was married with two children, and at the time of his arrest, was the sole breadwinner of his family. He pleaded with the court to sentence him to serve a non custodial sentence. At the hearing of the appeal, the appellant reiterated the contents of his petition of appeal. He submitted that he had stolen the two herds of cattle because his employer had refused to pay him his dues. At the time, his wife was sick and required hospitalization. He pleaded with the court to treat him with leniency because he had learnt that what he did was wrong. He promised to be a useful member of his society if he is released. Mr. Mugambi for the State left the issue of sentence to the court.

The appellant is not appealing against conviction. He is appealing against sentence. The trial magistrate was exercising judicial discretion when he sentenced the appellant. That discretion can only be interfered with by an appellate court under certain conditions. 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 appellant was convicted for stealing two herds of cattle belonging to the complainant. The appellant was arrested when he attempted to sell the two herds of cattle. He owned up to his crime. He was convicted on his own plea of guilty. The appellant pleaded with this court to consider reducing the sentence that was imposed upon him by the trial court. He told the court that he was remorseful. He had learnt his lesson in the period that he has been in prison. He undertook not to commit another offence if he is released from prison. Although the trial magistrate sentenced the appellant to serve a lawful custodial sentence, in the circumstances of this case, this court is of the view

that in the period that the appellant has been in prison *i.e.* since the 25<sup>th</sup> October 2006, the appellant has learnt his lesson. He is a first offender. Taking into consideration the value of the stolen item and the fact that the two herds of cattle were recovered and returned to the owner, this court is of the view that the appellant has been sufficiently punished. I will therefore favourably consider his plea for reduction of sentence.

In the premises therefore, the appeal on sentence is allowed. The sentence imposed by the trial magistrate is set aside and substituted by an appropriate sentence of this court. The custodial sentence imposed on the appellant is hereby commuted to the period already served. The appellant is ordered released from prison forthwith and set at liberty unless otherwise lawfully held.

It is so ordered.

**DATED at NAKURU this 20<sup>th</sup> day of December 2007**

**L. KIMARU**

**JUDGE**