

REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL 165 OF 2006

(From original conviction and sentence of the Senior Resident Magistrate's Court at Maralal in Criminal Case No. 130 of 2006 [S.N.Mbungu {S.R.M.})

SHABAN KUNTAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Shaban Kuntai 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 14th June 2006 at Londungokwe area of Samburu District, the appellant stole one camel valued at Ksh.20,000/=, the property of John Lengojine. When the appellant was arraigned before the trial magistrate's court, he pleaded guilty to the charge. He was convicted on his own plea of guilty and sentence to served seven years imprisonment. The appellant was aggrieved by his sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal, basically pleading with the court to exercise leniency on him. He complained that the sentence of seven years imprisonment that was imposed on him by the trial magistrate was harsh and excessive in the circumstances. At the hearing of the appeal, the appellant reiterated the contents of his petition of appeal. He further stated that since his incarceration his mother had died. He explained that he had stolen the livestock so as to enable him pay the hospital bill of his wife. He pleaded with the court to exercise leniency on him. Mr. Mugambi for the State left the issue of sentence to the discretion of the court.

The appellant is not appealing against his conviction. He is appealing against sentence. The appellant pleaded guilty to the charge. He was however aggrieved with the custodial sentence that was imposed on him by the trial magistrate. He pleaded with the court to exercise its discretion and reduce the custodial sentence that was imposed on him. 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 of stealing stock. He admitted that he stole one camel, the property of the complainant. He was sentenced to serve seven years imprisonment on the 22nd June 2006. He complained that the said sentence imposed was harsh and excessive in the circumstances. I have considered the appellant's plea for reduction of sentence. The appellant was a first offender. Although the sentence imposed by the trial magistrate was legal, in the circumstances of this case this court is of the view that the trial magistrate did not put into consideration the mitigating circumstances of the appellant. He failed to take into consideration that the appellant was a first offender. The appellant

told this court that he was remorseful and had learnt his lesson in the period that he has been in prison. He has now realised that crime does not pay. He is ready to be integrated into the society as a useful and law abiding citizen.

I will allow his appeal on sentence. I will set aside the sentence imposed upon him by the trial magistrate and substitute the said sentence with an appropriate one of this court. The sentence of the appellant is commuted to the period already served. He is ordered released from prison and set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED at NAKURU this 14th day of December 2007

L. KIMARU

JUDGE