REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 725 of 2003

(From Original Conviction and Sentence in Criminal Case No. 366 of 2003 of the Senior Principal Magistrate's Court at Garissa –J. G. Kingori)

AHMED OMAR KHALIF…….....…….APPELLANT

VERSUS

REPUBLIC …….....…..……RESPONDENT

JUDGMENT

The Appellant was convicted on his own plea of guilty for the offence of stealing stock contrary to Section 278 of the Penal Code. Upon conviction he was sentenced to serve seven (7) years imprisonment plus hard labour and three (3) strokes of the cane. The Appellant was aggrieved by the conviction and sentence and hence lodged the instant Appeal.

When the Appeal came up for hearing, the Appellant abandoned his Appeal against conviction. He was right to do so as clearly the plea was unequivocal and was recorded strictly along the lines set out in the celebrated case of ***ADAN VS REPUBLIC (1793) EA 445.***

The Appellant then proceeded to urge his Appeal on sentence. In his submissions in support of his Appeal on sentence which in real terms were pleas in mitigation the Appellant stated that he was remorseful, that his two children had passed on following his incarceration and that he was the sole bread winner. He therefore asked me to reduce the sentence imposed.

Mr. Makura, Learned State Counsel pointed out to the Court that having perused the record and with particular regard to sentence, he had come to the conclusion that the Learned Magistrate had misdirected himself. In imposing the sentence, the trial Magistrate was of the mistaken view that there was a maximum and minimum sentence for the offence. Counsel submitted that had the trial Magistrate been aware that there was no such minimum and maximum sentence for the offence, he could possibly have imposed a different sentence. Counsel further pointed out that the Appellant had been in custody for 3 years. In his view therefore the Appellant had been sufficiently punished.

An Appellate Court can only interfere with a sentence imposed by the trial Court if it is shown to the unlawful. In the instant case in his sentencing notes the Learned trial magistrate remarked:-

"…….***The accused has pleaded guilty and is treated as a first offender. I have noted his mitigation but offence is extremely notorious in the jurisdiction of the Court. It is a serious offence to steal stock and attracts a sentence of not less than 7 years and not more than 14 years with hard labour and corporal punishment……" (emphasize mine).***

With respect, this was a gross misdirection on the part of the Learned Magistrate. The minimum and maximum sentence with regard to this offence was done away by Act 22 of 1987. Before then the punishment of the offence was as set out by the Learned Magistrate in his sentencing notes. With the amendment, the Court was only now enjoined upon conviction to sentence the offender to imprisonment for a period not exceeding fourteen years.

The offence having been committed on 22nd may, 2003 after the amendment had come into force, the Appellant should have been sentenced in accordance with the amended law. Perhaps the Learned magistrate did not have in his possession the amended statute.

Be that as it may, and as correctly urged by Mr. Makura, learned State Counsel, had the Learned Magistrate been aware of the amendment, he would probably have imposed a different sentence. Due to the aforesaid misdirection I am bound to interfere with the sentence. I am of the considered view that the Appellant has served more than sufficient jail sentence. I would in the premises commute the sentence to the term so far served with the consequence that the Appellant shall be set free unless he is otherwise lawfully held.

Dated at Nairobi this 28th day of June, 2006.

……..

MAKHANDIA

JUDGE