



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Criminal Appeal 58 of 2004

(From Original Conviction(s) and Sentence(s) in Criminal case No. 194 of 2002 of the Resident Magistrate's court at Makadara (R. Mochache - RM)

OSMAN ABDULAHI ARUS.....APPELLANT

VERSUS

REPUBLICRESPONDENT

J U D G M E N T

OSMAN ABDULAHI ARUS, the Appellant herein, and **YUSUF MOHAMED ABDI**, his co-accused, were convicted on their own plea of guilty to a charge of **STEALING STOCK** contrary to **section 278** of the **Penal Code**. It was alleged that they stole 35 goats valued at Kshs.35,000/- the property of **ALI MOHAMED HASSAN**. Upon admitting the charge, both were sentenced to for 7 years imprisonment. The Appellant was dissatisfied with the sentence and therefore lodged this appeal.

The Appellant submitted that the sentence was excessive for several reasons. He submitted that all the goats were recovered. I have confirmed that fact from the summary of facts given in court by the prosecution as per the record of the proceedings. The Appellant further submitted that he had a family who solely depended on him and that since he had pleaded guilty to the charge he ought to have been treated with mercy.

Mrs. Obuo Learned Counsel for the State conceded to the appeal. Counsel submitted that in fact the trial before the lower court was defective by reason of the fact that the prosecutor of the court, one **CPL. GALMA** was unqualified to conduct the case on behalf of the prosecution and that this contravened the law. Counsel did not ask for a retrial. Instead, Counsel urged the court to consider that the Appellant had been in prison serving sentence for 4 years, that all the stolen goats were recovered and that due to lapse of time there was no guarantee that the goats would be available as exhibits for a retrial.

I have confirmed that one **CPL. GALMA** conducted the case on behalf of the prosecution and gave the facts of the case as the charge and its particulars were read to the Appellant and his co-accused. I find that the said **CPL. GALMA** was unqualified to conduct the prosecution of the case and that the provisions of **Section 85(2)** as read with **Section 88** of the **Criminal Procedure Code** were contravened. I quash the conviction and set aside the sentence.

The Appellant and his co-accused have served 4 years out of their sentence of 7 years. That is a substantive part of sentence. The sentence was excessive given the circumstances of this case, the fact that the Appellant and his co-accused had pleaded guilty to the charge, therefore saving court's time, the

fact that all the goats had been recovered and the fact that both the Appellant and the co-accused were first offenders.

Having considered these circumstances together with the fact that the State cannot guarantee that the recovered goats will be availed for a retrial and also the learned State Counsel's submission that the State would not require a retrial, I decline to order a retrial.

As I already ordered the release of both the Appellant and his co-accused in 25th October 2006 after hearing the appeal, I make no further orders.

Dated at Nairobi this 22nd day of November 2006.

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LESIIT, J.

JUDGE

Read, signed and delivered in presence of;

Appellant

Mrs. Obuo for State

Tabitha – Court clerk

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LESIIT, J.

JUDGE