

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

Criminal Appeal 20 of 2004

From Original BSA SRM's 1123 OF 2004

MUSA SALIM.....APPELLANT

VS

REPUBLIC.....RESPONDENT

J U D G M E N T

Musa Salim, the appellant herein pleaded guilty to a charge of stock theft contrary to Section 278 of the Penal Code. He was then convicted and sentenced to serve 7 years imprisonment. He has now appealed against the sentence on the ground that the same is harsh and excessive.

The learned senior state counsel did not oppose this appeal. In fact Mr. Onderi was of the view that the learned senior Resident Magistrate tendered a harsh and an excessive sentence.

This is an appeal which is only against the sentence. The principles of sentencing are well settled. On appeal the appellate court can only interfere with a sentence pronounced against an appellant if it is shown that the sentencing court overlooked some material factors or took into account some immaterial fact or acted on a wrong principle or that the sentence is manifestly excessive in the circumstances of the case.

The record of appeal shows that the appellant was a first offender. The Senior Resident Magistrate appears to have noted the appellant's mitigation. The fact is that the appellant had prayed to the sentencing court to tender a lenient sentence.

The trial Senior Resident Magistrate did not consider the fact that the appellant was a first offender. This was obviously a material factor which should have been taken into account before sentencing. The main reason why the prosecutor is invited to give the previous record about a convict is to enable the sentencing court to weigh the type of sentence to pronounce. If a court does not consider this aspect then it is in breach of one of the principles of sentencing which gives this court the power to interfere with the discretion on sentence.

The record shows that the stolen pig was recovered and possession to the complainant was restored. This was not taken into account before sentencing.

In the end I think it is important to interfere with the sentence. Had the magistrate considered the above factors she would have tendered a lesser sentence.

The upshot therefore is that I would and hereby do allow the appeal on sentence and proceed to set aside the sentence and substitute the sentence of 7 years

imprisonment with a reduced sentence of 3 years with hard labour.

DATED AND DELIVERED THIS 4th DAY O F March 2005

J.K. SERGON

JUDGE