

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE APPEAL NO. 9 OF 2003

(From BSA SRM Cr. No. 1456 of 2002 before SRM S.O. Omwega)

VINCENT BARASA APPELLANT

VS

REPUBLIC RESPONDENT

J U D G M E N T

The appellant pleaded guilty to a charge of stealing fishing nets contrary to section 278 B of the Penal Code. The particulars of this charge are that on the night of 11th and 12th day of October, 2002 at Sumba Island beach Bukani Sub-location, Bunyala West location in Busia District within Western Province stole (66) Sixty Six fishing nets valued at Kshs.170,000/= the property of Michael Bwire.

The appellant was convicted and sentenced to serve three (3) years imprisonment with two strokes of the cane. He now appeals to this court against the sentence. He protests that the sentence handed down was excessive.

Under Section 278 B of the Penal Code the law prescribes a maximum sentence of 5 years imprisonment. The record reveals that the appellant was treated as a first offender.

It is a well principle in law that an appellate court will not interfere with the discretion exercised by the trial court will sentence unless that court did not consider relevant factors or it considered irrelevant or immaterial factors or that the sentence tendered is inordinately low or excessive.

I have examined the record and it is clear that the trial court took into account the fact that the appellant was a first offender.

The learned Senior State Counsel opposed this appeal and maintained that it was neither excessive nor harsh.

I have noted from the record that all the fishing nets stolen were recovered. This was not taken into account by the convicting Magistrate before handing down the sentence. Had the trial Magistrate considered this fact he would have tendered a lighter sentence than he did in this case.

Corporal punishment was removed from the Penal Code. Hence it is no longer necessary for the appellant to receive the strokes as ordered by the trial Magistrate.

In view of what I have stated it is now necessary for this court to interfere with the sentence. Consequently the appeal is allowed. The 3 years sentence is set aside and substituted with a sentence of 18 months.

The order on strokes is set aside.

DATED AND DELIVERED THIS 9th DAY OF July 2004.

J.K. SERGON

JUDGE