



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lomeri v Republic (Criminal Appeal 3 of 2021)  
[2023] KEHC 238 (KLR) (17 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 238 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAPENGURIA  
CRIMINAL APPEAL 3 OF 2021  
JWW MONG'ARE, J  
JANUARY 17, 2023**

**BETWEEN**

**MUSA LOMERI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Appellant herein was charged with the offence of stealing stock contrary to section 278 of the *penal code*. the particulars of the offence are that on the 24<sup>th</sup> day of March, 2021 at Tartar village within West Pokot County he jointly stole two sheep (one sheep white valued at Kshs 5,000/- and one he black sheep valued at Kshs 4,000/- total value Kshs 9,000/-) the property of Sophia Cheptoo).
2. The Appellant pleaded guilty and upon consideration of his mitigation, the trial court sentenced him to three years imprisonment on April 19, 2020. Being dissatisfied with the conviction and sentence, the Appellant lodged the present appeal vide a petition of appeal on the following grounds;
  1. That the appellant was charged in a case of stealing stock contrary to section 278 of the *Penal Code*.
  2. That the appellant was convicted to serve 3 years imprisonment.
  3. That the appellant pleaded not guilty for not having prior knowledge of how to undergo a case, he was only a transporter of the alleged livestock.
  4. That the Appellant admitted that he was only a transporter and not an assailant.
  5. That the Appellant was not given an opportunity to mitigate to prove his innocence to the honourable lower court during the passing of his sentence.



6. That the Appellant calls for the appellate court to intervene and order a remedy for retrial in order to ascertain the said case of felony.
7. That the trial court allow a retrial in order to verify from the testimony of the complainant and the witnesses to ascertain who is the assailant in the case
3. The Appellant sought to either have a retrial or have the appeal allowed and his sentence quashed/set aside.
4. When the matter came up for hearing on January 17, 2023, Learned Counsel for the state, Mr Makori, submitted that the conviction was for three years from April 19, 2020 and that the accused had served 2 years. He had no objection to the term reduced to the period served.
5. Under section 333(2) of the Criminal Procedure Code, this court is obligated to take into account the time served by an accused person in determination of an appropriate sentence. This is buttressed by the Judiciary sentencing policy guidelines (under clauses 7.10 and 7.11) which state as follows;
6. The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.
7. This court is empowered by Article 165(6) of the Constitution of Kenya to review a decision by a subordinate court. Article 165(6) provides:-
8. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
9. In view of the fact that the state has no objection to reduction of the sentence to time served this court hereby reduces the sentence of the accused from three (3) years to the time served and the accused is to be set at liberty unconditionally unless otherwise lawfully held.

It is so ordered.

**DATED, SIGNED AND DELIVERED ON THIS 17<sup>TH</sup> DAY OF JANUARY, 2023 AT ELDORET**

.....  
**J. W. W. MONG'ARE**

**JUDGE**

**Ruling delivered in open court in the presence of;**

- 1) Ms. Okok – State Counsel
- 2) Appellant – Present
- 3) Mr. Juma – Court Assistant**

.....  
**J. W. W. MONG'ARE**

**JUDGE**

