



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 54 OF 2017**

**ALEX ONZERE..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(from the original conviction and sentence by E.W. Muleka, SRM in Hamisi SRMC Criminal Case No.355 of 2016 delivered on 14/10/2016)*

**JUDGMENT**

1. The appellant was convicted of 5 counts of the offence of stock theft contrary to section 278 of the penal code and sentenced to serve 7 years imprisonment. It was not indicated whether the sentence was for all the counts or any of the counts. The appellant was dissatisfied with the sentence and filed this appeal.
2. The appeal is basically on the severity of the sentence. The appellant contends that the sentence of 7 years imposed on him was harsh. He pleaded that he is remorseful and that he was the sole bread winner for his family. He urges the court to substitute the sentence of seven years with a non-custodial sentence.
3. There were 5 complainants in the case whose evidence was that their cattle were stolen from their homes on various dates between 3/1/2016 and 3/3/2016. They reported at Lyaduywa Administration Police Camp and at Kilingili police station. The last cow to be stolen was that of the complainant in count 5 which was stolen on the night of 2<sup>nd</sup> and 3<sup>rd</sup> March 2016. She made a report at Lyaduywa AP Camp. The area assistant chief PW7 and AP Charles Mulyenya PW8 of the above said AP post received the report of the theft. It had rained. They went to the home of the complainant and followed the hoof marks of the stolen cow. They led them to the home of a person called Evans PW6. At the home of Evans they found the stolen cow of the complainant in count 5 and 3 other cattle stolen from the other complainants. They passed the report to the OCS Kilingili police station. Cpl Mungika PW9 of the said police station and the OCS went to the home of Evans. Evans said that the animals had been sold to him by the appellant and another person called John. He said that the fifth animal was at Khayega. They went to the home of appellant and John. They arrested the appellant. They led them to a home in Khayega where the other cow was recovered. The cattle were taken to AP Camp. The complainants went to the AP Camp and identified their animals. Later John was arrested. He and the appellant were charged with the offence. They denied the charges. Evans PW6 was made a prosecution witness. The appellant and John were tried of the offences and convicted of all the counts. During the hearing, the investigating officer PW9 produced photographs of the stolen cattle as exhibits, PEx. 1-5.
4. The appeal is on the severity of the sentence. In mitigation, the appellant stated before the lower court that his parents were dead. That he had a brother. He pleaded for leniency.
5. It is the rule in sentencing that where an accused person is charged with several counts in a charge, the court should impose a sentence on each of the counts. The court also should state whether the sentences are to run consecutively or concurrently – See **Owiti –Vs- Republic (1984) KLR 733**. The trial magistrate in the appellant's case did not comply with the above. The magistrate was therefore in error in sentencing the appellant to a composite sentence of 7 years without indicating whether it was for each of the counts.
6. Section 382 of the Criminal Procedure Code allows an appellate court to rectify an error committed by a lower court if the error has not occasioned a failure of justice to the accused person. The error committed herein did not occasion a failure of justice to the appellant. The same is curable under the provisions of the referred to section. Since the trial court did not properly sentence the appellant, it is my duty to do so.
7. Sentencing is a discretion of the trial court. The maximum sentence for the offence of Stock theft under section 278 of the penal code is 14 years imprisonment.
8. I have considered that the appellant was a first offender. However the appellant seems to have been a big thorn in the flesh of villagers by stealing their cattle and selling them to a fellow villager. A deterrent sentence was called for. I reduce the sentence to 5 years imprisonment on each of the counts and direct that the sentences runs concurrently.

Orders accordingly.

**Delivered, dated and signed in open court at Kakamega this 14<sup>th</sup> day of May, 2020.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Mutua for State/Respondent

Appellant – present through video link to Shikusa Farm Prison

Court Assistant – Polycap

14 days right of appeal.