REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 18 OF 2018

JEVIN JOHN WIRE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal case No. 62D of 2017 of the Chief Magistrate's Court at Busia by Hon. W.K Chepseba–Chief Magistrate)

JUDGMENT

1. **Jevin John Wire,** the appellant herein, was convicted for the offence of stealing stock contrary to section 278 of the Penal Code.

2. The particulars of the offence were that on the night of 16th and 17th December 2017 at **Nango** village, in **Butula** sub-county of **Busia** County, stole one head of cattle valued at Kshs.35,000/= the property of **Mary Awour Omondi.**

3. The appellant pleaded guilty to the offence and was sentenced to serve four years imprisonment. He now appeals against the sentence which he claims was harsh and that he was a student.

4. The appeal was opposed by the state through Ms. Ngari, learned counsel who contended that the sentence was lenient.

5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

6. An appellate court can only interfere with the sentence by the trial court where there are sufficient circumstances. These circumstances were illustrated in the case of **Ogalo Son of Owuora vs. Republic (1954) 21 EACA 270** as follows:

> **The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364.**

When the appellant was called upon to mitigate, he offered no mitigation. The learned trial magistrate inferred from failure to mitigate that the appellant was not remorseful. The failure to mitigate may not necessarily mean that one is not remorseful. He may be stung by guilty conscience to be unable to mitigate.

7. Though the appellant claims to be a student, he never brought this to the trial court. The learned trial magistrate cannot be faulted for failure to factor it.

8. Although the appellant averred that he attached a copy of report card, there was no such a copy. I will however give him the benefit of doubts and interfere with the sentence considering that he was a first offender.

9. I will vary the sentence and release him from prison, and commit him to probation for a period of three years. Failure to comply with probation orders, he will be arrested and send back to prison to complete the remainder of the sentence.

10. His appeal therefore, succeeds to that extent.

DELIVERED and SIGNED at BUSIA this 7th day of March, 2019

KIARIE WAWERU KIARIE

JUDGE