



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CRIMINAL APPEAL NO. 75 OF 2016**

**MUSYOKA NGULI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in Kyuso Principal Magistrate's Court*

*Criminal Case No. 291 of 2016 by Hon. B. M. Kimtai S R M on 12/10/16).*

**J U D G M E N T**

1. **Musyoka Nguli**, the Appellant, was charged with the offence of **Injuring an Animal** contrary to **Section 338** of the **Penal Code**. Particulars of the offence were that on the **10<sup>th</sup>** day of **October, 2016** at **Keilile Area, Kyamututa Village, Katilinge Sub-Location in Tseikuru Sub-County** within **Kitui County**, willfully and unlawfully maimed an animal capable of being stolen, namely she camel valued at **Kshs. 150,000/=** the property of **Mohamed Yussuf Dimbil**.

2. At the outset, he admitted the charge therefore was convicted on his own plea of guilty and sentenced to serve **ten (10) years imprisonment**.

3. Aggrieved, he now appeals on the grounds that the sentence imposed was harsh and cruel; he was a 1<sup>st</sup> offender therefore had no knowledge of cases; he was threatened by officers, an act that led him to plead guilty, he is poor, disabled and a father of eight (8) children.

4. At the hearing the Appellant denied having committed the offence and stated that it was committed by his son. That he admitted thinking that it was a minor offence. He brought to the Court the attention of his disability as he has only one hand.

5. The State through the learned State Counsel **Mr. Mamba** opposed the Appeal. He urged that facts alluded to were not on record. That he admitted having committed the offence when the charge and facts were read to him. Regarding the sentence, he urged that the learned Magistrate stated that due to tribal animosity the sentence meted out had to be prohibitive in nature. He called upon the Court to find that ten (10) years imprisonment was lenient.

6. I do appreciate my duty to reconsider and re-evaluate what is on record and did transpire at the Lower Court then reach my own conclusion.

7. The plea that was taken herein was unequivocal. When given the opportunity of addressing the Court in mitigation he stated thus:

***“It's true I committed the offence. I pray for leniency and forgiveness, I will compensate the owner.”***

8. Therefore the Appellant can only question the legality of sentence. **Section 348** of the **Criminal Procedure Code** is very clear, it provides thus:

***“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.”***

9. It is urged by the Appellant that the sentence imposed is harsh and excessive. Principles upon which a Court will interfere with a sentence imposed by the Lower Court were enunciated in the case of **Ogolla s/o Owour vs. Republic (1954) EACA 270** where the Eastern African Court of Appeal had this to state:

*“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263).” See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-*

*sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)”*

10. The Appellant did contravene the provisions of **Section 338** of the **Penal Code** that provides thus:

*“Any person who wilfully and unlawfully kills, maims or wounds any animal capable of being stolen is guilty of a felony and is liable, if the animal is an animal such as is referred to in section 278, to imprisonment for fourteen years, and, in any other case, to imprisonment for three years.”*

A camel is one of the animals referred to in **Section 278** of the **Penal Code**.

11. The learned trial Magistrate in passing the sentence did not consider mitigating factors stated by the Appellant but did consider the animosity between the members of the two (2) neighbouring communities although he did not state which communities he had in mind as this fact was not disclosed in facts that were presented by the Prosecution. He noted that the actions of the Appellant were likely to spark off tribal animosity. He was of the view that such incidents were prevalent.

12. I have considered what was opined by the learned trial Magistrate and further the findings of the Probation Officer who is categorical that problems arise when camels from the Somali community graze on the crops of inhabitants who are basically Kambas. Currently the relationship between the two (2) communities at the border is not bad. It is also pointed out that the local administration is working on a long lasting solution to the problem.

13. I have also taken into consideration and weighed reasons advanced by the trial Court in meting out the sentence. Considering that the sentiments did not come from the State in the pre-sentence address, the sentence was excessive.

14. In the circumstances I allow the Appeal on sentence, quash the sentence imposed and substitute it with a non-custodial sentence. In the result the offender shall be under Probation Supervision for a period of **three (3) years**.

15. It is so ordered.

**Dated, Signed and Delivered at Kitui this 22<sup>nd</sup> day of November, 2018.**

**L.N. MUTENDE**

**JUDGE**