



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL APPEAL NO. 26 OF 2016**

**STEPHEN MAINA KINYUA ..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. E. Bett – Senior Resident Magistrate dated 19<sup>th</sup> May, 2015 in Nanyuki Chief Magistrate’s Court Criminal Case No. 1265 of 2015)*

**JUDGMENT**

1. **STEPHEN MAINA KINYUA** is appealing against his sentence of **7 years** imprisonment. That sentence was for his conviction on his own plea of guilt to the charge of **stealing stock contrary to section 278 of the Penal Code Cap 63**.
2. Appellant on 16<sup>th</sup> November 2015 stole a heifer valued at Kshs.22,000 while it had been left to graze in a field. Two days later reports were received by the police that the appellant’s homestead had attracted about 20 dogs that were seen moving around that home. The police on searching the appellant’s home found a head and hooves of a cow. Those were later identified by the complainant – as belonging to the stolen cow.
3. The appellant in his appeal submitted that he is an orphan and because he had found it difficult to get employment it had led him to commit the offence of the charge he faced. He further submitted that since his incarceration he had received training in tailoring which he stated, if he was released from custody, would enable him to be self-employed.
4. The trial court in sentencing the appellant to 7 years imprisonment considered the appellant’s mitigation: where he stated that he was beaten by the mob on being arrested; considered that the appellant was a first time offender; and considered that the offence was grave.
5. Under **section 354(3)(b)** of the Criminal Procedure Code an appellant court in considering an appeal against sentence may increase or reduce the sentence or alter the nature of the sentence. The principles to guide the appellant court in considering an appeal against sentence were discussed in the case **MACHARIA vs REPUBLIC (2003) KLR 115**, viz;

*“The court does not alter a sentence on the mere ground that if the member of the court had been trying the appellant, they might have passed a somewhat different sentence .... The court will also not ordinarily interfere with the discretion exercised by a trial judge unless as was held in **JAMES VS REPUBLIC (1950) EA 147**. It is evidence that the judge has acted upon*

*some wrong principles or overlooked some material facts.”*

6. The Irish Court of Appeal in the case **DIRECTOR OF PUBLIC PROSECUTION – V – SALAGEANU (2016) IECA 232**, in considering an appeal against sentence; gave what I consider to be useful guidance to the trial court in sentencing; and stated:-

*“ ..... Indicating that best practice involves in the first instance identifying the appropriate headline sentence having regard to the available range, based on an assessment of the seriousness of the offence taking into account aggravating factors (where seriousness is measured with reference to the offender’s moral culpability and the harm done), and then in the second instance taking account of mitigating factors so as to ultimately arrived at the proportionate sentence which is mandated by the constitution as was emphasized in **The People (Director of Public Prosecutions) v McCormack (2000) 4 I.R. 356.**”*

7. Although the trial court considered the gravity of the offence, it did not elaborate what the gravity of the offence was. Was it that the theft or stock was prevalent in the area? It would have assisted this court if it was made clear by the trial court. What made the offence of theft of stock to be considered grave. It certainly would have assisted this court to understand the rationale of the trial court’s sentence of the appellant to 7 years imprisonment. The Irish Court of Appeal in the above case further stated:-

*“Since its establishment this Court has repeatedly and consistently sought to emphasize that this approach is regarded by its as best practice and we have sought to commend to trial judges that they explain the rationale for their sentences in that structured way, not least because a sentence is much more likely to upheld if the rationale behind it is properly explained. Equally if this Court when asked to review as sentence cannot readily discern the trial judge’s rationale or how he or she ended up where they did having regard to accepted principles of sentencing such as proportionality, the affording of due mitigation, totality and the need to incentivize rehabilitation in an appropriate case, it may not be possible to uphold the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question.”*

8. The Irish court in the above case was careful to state that the mere fact the best practice had not been followed in terms of adequately stating the rationale behind the sentence did not necessarily imply the trial court had made an error in principle.

9. The Irish case is only persuasive to this court. But in this court’s view if that best practice was applied by the sentencing court, the appellant court would be greatly assisted in its consideration of an appeal against sentence.

10. The appellant in this case pleaded guilty to the offence at the very first instance of being presented before court. No doubt his plea saved the court’s time which would have been taken up by a lengthy trial. The state was also saved the expense of a trial. The prosecution did inform the trial court that the appellant was a first offender. With these two factors in mind this court would have been assisted by a detailed explanation of what informed the trial court in sentencing the appellant to 7 years imprisonment. The maximum sentence under **section 278** of Cap 63 is 14 years. In the absence of such explanation this court will proceed to interfere with the trial court’s sentence.

11. The appellant, although he did not disclose his age at the hearing of his appeal, seemed to be a young man in his thirties. He stated that he was led to commit the offence due to his lack of employment. He has now, since his incarceration, received training which will enable him to start his business. As a general rule, although not a matter of law, a party who pleads guilty expects some credit in his sentencing. In this case the trial court in sentencing the appellant did not take into account that the appellant pleaded guilty.

12. In view of the above I do hereby set aside the appellant’s sentence. I do sentence the appellant to two years imprisonment. The balance of the two years sentence the appellant is yet to serve shall be

suspended as provided in **section 15** of the Criminal Procedure Code. In that regard I order the appellant to be set free unless he is otherwise lawfully held.

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF JANUARY 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM**

Before Justice Mary Kasango

Court Assistant: Njue

Appellant: Richard Maina Kimiti .....

For the State: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**