



**REPUBLIC OF KENYA**

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

**LODWAR HIGH COURT CRIMINAL APPEAL NO. 93 OF 2016**

**MOSES POKOYEN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal from conviction and sentence in original Lodwar SRMCR 232/2015 delivered on 31/3/2015 by I.O Odhiambo Resident Magistrate)**

**JUDGMENT**

The appellant **Moses Pokoyen** was charged with another **Esekon Namojong** jointly 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, 2015 at Kanyipad village, Lorugum sub-location in Loima sub-county within Turkana County stole two goats valued at Kshs.5000 the property of Lopetet Lonyaman.

The charge was read over to the appellant in Turkana language where he understood and on being asked whether he admits or denied the truth of the charge replies

**“Accused 1 – true”**

Accused 2 - true

After the facts were narrated by the prosecution the accused was asked whether he admitted the facts and he replied

**Accused 1 – facts are true”**

Accused 2 – facts are true

He was then convicted and after mitigation he was sentenced to serve five (5) years imprisonment.

The appellant was dissatisfied with the conviction and sentence. He also filed his submission. Appellant submits that the prosecution did not prove its case beyond reasonable doubt; the elements of the offence were not proved, that the facts narrated did not support the charge and that there were major contradictions on the dates of the offence in the charge sheet and the acts. He relied on the decision in **Yongo -V- Republic 1983 KLR** in support of his contention. He further submitted that the trial magistrate did not consider his mitigation and that the sentence imposed was excessive in the circumstances.

Mr. Kimanthi for the state opposed the appeal. He submitted that the appellant pleaded guilty and as per the provision of section 248 he can only appeal against the legality of the sentence. He submitted that the offence appellant was charged with carries a maximum sentence of fourteen years imprisonment and the sentence of five years was not excessive.

This is a first appeal and the appellate court is enjoined to consider the evidence before the trial court and draw its own conclusions all the time bearing in mind that it did not have the benefit of hearing and seeing the witnesses testify.

The appellant was charged with the offence of stealing stock contrary to section 278 of the penal code. The charge was read to him on 31/3/2015 and he pleaded guilty to the charge. The facts were narrated by the prosecutor and when asked whether he admitted the facts replies –

**“Accused” facts are true**”. He was then convicted of the offence. He was given an opportunity to mitigate and he replied

**Accused** – I request for forgiveness. He was then sentenced. The procedure followed above was proper and the appellant understood the charge and therefore I find the plea of guilty was unequivocal. He therefore cannot appeal against the conviction under the provision of section 348 of the criminal procedure code.

The second ground raised by the appellant is that the sentence of 5 years imprisonment imposed on him is excessive and harsh and that the learned trial magistrate did not consider his mitigation. The appellant is charged with offence of stock theft contrary to section 278 of the penal code.

#### **Section 268 of the penal code provides**

Defines this offence of stealing as

**268 (1) A person who fraudulently and without claim of right takes anything capable of being stolen or fraudulently converts to the use of any person other than the general or special owner is said to steal that thing or property.**

#### **Section 278 of the penal code provides,**

**278 if the thing stolen is any of the following things that is to say a horse, mares, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe whether goat or pig or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years”**

An appellate court has powers to reverse finding’s and alter the sentence by reducing or enhancing or alter the nature of sentence 554(a) C.P.C appellate court should however bear in mind that ‘the appropriate sentence is a matter of discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the procedure that as an appellate court should not normally interfere with the discretion of the sentencing judge unless the sentence is legal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to injustice” ( see **Ogalo S/o Owuori - V – Republic 1954 21 EACA 210** ).

In this appeal I note that the maximum sentence for the offence under section 278 of the penal code is fourteen years. The appellant was sentenced to 5 years imprisonment. For an appellate court to interfere with the sentence of the trial magistrate, the appellant must satisfy the court that either the sentence is illegal; or is so excessive and harsh or that the trial magistrate failed to take into account relevant factors or took into consideration extraneous factors as the sentence to amount to an injustice. The appellant was only sentenced to nearly 1/3 of the maximum sentence provided. I do not find that the sentence was illegal; and or can it be said to be excessive in the circumstances. In the premises therefore I find no reason to interfere with the sentence of the trial magistrate. In the result I find no merit in this appeal which I hereby dismiss.

Dated and signed at Lodwar this 1<sup>st</sup> day of March, 2017.

**S N RIECHI**

**JUDGE**