



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL NO. 61 OF 2016**

**ALBANUS KYALLO MULI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An appeal arising out of the judgment and sentence of Hon. J. Bii RM in Criminal Case No. 487 of 2014 delivered on 18<sup>th</sup> November 2014 at the Senior Principal Magistrate's Court at Kangundo)**

**JUDGMENT**

Albanus Kyallo Muli, the Appellant herein, was charged in the trial Court with the offence of killing an animal with intent to steal contrary to section 289 of the Penal Code. The particulars were that on the 2<sup>nd</sup> August 2014 at Mutuwane village in Kawethei sub-location, Kangundo District within Machakos County, he killed a heifer cow with intent to steal the carcass and skin of the said cow valued as Kshs 20,000/=, which was the property of Joshua Muia Muindi. The Appellant was arraigned in the trial court on 11th August 2014 when he pleaded not guilty to the charge, and after trial he was convicted and sentenced to serve seven years imprisonment.

The Appellant has now appealed against the sentence in a Petition he filed in Court on 20th July 2016, seeking a reduction of the sentence and for the Court to consider the time he had served in prison. The Appellant stated that he was remorseful and sole breadwinner for his family, and was allergic to most of the protein foods which are given in prison.

The learned Prosecution Counsel, Ms. Mogoi, conceded the appeal in oral submissions made in Court on 2<sup>nd</sup> May 2017, on the ground that from the record, the Appellant was charged under a defective charge sheet which only indicated the section creating the offence which is section 289 of the Penal Code, but that the penalty clause being section 278 of the Penal Code was not indicated.

I have perused the charge sheet in the trial Court and find that while this is indeed the position, section 289 of the Penal Code clearly indicates the punishment to be meted out as follows:

**“Any person who kills any animal capable of being stolen with intent to steal the skin or carcass, or any part of the skin or carcass, is guilty of an offence and is liable to the same punishment as if he had stolen the animal.”**

The punishment for stealing an animal is prescribed in section 278 of the Penal Code as a maximum of 14 years imprisonment.

In addition, this is a defect that is curable by this Court under section 382 of the Criminal Procedure

Code, as no prejudice was caused by the Appellant having been charged under the proper section causing the offence, and the particulars of the offence having been read to him, and it was only upon conviction that section 278 of the Penal Code became applicable.

I have however considered the Appellant's mitigation, and the issue for determination by the court is whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute, and whether the said sentence is amenable to reduction and /or variation. Section 354 (3) (b) of the Criminal Procedure Code provides as follows on the powers of the Court on an appeal on sentence as follows:-

**“ In an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence”.**

The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor vs R, (1954) EACA 270** wherein the Court of Appeal stated as follows:

**"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)."**

I am of the view that given that the Appellant was convicted of killing an animal whose value was Kshs 20,000/-, the sentence of seven years imprisonment while lawful, was excessively harsh in the circumstances. I also am of the view that the sentence that the Appellant has already served of two years and a half years in prison is in the circumstances enough punishment.

The Appellant's conviction for killing an animal with intent to steal contrary to section 289 as read with section 278 of the Penal Code is accordingly upheld, however the sentence of seven years imprisonment for this conviction is set aside. The Appellant is sentenced to the time served, and he be and is hereby set at liberty unless otherwise lawfully held.

It is so ordered.

**DATED AT MACHAKOS THIS 4<sup>TH</sup> DAY OF MAY 2017.**

**P. NYAMWEYA**

**JUDGE**