



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

**CRIMINAL APPEAL 94 OF 2015**

**[Arising from PM's Sirisia Court Criminal Case No. 440 of 2015]**

**R N K..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**R N K**, the appellant herein, pleaded guilty to the offence of stealing stock, contrary to section 278 of the Penal code.

The particulars of the charge are that on the 25th Day of April 2015 at 22.45 hours, at [particulars withheld] Emia Location of Cheptais District, within Bungoma County, the appellant stole two sheep valued at Kshs. 8000 the property of D KC.

The facts as they were read to the appellant are that on 25/4/2015 the complainant, one D K tied his sheep in his shed together with 6 days old Ram and retired to his bed at around 9.00 pm. He woke up at 11.00 pm to check on the condition of the sheep only to find the same missing. He woke up his neighbours and they mounted search but they were unsuccessful. He made a report at Kipsigon Police station. Later on 29/4/2015, he got information that the sheep was seen around Kabuko area being driven by some people.

On following up the information, he realized that the sheep had been taken to Chepkurkur G.S.U Camp. He realized that the sheep was being driven by members of “*Nyumba Kumi*” who had met the appellant who ran away leaving the sheep. The appellant had escaped in the forest only to emerge from therein shouting the name of one of the members of “*Nyumba Kumi*”.

He was arrested and taken to Chepkurkur G.S.U Camp. The complainant went to the camp and positively identified the sheep and the ram. They were taken to Kipsigon Police station and witnesses recorded statements. The sheep was photographed and released to the complainant. The sheep was valued at Kshs. 8,000/=. The accused was later charged with the offence of stealing stock. The taken photographs were produced in court as Exhibit.

The appellant upon conviction was treated as a first offender. In Mitigation he stated that his parents died of HIV. They are 8 siblings and he is the eldest. He takes care of the rest. He prayed for forgiveness.

The court sentenced him to serve 5 years imprisonment.

The appellant had initially appealed against conviction and sentence but during the hearing of appeal abandoned on conviction and proceeded on sentence. He argued that he pleaded guilty to the charge, had

stolen only one sheep of which was recovered and given to the owner. He alleged that 5 years imprisonment was on the higher side.

The state opposed the appeal on the ground that his Mitigation was considered and the sentence was fair.

The offence the appellant was convicted of carries a Maximum sentence of 14 years imprisonment. This is an indication that it is considered a serious offence. However it allows the court the discretion of considering the Mitigating factors to give a deserved lower sentence.

The appellant is a first offender. He pleaded guilty to the charge thus saving the court the time of hearing the case, in his mitigation he stated that his parents died of HIV. They were left 8 siblings and he is the eldest. He takes care of others. He requested court for forgiveness. As he indicated during the appeal, the stolen sheep was recovered and handed back to the owner.

The Judicial service Act (No. 1 of 2011) gives sentencing guidelines. In situation analysis(7.6), it observes that the Prisons in Kenya are overcrowded and one of the major contributing factors is the over utilization of custodial sentences. It states further that there are many cases in which non custodial sentences will be suitable but the courts opt for custodial sentences.

In weighing Custodial =vs= non custodial sentences, the guideline given is that where the option of a non custodial sentence is available, a custodial sentence should be reserved for a case in which the objectives of sentencing cannot be met through a non custodial sentence. Factors to be considered are the gravity of the offence, criminal history of the offender, character of the offender, his age, protection of the community and offender's responsibility to third parties.

The circumstances under which the offence was committed and the mitigating factors indicated in this case, were favourable to incline the court towards granting a non custodial sentence. Appellant was sentenced on 8/5/2015. He has served a custodial sentence for a period of about 2 years. I do find it more than enough for the offence committed, in consideration of the mitigating factors in his favour.

I accordingly vary the sentence of 5 years to the period already served. The appellant should therefore be set free forthwith unless otherwise lawfully held.

**Judgment** Signed and Delivered in open Court before the state counsel, court assistant and the appellant this **17th** day of **July** 2017.

**S. GITHINJI**

**JUDGE**