



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VOI
CRIMINAL APPEAL NO 37 OF 2015

JACKSON MWANDAWIRO MGENYI APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(From original conviction and sentence in Criminal Case Number 496 of 2014 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon G. M. Gitonga (RM) on 9th December 2014)

JUDGMENT

INTRODUCTION

1. The Appellant herein, Jackson Mwandawiro Mgenyi, was tried and convicted by Hon G. M. Gitonga, Resident Magistrate for the offence of stealing stock and an alternative charge of handling stolen property contrary to Sections 278 and 322(1) of the Penal Code respectively. He was sentenced to serve seven (7) years' imprisonment for the offence of stealing stock.
2. The particulars of the charge were as follows :-

“On the 5th day of November 2014 at Kati Village Kishushe location within Taita Taveta County jointly stole two goats valued at Kshs 10,000/=, the property of TRIZAH MWAHE MWALUMA.”

ALTERNATIVE CHARGE

“On the 5th day of November 2014 at Kati Village Kishushe location within Taita Taveta County jointly otherwise than the course (sic) of stealing dishonestly retained two goats knowing or having reason to believe them to be stolen or unlawfully obtained.”

3. Being dissatisfied with the said judgment, on 16th July 2015, the Appellant filed a Petition of Appeal. The Grounds of Mitigation could be summarised as follows:-
 1. **THAT he was too remorseful and was praying for leniency despite the offence.**
 2. **THAT he was a first offender and layman in law.**
 3. **THAT the Honourable Court ought to consider his state of health as he suffers from gastro infection, ulcers and a dilapidating heart condition.**
 4. **THAT the sentence herein ought to be set aside and/or his sentence be shortened or reduced to enable him join his family again.**

4. On 16th March 2016, the court directed the Appellant to file his Written Submissions. Instead, he filed fresh Grounds of Mitigation and a Notice of Motion application seeking to be allowed to file his appeal out of time. This application was unnecessary as this court had on 29th September 2015, allowed his Notice of Motion application dated 8th June 2015 and filed on 16th July 2015 seeking to be allowed to file his appeal out of time was allowed and deemed the Petition therein as having been duly filed and served.
5. His fresh Mitigation Grounds of Appeal could also be summarised as shown hereunder:-
 1. **THAT he had come from a poor family and having been the sole breadwinner of his family, his only deceased sister's children whom he was supporting would continue to suffer as a result of his continued incarceration.**
 2. **THAT he was a first offender and a layman and that the sentence ought to be reduced and he be put on non-custodial sentence.**
 3. **THAT he promised not to repeat the offence and that since he was now a reformed man who had undergone intensive programmes on counselling and acquired grades and skills in masonry, building and construction, he would utilise the skills to earn a living so as to assist his family and be a good ambassador and promote care and justice in the society(sic).**
6. The State's undated Written Submissions were filed on 28th April 2016. When the matter came up in court on the same date, both the Appellant and the State asked the court to rely on their respective Written Submissions when writing its decision. The Judgment herein is there based on the said Written Submissions.

LEGAL ANALYSIS

7. As can be seen from the Grounds of Appeal herein, the Appellant was not challenging the fact that the Prosecution had proved its case to the required standard. Rather, he was seeking a reduction of the sentence and that he be put on non-custodial sentence. No value then would be added in analysing the evidence that was adduced during trial.
8. The question that this court was being asked to consider and determine was whether or not the Appellant had advanced good reasons to persuade it to set aside the aforesaid sentence with a view to putting him on a non-custodial sentence.
9. Before the Learned Trial Magistrate read out the sentence herein, he considered the Probation Report in which it had been stated that the Appellant could not be rehabilitated within the community. In his Mitigation, the Appellant stated as follows:-

“My father is disabled. He depends on me. I was forced to take the goats from my uncle so that I could raise money to take my sick father to hospital.”

10. The Learned Trial Magistrate then recorded the following:-

“It is therefore clear from accused criminal antecedents that he cannot be reformed outside prison walls. The offence which the 1st accused is charged and for which he had pleaded guilty carries a maximum 14 years imprisonment. I do note that it is also a prevalent crime in this area. Putting all these factors into consideration, I sentence the 1st accused to 7 years imprisonment...”

11. Section 278 of the Penal Code Cap 63 (Laws of Kenya) provides as follows:-

“If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, wether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.”

12. The import of the penalty is that a Trial Court cannot sentence a person convicted to the offence of

- stealing stock to imprisonment to more than fourteen (14) years. As was rightly pointed by the State, the sentence of seven (7) years the Appellant herein was sentenced to by the Trial Court was therefore proper and in accordance with the law. Indeed, a non-custodial sentence as had been sought by the Appellant herein was untenable as the Learned Trial Magistrate exercised his discretion judiciously.
13. However, the court took into account the cases of **Katana Ali vs Republic [2016] eKLR**, **Muktar Shogolo vs Republic [2016] eKLR** and **Mohammed Hassan vs Republic [2016] Eklr** which were both in this very court, in which the State pointed out therein that the value of the two (2) cows that had been stolen was Kshs 150,000/= with one cow (1) having been recovered.
 14. The State contended that in view of the fact that the appellants therein had been imprisoned for more than three (3) years, the court could exercise its discretion to reduce the sentence from ten (10) years to a period this court would deem fit to grant as the sentence that had been meted upon the said appellants was harsh. This court duly obliged and reduced the sentence of those three (3) appellants to five (5) years each.
 15. In this case, the value of the two (2) goats the Appellant was said to have stolen was Kshs 10,000/=. Having considered the submissions by the Appellant and the State herein, purely on the principles of proportionality and to appear consistent in court's decisions relating to similar matters, this court was persuaded to accede to the Appellant's request to reduce the sentence.
 16. However, although the value of the stolen stock was so minimal, this court took into consideration that the findings in the Probation Report that the Learned Trial Magistrate relied upon when sentencing the Appellant herein and noted that he was a notorious petty thief and a repeat offender. In fact, he had been convicted for a similar offence as the offence he had been charged with herein and sentenced to three (3) years.
 17. Doing the best that it could, this court found that it could only reduce the sentence that was imposed upon him by the Learned Trial Magistrate to five (5) years' imprisonment.

DISPOSITION

18. For the foregoing reasons, this court hereby affirms the conviction against the Appellant but sets aside the sentence that was passed against him by the Trial Court and substitutes the same with five (5) years' imprisonment that is to run from the date he was imprisoned.
19. The upshot of this court's judgment, therefore, is that the Appellant's Appeal filed on 16th July 2015 is hereby allowed on the aspect of sentence only. The Learned Trial Magistrate did not address his mind to the alternative charge. For completeness of record, this court made no determination on the alternative charge as the Appellant had already been convicted and sentenced on the main charge of stealing stock as aforesaid.
20. It is so ordered.

DATED and DELIVERED at VOI this 9th day of May 2016

J. KAMAU

JUDGE

In the presence of:-

Jackson Mwandawiro Mgenyi- Appellant

Miss Anyumba- for State

Simon Tsehlo- Court Clerk