



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

**CRIMINAL APPEAL NO. 101 OF 2015**

*(From original conviction and sentence in Criminal Case No. 339 of 2015 of the PM Magistrate's Court at Wajir – before Hon. Rogocho - RM).*

**ADAN MOHAMED SEELE ..... APPELLANT**

**V E R S U S**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The appellant Adan Mohamed Seele was charged in the Magistrate's court at Wajir with Stock Theft Contrary to Section 278 of the Penal Code. The particulars of the offence were that on 10th August 2015 at Borji – Garse Location within Wajir County stole one camel valued at Kshs 80,000/- the property of Bishar Abdow Ahmed.

In the alternative he was charged with handling stolen goods contrary to Section 322(2) of the Penal Code. The particulars of the offence were that on the 11<sup>th</sup> August 2015 at Borehole II in Mandera Central Sub County within Mandera County otherwise than in the course of stealing arranged the retention or disposal of one camel for the benefit of himself.

Initially he denied both counts and one witness the complainant Bishar Abdow Ahmed testified. Thereafter, the appellant was recorded as having changed his plea to guilty. He was thus convicted. He was then sentenced to serve 7 years imprisonment.

Dissatisfied with the decision of the trial court, the appellant filed his appeal to this court in October 2015 against both conviction and sentence. Before the appeal was heard however, he filed an amended petition of appeal and written submissions, which he relied upon. His amended petition of appeal is on sentence alone, with 3 grounds as follows:-

1. That the custodial sentence imposed was excessively harsh.
2. That though the trial court asked for a probation officers report the magistrate wrongly sentenced him before the report was prepared when the court became impatient and thus sentenced him to seven year imprisonment.
3. That he is remorseful and that he begs for leniency.

His written submissions, which I have perused, relate to the sentence only, not conviction. He stated that the complainant was his employer and had not paid his Kshs 40,000/- salary and therefore took the camel without knowing that such was a wrong action. He stated that he had a family and children who were

suffering while he was in custody.

At the hearing of the appeal, the appellant added orally that he had not gone to school and that the complainant had paid him only part of his salary and had failed to pay him Kshs 40,000/=. He stated also that he accepted the charge because he thought that he would be forgiven as promised by the complainant, only to realise later that he was sentenced to serve 7 years imprisonment.

Learned prosecuting counsel Mr. Okemwa opposed the appeal. Counsel submitted that the appellant used a criminal method of attempting to recover his Kshs 40,000/-. Counsel submitted that the value of the stolen camel was Kshs 80,000/= and that the plea of guilty was unequivocal as the appellant admitted the offence after the complainant had testified, and elected not to cross examine the complainant.

With regard to sentence, counsel submitted that the maximum sentence for the offence was 14 years imprisonment. As such according to counsel, the learned magistrate was lenient in sentencing him to serve 7 years imprisonment.

This is a first appeal. The appellant has appealed on sentence only. He was convicted on his own plea of guilty. He was not represented during the trial.

Though the appeal of the appellant is on sentence, as he is a layman, I am duty bound to peruse carefully the record to satisfy myself whether the conviction was proper.

I have perused the record. The appellant was initially brought to court on 14<sup>th</sup> August 2015 when he pleaded not guilty to both counts. After some mentions, on 22<sup>nd</sup> September 2015 the complainant tendered his evidence. At the end of that evidence the appellant did not cross examine him and instead indicated that he wanted to change his plea.

The matter was then adjourned for mention on 25<sup>th</sup> September 2015 when the charge was again read over to the appellant and he admitted the same. The prosecutor then said that the facts were as per the charge sheet and the appellant admitted that the facts were true. He was convicted and sentenced.

The steps to be taken by a court in ensuring that a plea of guilty is unequivocal were listed in the case of ***Adan -vs- Republic (1973) EA 445***.

In our present case, the prosecutor took a short cut by saying that the facts were as per the charge sheet instead of actually giving his own summary of the facts. In my view, prosecutors should avoid this shortcut procedure of saying that facts are as per charge sheet, and instead give a summary of what exactly took place so that both the accused person and the court can consider and determine whether the facts disclosed the offence charged and were in line with particulars in the charge sheet.

Having said so, since the complainant had tendered his evidence on how his camel was stolen and found in the possession of the appellant and was not cross examined by the appellant, in my view, it cannot be said that the appellant did not in any way understand what was alleged against him. The facts disclosed to the court and the appellant were so clear that he was found in possession of the camel belonging to the complainant after it was found missing, and that he even attempted to use a knife to attack those who approached him to recover the camel. In my view therefore, the plea of guilty by the appellant was unequivocal. The conviction was thus proper and sustainable. I will uphold the conviction.

With regard to sentence, the maximum sentence for the offence is 14 years imprisonment. Many years ago, there was a minimum sentence of 7 years imprisonment in cases of stock theft like the present one. However the minimum sentence was later repealed by the Parliament.

I take into account that the appellant had no previous criminal record. He pleaded guilty to the charge after only one witness had testified and thus saved the court's time and the State expense of calling the additional witnesses. The camel valued at Kshs 80,000/- was also recovered.

I appreciate that sentencing is in the realm of exercise of discretionary power by a trial court. The trial court even called for a Probation Officers report before sentencing. However such report was not brought to court, and due to delays, the court decided to pronounce sentence without the advantage of considering a Probation Officers report.

In my view the magistrate cannot be faulted for failing to wait longer for the Probation Officers report since the prosecution did not give any convincing reason why that report was not availed as required or suggest a time frame within which the report would be availed. In my view the court was perfectly in order to reduce delay in concluding the case by pronouncing sentence in this particular case.

However in my view the sentence imposed herein was excessive taking into account that the appellant pleaded guilty to the charge and the camel in question had been recovered. The appellant also had no previous conviction and was thus to be treated as a first offender. He further stated in mitigation that he was 29 years of age and had children.

In these circumstances, I am of the view that the sentence of 7 years imprisonment, which was half the maximum sentence was excessive. I will thus set aside the sentence and substitute therefore a prison term of 2 years from the date on which the appellant was sentenced.

Consequently, I uphold the conviction of the trial court. I however set aside the sentence, and order that the appellant will instead serve imprisonment for 2 years from the date on which he was sentenced by the trial court.

**Dated and delivered at Garissa this 6<sup>th</sup> day of July 2016.**

**GEORGE DULU**

**JUDGE**