



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 11 OF 2015

AGNES LOSIWARENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case No. 890 of 2014 Republic v Agnes Losiwareng & 2 others in the Principal Magistrates Court at Kabarnet by S. O. Temu, Principal Magistrate, dated 9th October 2014)

JUDGMENT

1. The appellant pleaded *guilty* for *stealing stock* contrary to section 278 of the Penal Code. She was sentenced to *four years* imprisonment.
2. The offence was committed on 6th October 2014 at Kwumbini village, Marigat Sub-county of Baringo County. The appellant and her co-accused stole one sheep valued at Kshs 7,000; the property of David Chebii.
3. The petition of appeal is on *sentence* only. The *original* petition of appeal was filed out of time on 5th February 2015 but with *leave* of the court. At the hearing of the appeal, the appellant pleaded for mercy. The appellant said she is a *widow*; and, that she has very young children who depend on her. She prayed for a non-custodial sentence so that she could *re-unite* with her family. For the avoidance of doubt, she confirmed that she was *not* challenging her conviction. In a synopsis, the entire appeal is a plea for *clemency*.
4. The appeal is contested by the Republic. The case for the State is that the sentence was well within the law. I was implored to dismiss the appeal.
5. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
6. The facts read to the appellant at her trial were straightforward: The complainant had locked up his sheep. When he returned, he discovered that one was missing. He made a report to the Chief. The appellant and her accomplices were found with the carcass. They were arrested and detained at Marigat Police Station. The appellant accepted the facts were *true*. I am thus satisfied that her final plea of *guilt* was *unequivocal*.
7. Sentencing is at the discretion of the trial court. But power still reposes in an appellate court to review the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559, *Simon Muge Kipketer v Republic* Eldoret, Criminal Appeal 25 of 2014 [2015] eKLR.
8. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.....(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or..... ”

9. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

“The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. ...The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.”

10. The appellant is a *first* offender. From the record of the lower court the appellant tendered the following mitigation- “*I pray for leniency*”. She did *not* disclose to the lower court that she was widowed; or, that she had young children.
11. The learned trial Magistrate considered that the appellant was a first offender. He also took into account the mitigation offered. But he was of the opinion that the offence was *prevalent* in the area; and, that a *deterrent* sentence was appropriate. He sentenced the appellant to *four years* imprisonment. The plea for mercy before this court must be looked at through those lenses.
12. In the present case I cannot say the learned trial Magistrate *acted upon some wrong principles or overlooked some material factors*. He considered the mitigation; he considered the appellant was a first offender; and, that the offence was prevalent in the area. Despite the fresh clamour for leniency, I remain alive that stock theft is a *serious* offence against *property*. The value of the sheep was placed at Kshs 7,000. Section 278 of the Penal Code provides for a sentence of up to *fourteen years*. This court will *not* alter a sentence on the mere ground that it might have passed a somewhat *different* sentence. See *Macharia v Republic* [2003] 2 E.A 559. Considering the *gravity* of the offence, the sentence of *four years* was quite *lenient*. I thus refuse to disturb the sentence.
13. The upshot is that the appeal is devoid of merit. It is *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 6th day of July 2016

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant (in person).

Ms. B. Oduor for the Republic.

Mr. J. Kemboi, Court Clerk.