



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

HIGH COURT CRIMINAL APPEAL NO. 48 OF 2015

JOHN OLOILOI MUSERE.....APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein, John Oloilo Musere was, on his own plea of guilty, convicted for the offence of stealing stock contrary to section 278 of the Penal Code. He was sentenced to serve 10 years imprisonment. The particulars of the charge were as follows:-

“On the 11th day of May 2015 at Ngutoto village in Transmara West District within Narok County, he stole one bull valued at kshs. 30,000/= being the property of Phillip Kayoni Gisoï”.

2. Being dissatisfied with the said sentence, the appellant filed a petition of appeal citing the following grounds of appeal:-

1. "That I pleaded not guilty to the charges of stealing stock.

2. That, the magistrate did not allow me back to retrial so that I can attend the witnesses of the victim.

3. That, the term imposed on me was harsh the trial magistrate did not grant me fair sentence which will allow me to assist the family members who are suffering of insecurity and food since I was the bread winner."

3. When the matter came for the hearing of the appeal on 26th May 2016, the appellant submitted that he admitted to the charge because he did not understand everything. He thus prayed for leniency while stating that he was the sole bread winner of his family.

4. Mr. Otieno learned counsel for the state submitted that the appellant pleaded guilty to stock theft contrary to section 278 of the Penal Code. He further submitted that the charges were read to him (appellant) in Maasai language whereupon he pleaded guilty and when the facts were read out to him he confirmed that the facts were correct and that he indeed, had the bull. Mr. Otieno stated that the trial court was therefore justified in convicting the appellant and in calling for the probation officer's report before sentencing.

5. Mr. Otieno further submitted that appellant was sentenced to 10 years imprisonment by a different magistrate on the strength of a probation officer's report which indicated that the appellant was a repeat

offender and hence the need to mete out a deterrent sentence.

6. Mr. Otieno however submitted that the sentence was a little harsh considering that the prosecution had earlier indicated that it had no previous criminal record of the accused and that it was the prosecution and police who could attest to the appellants previous criminal record and not the probation officer. He thus submitted that the probation officer's report was skewed against the appellant and urged the court to consider varying the sentence while arguing that the court has powers to entertain the appeal and vary sentence of a lower court where wrong principles are applied on arriving at the sentence. He submitted that he supported the conviction but not the sentence.

Proceedings of the lower court

7. At the trial court, the charges were read to the appellant in Maasai language and the appellant answered "it is true" and a plea of guilty was entered. The prosecution summarized its case as follows:

"On 11th May 2015 at Nkutoto village, JW, NC around 7.00am the accused person was seen near the village driving a donkey. He entered into complainant's grazing fields and left the donkey there. In the process he took one big red bull in the grazing field belonging to complainant. On reaching near Kichwa Tembo camp. He was seen by the neighbour of the owner of cow. Immediately the neighbour called complainant inquiring from him whether he had sold the bull. The complainant who was away from home denied selling the bull and informed his other neighbours and efforts were made and accused was arrested near Lolgorian. A bull valued at kshs. 38,000 was recovered. Accused together with the bull were taken to Lolgorian Police Station investigation was done. The photo of the bull was taken and when complainant arrived he identified the bull was his. Accused was charged. The photograph depicting the bull is produced as an exhibit in this matter. That is all.

Accused: The facts are correct. This was the bull I had."

8. The prosecutor then informed the court that even though the accused had been charged with a similar offence the previous year, the charge had been terminated under Section 87A of the Criminal Procedure Code and as such he did not have any previous criminal record of the accused. The accused then mitigated by seeking the court's pardon after which the court called for a probation officer's report on the accused's social background. The accused was later on sentenced to 10 years imprisonment by a different magistrate.

Determination

9. This court as the first appeal court has a duty to reconsider the evidence tendered before the trial court afresh and come to its own independent conclusion. See **Okeno –vs- Republic (1972) E.A 32**

10. The procedure for recording a plea of guilty as laid out in the celebrated case of **Adan –vs- Republic [1973] E. A 445-447** as follows:-

- 1) That the charge and all essential ingredients of the offence should be explained to the accused in his language or in a language he understands.**
- 2) The accused's own words should be recorded and if they are an admission a plea of guilty should be recorded.**
- 3) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.**
- 4) If the accused does not agree the facts and raises any question of his guilt his reply must be recorded and change of plea entered.**

5) If there is no change of plea conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

11. In the instant case, it is indicated that the charges against the appellant were read to him in Maasai language that accused understood. The appellant pleaded guilty when the charges were read to him. In my humble view, plea was taken by the lower court in accordance with the steps set out in the **Adan Case (Supra)** and I agree with Mr. Otieno's submissions that the same was unequivocal.

12. With regard to the issue of sentence, this court observes that before sentencing the appellant, the trial court requested for a probation report.

13. In **James Kimani Maina & Another –vs- Republic** [2016] eKLR Waweru J. observed:-

“The purpose of obtaining a probation report on a convicted accused person is to enable the court to consider a period of probation as an appropriate sentence instead of a term of imprisonment or fine, or other punishment.”

14. Section 4 (1) and (2) of the Probation of Offender act, Cap 64 provides:

4 (1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but it is of the opinion that, having regard to the youth character, antecedents, home surroundings, health or mental condition of the offender or to the nature of the offender, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may:

(a) Convict the offender and make a probation order: or

(b) Without proceeding to conviction make a probation order, Or in either case may require the offender to enter into a recognizance, with or without sureties in such sum as the court may deem fit.

(2) Where any person is convicted of an offence by the High Court and the court is of the opinion that having regard to the young character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may in lieu of sentencing him to any punishment make a probation order and may require the offender to enter into a recognizance, with or without sureties in such sum as the court may deem fit.

15. A reading of the above provisions shows that probation reports are never meant to provide the court with justification for a much stiffer sentence than the court would otherwise have meted out were there no such reports. Probation reports are purely meant to assist the court in considering if probation sentence would be a suitable sentence.

16. In the present case, as correctly submitted by Mr. Otieno, the report that the appellant was a repeat offender did not emanate from the prosecution but from the if probation officer who not only had no evidence of the previous conviction but also did not have the mandate to address the court on the appellants previous criminal record which is the preserve of the prosecution. The appellant seemed remorseful at trial and pleaded that the court pardons him thereby prompting the trial court to call for a probation report. It is also noted that the bull that the appellant stole was recovered alive and taken back to the owner.

17. Under the above circumstances, I am of the view that the sentence of 10 years imprisonment meted out to the appellant was manifestly harsh and excessive. Mr. Otieno learned prosecution counsel does not support the sentence. Consequently, I hereby dismiss the appeal on conviction but allow the appeal against sentence by setting aside the said sentence imposed and substituting it with a sentence of

imprisonment equivalent to the period that the appellant has already served in jail. In other words, I order that the appellant shall forthwith be set at liberty unless he is otherwise lawfully held.

18. It is so ordered.

Dated, signed and delivered in open court this 6th day of July, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

Mr. Otieno for the State

Appellant for the Appellant

Omwoyo court clerk