

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 86 OF 2013

MUTEMI MWEMA MWINZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant was charged in the subordinate court with stealing stock contrary to section 278 of the Penal Code. The particulars of the offence were that on 14th April 2011 at Ngalange Location in Tseikuru District within Kitui County stole three she goats valued at Kshs. 12,000/= the property of Newton Muithya Syengo. He denied the charge. After a full hearing he was convicted of the offence. On the basis of a probation report, he was put on probation for 3 years during which time he will be supervised, guided and counseled by the Probation Officer. He violated the conditions of the probation sentence twice. He was thus put in prison for the remainder of the three years, that is one year ten months on 2nd July 2013.

Subsequent to that the appellant filed the present appeal. He filed his appeal and later withdrew it. But he reinstated it again with the permission of the court.

At the hearing of the appeal the appellant submitted that he was not found in possession of the stolen goats. That he wanted the sentences to run concurrently. That his parents had died and he was an orphan. That he was arrested during a teachers strike and the lower court found that he was framed up.

The learned Prosecuting Counsel Mr. Orwa opposed the appeal. Counsel submitted that PW1 and PW2 testified that the goats were found in the possession of the appellant. He did not challenge that evidence. In any event he ran as he was being apprehended which is evident of guilty conscience. Counsel argued that evidence on record was in agreement with particulars of charge and that the learned magistrate told into account the defence of the appellant before conviction. With regard to sentence counsel stated that the appellant failed to comply with probation orders and as such the probation officer asked for a review of the same. Therefore the prison sentence was merited.

In response the appellant stated that he wanted the court to consider his interest as he was in custody for 1 ½ years.

This is an appeal against conviction and sentence. It was filed after the appellant's probation was canceled and he was put in prison custody for the remainder of the three years' probation sentence. The appellant has now come to this court challenging both the conviction and the sentence. This being a first appellate court, I am duty bound to re-evaluate all the evidence on record and come to my own conclusions.

I have re-evaluated the evidence on record. The prosecution called 5 witnesses. The appellant gave unsworn defence statement. In my view the prosecution proved their case against the appellant beyond reasonable doubt. He was found with the goats in broad day light. The evidence on the prosecution witnesses especially PW1 and 2 is quite straight forward. The evidence of PW3 and 4 supports that of PW1 and 2. I find that the conviction was well grounded.

On sentence the appellant was treated leniently because of his age. He was given an option of a probation sentence of 3 years. However he violated the probation terms twice necessitating the probation officer to ask for the review of the sentence. The appellant was thus put in prison for the remainder of the 3 years probation term. In my view the appellant abused the opportunity to be given a non custodial sentence. He

did so consistently two times. He deserved the custodial sentence imposed on him.

In conclusion I find no merits in the appeal. I dismiss the appeal and uphold both the conviction and sentence of the trial court.

Dated and delivered at Garissa this 6th May, 2015

GEORGE DULU

JUDGE