



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Criminal Appeal 382 of 2007 & 383 of 2007 (Consolidated**

**DAVID MUTHII NDEGE ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**CONSOLIDATED WITH**

**HIGH COURT CRIMINAL APPEAL NO. 383 OF 2007**

**JACKSON MUTUGI KIMONDO ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Appeal from original Conviction and Sentence in the Resident Magistrate's Court at Karatina***

***in Criminal Case No. 512 of 2006 dated 22<sup>nd</sup> November 2007 by B. M. Kimemia – RM)***

**J U D G M E N T**

The 2 appellants whose appeals I have consolidated for ease of hearing were charged in the Senior Resident Magistrate's Court, Karatina with the offence of killing an animal with intent to steal contrary to section 289 of the Penal Code. They pleaded not guilty to the charge and they were tried.

The prosecution's case was that PW1 on 15<sup>th</sup> January 2006 at about 9.00 p.m. was in house when he heard screams outside and thought that those screaming were drunkards enroute home. Again at about 11.00 p.m., he heard people screaming and his brother P.W. V called him and told him that some people had been sited in his cow boma slaughtering a cow and had ran away on being confronted to by his employee P.W II. That P.W. II was in hot pursuit of them. In the morning he was able to confirm that one of his bulls was actually missing, whose carcass he later found in the compound. He then reported to PW.4, a police officer at Karatina Police Station. Together they went back to the scene and took photographs. P.W.II subsequently told him that he had managed to recognise the perpetrators of the crime being the appellants who were also employees of the complainant.

According to P.W. II he was coming from Itundu when found the appellants in the cow boma of the complainant slaughtering a cow. That there was moonlight and he had a torch as well. When he directed

the torch towards the appellants he was able to recognise them. The 2<sup>nd</sup> appellant was only wearing an underwear whereas the 1<sup>st</sup> appellant was stark naked. When he called out their names, they all ran away by jumping over the fence and gate respectively. He pursued them and in particular the 2<sup>nd</sup> appellant. When they got on the road, the 2<sup>nd</sup> appellant jumped into the bush and disappeared. He had known the appellants for 2 months as they were his co-workers. He thereafter went and informed the farm manager and together with villagers and other workers on the farm reported the incident to the Assistant Chief and the next day they found the knife and the carcass of the slaughtered cow.

P.W. III had been with P.W. II as they walked together from Itundu area and had just parted ways at a path at about 9 p.m. Soon thereafter he heard screams coming from P.W. II's direction and he went back. On the way he bumped into the 2<sup>nd</sup> appellant running, stark naked. When he confronted him, he said that he had a fight with his wife and was running away from his home.

P.W. IV is the police officer who received the report the next day and went to the scene of crime in the company of P.W.1. They tried to call the scenes of crimes personnel to take photographs of the carcass but were far so they opted to use the complainant's own camera to take photographs of the slaughtered cow. Later he took the film to the scenes of crimes where it was developed and he was issued with a certificate. He thereafter recorded statements from witnesses. On 25<sup>th</sup> January 2006 the 1<sup>st</sup> appellant was availed to him having been arrested by police officers from Kabonge Police Post. He re-arrested him. The 2<sup>nd</sup> appellant was brought from Kerugoya prison having been convicted for the offence of housebreaking and stealing on 29<sup>th</sup> March 2006 in another criminal case being Criminal 306 of 2006 in the Kerugoya Senior Resident Magistrate's Court and sentenced to a prison term. It was then that he charged them jointly with the offence.

In defence both appellants gave unsworn statements and called no witnesses. 2<sup>nd</sup> appellant who was the 1<sup>st</sup> accused during the trial stated that on 20<sup>th</sup> December 2005, he left the complainant's home and went to look for work elsewhere. He was arrested on 25<sup>th</sup> January 2006 when a theft occurred and he was convicted by Kerugoya Court. On 1<sup>st</sup> June 2006 he was due to be released on Presidential amnesty but was instead taken to Karatina Police station and charged with the instant offence. He maintained that the reason why he was charged is because he left the complainant's employment without telling him.

1<sup>st</sup> appellant who was the 2<sup>nd</sup> co-accused in the trial court stated that on 5<sup>th</sup> December 2005 P.W. II came home drunk and they quarrelled and on 12<sup>th</sup>, he found his wife in his house. On 10<sup>th</sup> January 2006, P.W. II parted ways with his wife who went to live with the appellant and they quarrelled. That he went home on 14<sup>th</sup> and on 25<sup>th</sup> January 2006 a police officer from Kabonge police post arrested him and brought him to Karatina police station where he was charged. It was his contention that there was a grudge between him and P.W. II, hence the frame up.

The learned magistrate having carefully appraised and evaluated the evidence tendered in support of the case and the defence, found favour with the prosecution case. Accordingly she convicted the appellants and sentenced them to seven years imprisonment each. No doubt the appellants were aggrieved by the conviction and sentence aforesaid. Accordingly they each lodged separate appeals which as I have already stated have been consolidated.

In their Petitions of appeal, it turns out that the appellants are actually complaining about the harshness of the sentence and not conviction. They all allege that the sentence imposed was extremely harsh and excessive.

When the appeals came up for hearing, the appellants urged them as though they had also appealed on conviction as well. Clearly this was a misadventure on their part. A party is normally bound by what he asks the court to do for him. He cannot go outside what he had pleaded with the court. In the circumstances of these appeals, much as the appellants argued their appeals on both conviction and sentence, they are bound by their Petitions of appeal. They were only appealing on sentence and not conviction. Accordingly, this is the only aspect of the appeal that I will address in this judgment.

Sentence is generally a matter for the discretion of the trial court. The discretion must however, be exercised judicially and not capriciously. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated to its satisfaction that the sentence imposed is illegal or is so harsh and excessive as to amount to a miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. See generally, **Ogalo s/o Owuora v/s Republic (1954) 19 EACA 270**, **James v/s Republic (1950) 10 EACA 147**, **Nilson v/s Republic (1970) E.A. 599** and **Wanjema v/s Republic (1971) E.A. 493**.

The trial court's notes on sentence in this matter are fairly extensive and went along way in justifying the sentence that was eventually imposed. The maximum sentence allowed under the statute for that kind of offence is fourteen (14) years. In my view however the sentence imposed though legal was nonetheless harsh and excessive considering the circumstances of the case. I think a sentence of three (3) years imprisonment would have met the justice of this case. Accordingly I would reduce the sentence of 7 years imposed on the appellants to 3 years imprisonment for each appellant effective from the date of conviction and sentence in subordinate court.

*Dated and delivered at Nyeri this 3<sup>rd</sup> day of June 2009*

**M. S. A. MAKHANDIA**

**JUDGE**