



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL NO 172 OF 1987
BETWEEN
REPUBLIC..... APPELLANT
AND
JOSEPH MURIITHI NYAMURESPONDENT
JUDGMENT

(Appeal from Conviction and Sentence of the District Magistrate’s Court at Baricho, J M Kairo Esq)

October 18, 1988, **Abdullah J** delivered the following Judgment.

The appellant was convicted by the II Class District Magistrate at Kerogoya of stock theft contrary to section 278 of the Penal Code and was sentenced to 2 years’ imprisonment with 4 strokes of cane.

Section 278 of the Penal Code carried a minimum statutory punishment of 7 years’ imprisonment with hard labour together with corporal punishment. The said section reads thus:

“If the thing stolen is any of the things following, that is to say, a horse, mare, gelding, ass, mule, camel, ostrich, bull, cow , ox , ram, ewe, wether, goat or pig or the young thereof, the offender is liable to imprisonment with hard labour for a term not less than seven and not more than fourteen years together with corporal punishment.”

From the above it will be seen that if a sentence of imprisonment is to be imposed under the Penal provisions of section 278, the term of such imprisonment shall not be less than seven years. It does not allow for discretion or foe room to impose a sentence if less than an imprisonment for seven years.

If a sentence of two years’ imprisonment is imposed, it is not a correct sentence in accordance with the sentence provided under section 278. What is to be done when such sentence less than the minimum prescribed is imposed upon the offender? The High Court may under its power of revision, under Section 364(2) of the Criminal Procedure Code, impose the correct sentence after giving the offender an opportunity of being heard, provided the trial court had power to impose such minimum sentence.

In the instance case, the II Class Magistrate heard the offence of stock theft and passed the sentence.

Section 7(3) (a) of the Criminal Procedure Code authorises a subordinate court of the second class to pass a sentence of imprisonment for a term not exceeding two years. Clearly, such court cannot pass the minimum sentence of 7 years' imprisonment required by section 278 of the Penal Code.

The fifth column of the first schedule of the Criminal Procedure Code shows that offence of stock theft under section 278 is triable by the subordinate court of the first or second class in accordance with section 4 of the said code.

Notwithstanding the provisions 4 of the said Code, I am of the view that a court which has no power to impose a minimum sentence required by the penal provisions cannot have jurisdiction to try and determine the offence under such appeal provision. By taking cognisance of such offence, such subordinate courts fall into error of passing sentence which is not in accordance with law. In my view section 221 of the Criminal Procedure Code may not be invoked for committal to higher court for sentence. A similar anomaly with regard to section 308 (1) and section 322 of the Penal Code exists in the fifth column of the First Schedule.

The Law Reform Commission may wish to rectify the above anomaly. A copy of this judgment may be forwarded to the Chairman of the Law Reform Commission.

The conviction by Court without jurisdiction is a nullity and so is sentence. Both are quashed.

The appellant be taken forthwith before a court of competent jurisdiction for a fresh trial.

Dated and delivered at Nyeri this 18th day of October , 1988

ABDULLAH

JUDGE