



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: S. E. O. BOSIRE, W. S. DEVERELL & D. K. S. AGANYANYA)

CRIMINAL APPEAL 151 OF 2006

1. EKABURAT ECHAKAR

2. ACHUKA ACHAKAR APPELLANTS

AND

REPUBLIC RESPONDENT

(Appeal from the sentence of the High Court of Kenya at Kitale (Lady Justice Karanja) dated 3rd May, 2006 In H.C.CR.A. NOS. 123 & 124 OF 2005)

JUDGMENT OF THE COURT

The appellants were charged in the court of the Senior Resident Magistrate at Lodwar with the offence of stock theft contrary to **section 278** of the Penal Code. When plea was taken on 7th April, 2005, they denied the charge.

The complainant **Echakar Edapal** is the father of the appellants. On diverse dates between 1st January, 2005 and 9th March, 2005, he took his 24 camels for grazing unattended at Lokapel Manyatta Katilu in Turkana District.

The animals grazed randomly within that area but when he later went to check on them, he found them missing.

He informed his neighbours of the loss and also carried out his own investigations which revealed that the appellants had been seen driving them away and that they had sold them to various people in Katilu area, whereafter they went into hiding.

The appellants were later arrested on 3rd April, 2005 by Kenya Police Reserve Servicemen, taken to Katilu Police Patrol Base then to Kainuk Police Station where they were charged with the offence subject of this appeal.

When the case was called for hearing before the Senior Resident Magistrate at Lodwar on 5th July, 2005 and the appellants were reminded of the substance and every ingredient of the charge, they changed their plea and pleaded guilty to it. They were sentenced to 10 years imprisonment each.

They appealed to the superior court against the sentences but their appeals were dismissed and this is why this appeal has been lodged before this Court.

Being a second appeal, only a point or points of law should be raised.

In their appeal, however, the appellants complain that the superior court did not consider their mitigation or give them the benefit of doubt before sentencing them, that it failed to consider that they were sons of the complainant or that the camels sold in effect belonged to them.

In his submissions before this Court the first appellant stated that the sentence meted out to him was too harsh, that the animals sold belonged to his father who is polygamous and that the sentence should be reduced.

On his part, the second appellant, submitted that he had no intention to steal and that he did it for the sake of his mother and her children, that his father was away with his other wives and that he did not think the father would object to him having sold the camels.

All these are factual issues and not points of law.

Section 361 (1) states as follows:

“361 (1) A party to an appeal from a subordinate court may subject to sub-section (8) appeal against a decision of the High Court in its appellate jurisdiction on a matter of law and the Court of Appeal shall not hear an appeal under this section:

(a) on a matter of fact, and severity of sentence is a matter of fact”.

When the appellants appeared before the superior court, they both complained about the harshness of the sentence.

And in what the learned Judge of the superior court (Karanja J) referred to as a “*ruling*”, though it was a “*judgment*” she stated that:

“I have heard the appellants on the issue of sentence. The learned State counsel supports the same view. I have looked at the mitigation offered by the appellants before the trial court and the magistrate’s court notes on sentencing. 24 camels is a large number to steal even from ones father. These appellants impoverished their own father. There is no indication that they used the proceeds of the sale for the betterment of their families. The offence carries a maximum of 14 years imprisonment. The sentence meted out by the trial magistrate is lawful and was arrived at after considering the mitigation by the appellants and all the circumstances surrounding the matter. I see no justification to interfere with the said sentence. This appeal is therefore dismissed. Appellants to serve the remainder of the sentence”.

We agree the sentence imposed upon each of the appellants was lawful and no facts have been stated to bring the matter within the purview of **section 361 (1) (b)** of the Criminal Procedure Code to enable us to intervene in this matter. The counsel for the State opposes this appeal and we concur.

Briefly put, we have no jurisdiction to entertain this appeal and we therefore order the same to be dismissed.

Dated and delivered at Eldoret this 11th day of April, 2008.

S. E. O. BOSIRE

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JUDGE OF APPEAL

W. S. DEVERELL

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JUDGE OF APPEAL

D. K. S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR