



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL APPEAL NO. 17 OF 2014**

**Appeal from the original conviction and sentence by the Resident Magistrate (E. M. Mutunga, RM)  
in Kyuso Principal Magistrate's Court Criminal Case No. 44 of 2014**

**STANLEY OUMA KITHYAKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGEMENT**

Stanley Ouma Kithyaka, the appellant, has filed this appeal against the conviction and sentence. He had appeared before the lower court on a charge of stock theft contrary to section 278 of the Penal Code. It was alleged that on 29<sup>th</sup> January 2014 at Kyuso sub-location of Kyuso Sub-County within Kitui County he stole a bull valued at Kshs.50,000 the property of Margaret Ndanavi Musili. He pleaded guilty to the charge and was conviction on his own plea of guilty and sentenced to serve four years imprisonment.

His petition of appeal contains five grounds but the 4<sup>th</sup> and 5<sup>th</sup> grounds are mitigation and a plea to be present during the hearing of his appeal respectively. I have understood the other four grounds and have summarized them as follows:

- i. The sentence is severe and excessive for a first offender (grounds 1 & 3).
- ii. The trial court failed to take into account the existing grudge between the appellant and a son of the complainant over a debt (ground 2).

The appellant made brief oral submissions in which he told the court that he is the older brother and takes care of his siblings because their parents are dead. He submitted that the bull, subject matter of this case, belonged to them and he had taken it to the market to sell it in order to pay school fees to this younger brother because their aunt had failed to do so. He submitted that the said aunt had intended to withdraw the charge against him but found that the appellant had already been taken to court. He asked the court to pardon and release him so that he can continue to take care of his siblings.

The appeal was opposed by the respondent. The learned state counsel submitted that the appellant pleaded guilty to the charge and under section 348 of the Criminal Procedure Code the appellant is barred from bringing this appeal against conviction; that the sentence is not severe given that the maximum sentence under section 278 of the Penal Code is fourteen years; that there is no proof that there was a grudge between him and the complainant's son and that the lower court took into consideration the appellant's mitigation before sentencing. Counsel submitted that the submissions by the appellant before this court are an afterthought. He asked this court to dismiss the appeal for lack of merit.

I have considered this appeal. The facts presented before the lower court are brief and show that the complainant's shepherd lost one bull on 29<sup>th</sup> January 2014 and that the same was found with the appellant at Tseikuru market. The appellant was arrested and later charged.

The appellant admitted the facts as true. In his submissions before this court he said he had gone to sell the bull to get school fees for his younger brother. He told this court that at the time of taking the plea he did not know that he could tell court the circumstances under which he took the bull and that it was their bull. It is not understood whether by 'their' bull he meant family bull.

As submitted by the learned state counsel an appellant who has been conviction and sentenced on his own plea of guilty is barred from raising an appeal against the conviction under section 348 of the Criminal Procedure Code.

I have scrutinized the record of the trial court. The plea was unequivocal. There is nothing in that record to show that the appellant did not understand the charges. I have noted in his mitigation in the lower court, the appellant stated that he wanted to use the bull as security for a loan. In this court he said he wanted to pay school fees for his younger brother. Both versions cannot be true. To me this shows that the appellant is not being honest.

On the sentence, it is trite law that an appellate court will only interfere with the discretion of the trial court if the sentence is excessive or illegal. The circumstances under which the appellate court can interfere are well illustrated in Nelson vs. Republic [1970] E.A 599 relying on Ogalo s/o Owuora vs. Republi (1954) 21 EACA 270 in the following terms:

**“The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James vs. Rex (1950), 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case.”**

Is the sentence in this appeal excessive in the circumstances of the case? Section 278 provides for a sentence not exceeding 14 years. The circumstances of the case are that the complainant lost a bull. It was found with the appellant in the market obviously intending to sell it or dispose of it in any other manner like to give it as security for a loan as he stated. The bull was recovered and the appellant did not benefit from his criminal act. If the bull belonged to him, he would have shown some evidence of ownership to the police. If the bull belonged to the family, then he cannot claim it as his and he needed to consult his family to agree to sell it. A sentence of four years against a maximum of fourteen years is not excessive but for the circumstances of this case.

I note from the record that the appellant was convicted and sentenced on 4<sup>th</sup> February 2014 and he has been serving sentence for about four months now. I am sure he has learnt a lesson. This court hereby upholds the conviction and sets aside the sentence of four years imprisonment imposed by the lower court. The appellant is hereby granted conditional discharge that he shall not commit another offence for a period of one year. If he commits another offence during that period, he shall be liable to be sentenced for the original offence. I make orders accordingly.

**Dated, signed and delivered this 29<sup>th</sup> July 2014.**

**S.N.MUTUKU**

**JUDGE**