



**ANDREW MSAMA MWANJALA ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From Original Conviction and Sentence in the Criminal Case No. 867 of 2010 of the Principal Magistrate's Court at Voi – Nyakundi L.M. – R.M.)t*

### **JUDGMENT**

**ANDREW MSAMA MWANJALA** hereinafter referred to as the appellant was charged before the Principal Magistrate's Court at Voi, with the offence of **Stock Theft** contrary to section 278 of the Penal Code.

The particulars of the charges are that on the 13<sup>th</sup> day of September 2010, at Tausa area, within Taita Taveta County, jointly with others stole one cow valued at Kshs. 35,000 the property of one **ANASTACIA MWANJALA**.

The appellant pleaded not guilty to the charges, he was tried, convicted and sentenced to serve five (5) years imprisonment. He has appealed against the sentence only.

The brief circumstances of the case are that on the 14<sup>th</sup> day of September 2010, the complainant Anastacia Mwanjala woke up at 5.00 a.m. She went around her homestead and noticed that her cow was missing. It was not in the cowshed where she had kept it the night before. It was a heifer. She woke up her daughter and her son. He was not in his house. She noticed the hoof prints of the cow moving towards the gate. She and other neighbours followed the hoof prints to the neighbors. She inquired and was informed by the neighbour, one Mnyapala that, he had seen her son with the cow. The complainant's son is the appellant herein. She followed the foot path to the main road. She noticed there was alot of cow dung and marks, for both the human and cow. She decided to check in the slaughter houses. She went to Tausa slaughter house then to Maungu and Mwatele slaughter house. She was not able to recover the cow. She then reported the matter at Voi Police Station. On 17<sup>th</sup> November 2010, the appellant was arrested and charged accordingly. The cow was not recovered.

The appellant filed a memorandum of appeal and listed nine (9) grounds of appeal. They are against both conviction and sentence. However, as aforesaid, he decided to pursue the appeal against the sentence alone.

At the hearing of the appeal, the appellant was represented by the Learned Defence Counsel, Mr. Mwawasi, while the State was represented by the Learned State Counsel, Mr. Jami.

In his oral submission supported by the written submissions filed by the appellant, the defence counsel told the court that, the Learned trial Magistrate was carried away with anger while passing the sentence. He invited the court to note the comments of the trial Magistrate before passing the sentence. He argued that there is heavy disparity between the sentence given to the appellant and his co-accused. He told the

Court that at one time, the appellant, mother who was the complainant was ready to withdraw the complaint, but the prosecution objected and the court upheld the objection. That, this was a family matter, therefore suitable for a non –custodial sentence. He told the court to consider that, the appellant has already served a period of one year in jail.

In opposing the appeal, Mr. Jami, told the Court to note that under Section 354 of the Criminal Procedure Code, the Court can only interfere with a sentence if there are sufficient grounds. He submitted, that, the sentiments made by the trial Magistrate before pronouncing the sentence were **NOT** informed by anger but were based on facts. That, the offence carries fourteen (14) years imprisonment, thereof a sentence of five (5) years is not harsh nor excessive. He told the court to note the property stolen was not recovered.

I have considered the appeal against sentence, the submissions in support thereof and the submissions opposing the same. I have also considered the circumstances of the case herein. I note that, first and foremost, the appellant was charged jointly with two other accused persons. The 1<sup>st</sup> and the 2<sup>nd</sup> accused were convicted. The 3<sup>rd</sup> accused was acquitted under Section 215 of the Criminal Procedure Code. The 1<sup>st</sup> accused, the appellant, was sentenced to **five years** imprisonment, while the 2<sup>nd</sup> accused was sentenced to **two years on Probation**. The appellant submits that, there is great disparity in these sentences.

In determining the appropriate sentence for a convict, the court has to consider inter alia, the previous records of the convict. In that regard, first offenders should not be given maximum sentences. The other factors to consider includes, the prevalence of the offence, the severity of the sentence provided, the circumstance of a particular case, and the value of the subject matter involved. In this case, the value of the cow was stated as Kshs. 35,000. The cow was not recovered. The appellant was treated as a first offender.

I note the sentiments made by the Trial Magistrate prior to sentencing the appellant. I think the trial Magistrate having opted to get a pre-sentence report for the 2<sup>nd</sup> accused, should have done the same for the appellant to determine whether, the appellant's mitigation held water or not. Be it as it were, even if the trial Magistrate found the appellant was not remorseful, then the sentence imposed, should not have been double that of, the co-accused, especially when the co-accused was given a non-custodial sentence. I find this regard there was great disparity as submitted by the defence. I therefore find this is a suitable case for review. However, before I review the sentence I order a pre-sentence report to be availed in court in two weeks to enable me determine the appropriate sentence to pass. Secondly, it will enable me, find out, the victims impact assessment.

I order so accordingly.

Dated, delivered and signed at Mombasa this 23<sup>rd</sup> day of August 2012.

**G. NZIOKA**

**JUDGE**

**23.8.2012**

In the presence of:

The appellant in person

Mr. Gioche for the respondent.

**G. NZIOKA**

**JUDGE.**

Court order – Further mention on 6<sup>th</sup> September 2012 for further orders.

**G. NZIOKA**

**JUDGE**

**23.8.2012**

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