



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Criminal Appeal 28 of 2009**

(From original conviction and in Criminal Case No. 1870 of 2008 sentence of the Chief Magistrate's Court at Malindi before Hon. C Ocharo – RM)

KASENA KITSAO CHUYE.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Kasena Kitsao Chuye (referred to as the appellant) was convicted on a charge of stealing stock contrary to section 278 of the Penal Code and sentenced to serve five (5) years imprisonment. The appellant pleaded guilty to the charge whose particulars stated that on the night of 4th and 5th December 2008 at Sabaki village in Malindi District within the Coast Province, he stole one cow valued at Kshs. 18,000/- the property of Ngonyo Nzola Ngonyo. The charge was read over to the appellant in Kiswahili on 16-1-09 (having initially entered a plea of not guilty), at his own request, and his reply was:

“it is true”

The facts were narrated to the court that on 5-12-08 in the early morning, the complainant had gone to her cowshed to milk but found the animal missing. She carried out her own investigations and reported the matter to police. She received information later on that the cow had been seen in Masheheni area in Magarini division with the appellant and another. Since she knew the appellant, she proceeded straight to his home. She did not find the cow, so she went with the police together with witnesses but the animal was not recovered. Appellant was arrested, but his accomplice remains at large.

Appellant stated *“The facts are true”*

The prosecution told the court to treat appellant as a first offender and in mitigation appellant said he was an orphan.

He now appeals against the sentence on grounds that:

- (1) The sentence is harsh and stiff and he sought leniency
- (2) The trial magistrate failed to consider that he was a first offender
- (3) He filed written submission saying his constitutional rights were violated under the provisions of section 72(3) (b) of the Constitution and cited details which are totally irrelevant to that provision.

On sentence he urges this court to consider that he admitted the charge and is remorseful. He also urges this court to consider that he is 19 years of age and was left an orphan with 4 other children who depend on him.

He blames his action on being jobless and bad company and that he committed the offence due to hunger, and so as to be able to buy items of clothing for his siblings.

The appeal is opposed, and Mr. Naulikha on behalf of the State urges this court not to interfere with the sentence saying there is

nothing to warrant the court interfering with the sentence which should act both as punishment and a deterrent to other offenders.

The offence of stock theft attracts a prison term of 14 years maximum.

I take into account the appellant's age, and the circumstances surrounding the offence, I also take note that the animal was not recovered.

I think an imprisonment term of two years would be commensurate with the offence taking into account it was one cow and appellant expresses his remorsefulness.

Consequently my finding is that the five (5) year jail term is rather harsh, and I set the same aside. I substitute the sentence with a two year sentence which shall take effect from the date of conviction.

Delivered and dated this 8th day of March 2010 at Malindi.

H. A. Omondi

JUDGE