



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Criminal Appeal 66 of 2007

DAVID ODERA OMIMWA APPELLANT

AND

REPUBLIC RESPONDENT

[Appeal from the Conviction and Sentence in Criminal Case of the Senior Resident Magistrate's Court Dated 23.3.2007 at MASENO : J. M. Nang'ea (Esq.), - Ag. S.R.M. in P.M.C.C No. 499 of 2007]

JUDGMENT

The appellant **David Odera Omimwa** was charged with stealing stock contrary to S. 278 of the penal code, in that on the 11th May, 2007 at Sunga Sub-Location in Kisumu West District of the Nyanza Province, stole a cow valued at KShs.15,000/= the property of **Festo Ongonga**.

Alternatively, the appellant was charged with handling stolen property contrary to S.322 of the penal code, in that on the 11th May 2007 at Maseno township in Kisumu West District of the Nyanza Province, otherwise that in the course of stealing, dishonestly retained one cow having herein or having reasons to believe it to be a stolen property.

The appellant was arrested on 11th May, 2007 and appeared in court on 14th May, 2001 when the plea was taken by the Learned Acting Senior Resident Magistrate J. M. Nang'ea at Maseno. The charges were read over and explained to the appellant in the Kiswahili language. He pleaded guilty to the main count and the facts were given as follows:

"That on the 11th May, 2007, at about 8.00 a.m. the complainant tethered his cow in his compound. He then left to attend a funeral near his home. He returned at 1.00 p.m. and found the cow missing from where it was tied. On the same day the accused was seen with the cow in Maseno township trying to sell.

The police were alerted and they arrested the accused immediately. The cow was detained in Police custody. The complainant was informed and he identified the cow at the Police Station. The accused was then charged with theft of the cow."

The appellant confirmed the correctness of the facts and was subsequently found guilty on own plea and convicted in the main count of stealing stock. After due consideration of the mitigation factors the court noted that the offence was prevalent in that jurisdiction and therefore a deterrent sentence was necessary. The appellant was thus sentenced to serve three years imprisonment and to be under police

supervisor for twelve months after serving sentence.

The appellant is now appealing against the sentence passed upon him by the lower court on the following grounds specified in the Memorandum of Appeal i.e.

- (i) **That he pleaded guilty of the charge of stealing stock.**
- (ii) **That he is appealing against the sentence of 3 years imprisonment.**
- (iii) **That this was his first offence.**
- (iv) **That he is 20 years old, married with two children.**
- (v) **That the complainant is his grandfather.**
- (vi) **That he prays for any non-custodial sentence or otherwise as the court deems fit.**

The republic represented by the State Counsel

Mr. Mutai opposes the appeal and contends that the sentence was merited given the circumstances of the case and in any event, the maximum sentence under S.278 of the penal code is fourteen years imprisonment. The sentence passed against the appellant was not therefore manifestly excessive and his appeal sought to be dismissed.

Sentencing upon a plea of guilty is a matter left at the discretion of the trial court. However, the appellant court can only interfere where the trial court in assessing the sentence has acted on wrong principles or has imposed a sentence which is manifestly inadequate or manifestly excessive. This was settled in the case of **DIEGO VS. REPUBLIC [1985] KLR 621** and applied in several decisions of the court of appeal including **TERESIA WANJIKU VS. REPUBLIC NKU C/APP. NO. 38 of 2006** and **SAMUEL GITUA NJOROGE VS. REPUBLIC NKU C/APP. NO. 53 of 2006**.

The appellant does not say in his grounds of appeal that the sentence passed on him is either harsh or manifestly excessive. His grounds of appeal basically amount to a plea of leniency which leniency was accorded by the lower court. When he was sentenced to serve only three years imprisonment for an offence which is serious and prevalent in the Kisumu West District.

The sentence in the circumstances was neither harsh nor manifestly excessive.

This appeal must fail and is hereby dismissed accordingly.

Dated and Delivered at Kisumu this 10th day of MARCH 2008.

J. R. KARANJA

JUDGE