



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
OF KISII**

**Criminal Appeal 269 of 2006**

**MWITA MULIANI MWITA ..... APPELLANT**

***VERSUS***

**REPUBLIC ..... RESPONDENT**

**(From original conviction and sentence of the Resident Magistrate's Court at Kilgoris,  
Criminal Case No.302 of 2006 by Mr. W. N. Kaberia, RM)**

**JUDGMENT**

The appellant was charged with **stealing stock** contrary to **section 278** of the **Penal Code**. He also faced another count of **being unlawfully present in Kenya** contrary to **section 13(a)** of the **Immigration Act** Cap 172 laws of Kenya.

He was convicted on his own plea of guilty on both counts and sentenced to 10 years' imprisonment on the first count and 1 year imprisonment on the second count. The sentences were to run consecutively.

Before the sentence was passed, the prosecutor informed the learned trial magistrate that the appellant was a first offender. The prosecutor added that there was a high incidence of stock theft in Trans-mara District and therefore urged the court to pass a deterrent sentence.

It is important to point out that it is improper for a prosecutor to attempt to influence the exercise of a trial magistrate's discretion in sentencing an accused person by appealing to him to pass a deterrent sentence.

Secondly, it is trite law that where a person commits more than one offence at the same time in the same transaction, save in exceptional circumstances, the sentences imposed should run concurrently, see **ONDIEK V REPUBLIC** [1981] KLR 430. It was therefore improper for the learned magistrate to order that the sentences do run consecutively.

The appellant was a first offender and had pleaded guilty. The sentence that was imposed upon him was most likely influenced by the improper comments by the prosecutor. The sentence was, in my view, harsh, considering that the appellant was a first offender and the animals that had been stolen were recovered and returned to the owner.

In the circumstances, I allow the appeal and reduce the sentence on the first count to 3 years' imprisonment and on the second count to 6 months' imprisonment. The sentences shall run concurrently.

**DATED, SIGNED and DELIVERED** at Kisii this 28<sup>th</sup> day of April, 2008

D. MUSINGA

JUDGE

Judgment delivered in the presence of:

Mr. Kemo for the Republic

Appellant present

**D. MUSINGA**

**JUDGE**