REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 125 of 2005

BONIFACE NDIRANGU MWANIKI ………………………………… APPELLANT

VERSUS

REPUBLIC ……………………………………………..……… RESPONDENT

(Appeal from original Conviction and Sentence in Criminal Case No. 377 of 2004 of the Chief Magistrate's Court at Nyeri dated 4th February 2005 by Ms R.A.A. Otieno – S.R.M.)

J U D G M E N T

Boniface Ndirangu Mwangi, hereinafter referred to as "**the appellant"** was tried and convicted for the alternative count of handling stolen property contrary to section 322(2) of the Penal Code. ***The particulars being that on the night of 4th February 2004 at Mung'aria village, Mung'aria Sub-location in Nyeri District within Central Province, the appellant dishonestly received or retained one cow knowing or having reasons to believe it to be stolen property or unlawfully obtained.***

Upon conviction the appellant was sentenced to seven years imprisonment. He was aggrieved by the conviction and sentence and promptly lodged this appeal. When the appeal came up for hearing however, the appellant chose to abandon the appeal on conviction and instead pursue the appeal on sentence.

In support of his appeal on sentence the appellant submitted that the sentence imposed was harsh and manifestly excessive. That before sentence, he had been continuously in custody for about a year. He was also a first offender.

In response, **Mr. Mugwe,** learned state counsel opposed the appeal on sentence. Counsel submitted that the sentence imposed was legal. That it was neither harsh nor excessive. The offence attracted a maximum sentence of 14 years imprisonment, yet the appellant was only sentenced to 7 years. The sentence in the mind of the learned state counsel was reasonable considering the circumstances of the case.

It has been constantly held that sentencing is a matter for the discretion of the trial court. The discretion must however, be exercised judicially. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. (See generally **Republic v/s Batista Ligoni Beni, Cr. App. No. 65 of 2004)**.

In sentencing the appellant, the learned magistrate took into account the fact that the offence was serious requiring a deterrent sentence. This is all fine. However the appellant was a first offender. This should count for something. Further the stolen cow was recovered and reinstated to the owner, the complainant. The appellant therefore did not suffer any or any substantial loss. The learned magistrate should also have taken into account this aspect of the matter. The appellant also advanced the theory of an innocent purchaser for value without notice that the cow could have been stolen. This defence may or may not have been true. In all probability, it may have been true though insufficiently proved. The issue was therefore worth of consideration of the learned magistrate.

When all these circumstances are considered, I am of the view that the trial court grossly misdirected itself in the sentence it came to and erred in principle by failing to take into account the core factors of this case and thus arrived at a harsh and manifestly excessive sentence which calls for my interference.

Accordingly, I would set aside the sentence of 7 years imposed on the appellant, and substitute therefore a sentence of 3½ years imprisonment from the date of conviction. That is my order.

Dated and delivered at Nyeri this 30th day of May 2007

M. S. A. MAKHANDIA

JUDGE