

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE

CRIMINAL APPEAL NO.133 OF 2003

**(From Original conviction and sentence in Criminal Case No.1038 of
2001 of the Resident Magistrate's Court, Kwale)**
MASOOD OMAR MWAGWAYU APPELLANT
VERSUS
REPUBLIC RESPONDENT

J U D G M E N T

MASOOD OMAR MWAGWAYU (the appellant) was convicted of Stock Theft contrary to Section 278 of the Penal Code and sentenced to serve three years imprisonment on 9.12.2002 and to receive two strokes of the cane. He is alleged to have stolen two heads of cattle valued at Shs.16,000/- the property of HAMISI MASOOD. He has appealed to this court through Mr. Gatonye advocate against conviction and sentence.

Mr. Gatonye has pointed to the court that the prosecution of the appellant was conducted by a police Constable contrary to Section 85 (2) Criminal procedure Code and that there was therefore a mistrial. Miss Kwena has conceded this point. On retrial, Miss Kwena does not wish to pursue this matter any further, as the appellant has served about 9 months in prison, and the stolen cows were recovered and given to the owner.

For the above reasons I quash the appellant's conviction, set aside the sentence passed and order that he be released forthwith from prison custody unless otherwise lawfully held.

It is so ordered.

Dated, signed and delivered at Mombasa this 11th September 2003 in the appellant's presence and that of both Gatonye and Miss Kwena.

A.G.A. ETYANG
JUDGE