

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 95 OF 2000

**(From Original Conviction and Sentence in Criminal Case No. 475 of
1999 of the Senior Resident Magistrate's Court at Kitui: K. O. Ogola
Esq. on 11.11.99)**

MWALUKO KYALO ::: APPELLANT
VERSUS
REPUBLIC ::: RESPONDENT

Coram: J. W. Mwera J.
Appellant not present
Orinda State Counsel for Respondent
C.C.Muli

J U D G E M E N T

20 The appellant was charged under S. 278 Penal Code in that on 2.9.99 at B2 Ranch, Kanyonya sub location Kitui District he stole one head of cattle worth Sh.7000/=, the property of Julius Mutua. He was tried, convicted and sentenced to served 7 years imprisonment with hard labour plus three (3) strokes of the cane. It should be pointed out right away that S.278 Penal Code does not provide for hard labour (as amended by Act 22/87). He appealed saying that evidence against him was neither sufficient nor credible. That his defence was not well appreciated by the lower court. The Learned State Counsel supported the conviction but observed that the sentence may have been on the higher side.

From reviewing the whole lower court record, this court is satisfied that the conviction as on cogent and strong evidence. A brown colour from the ranch went missing. Benson Musyimi (P.W.2), Stephen Mwanzia (P.W.3) and A.P.C. Mutemi (P.W.5) visited the appellant's home. 10 He lived close to the ranch. They found him cutting up large chunks of meat. They were intrigued and suspicious; they interrogated the appellant. He led them to a point he had buried a fresh brown cow's skin which bore the brand mark of the ranch "C.I.Y".

On all this evidence was overwhelming against the appellant. On the sentence 7 years plus strokes was a lawful sentence. Adding hard labour was not and that bit is set aside. The ranch had complained of many cattle thefts, so the prosecutor told the lower court. The appellant was a first offender. 20 In this court's view ends of justice will still be served if the lower court sentence is set aside and substituted with one of four (4) yeas and three (3) strokes of the cane. Save for the variation in the sentence the appeal is dismissed.

Judgement accordingly.

Delivered on 2the July 2001.

J. W. MWERA

JUDGE